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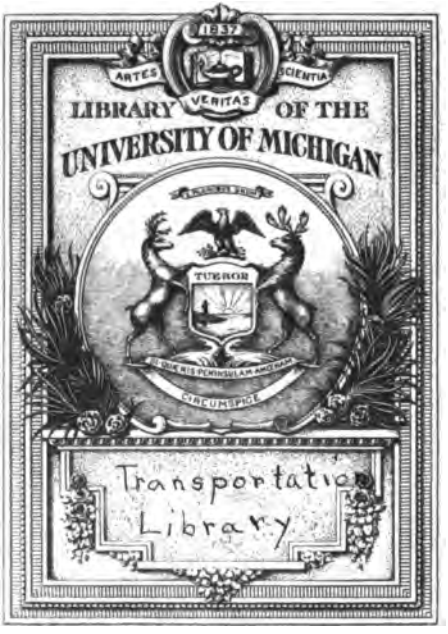

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WORKS OF JOHN C. WAIT

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ENGINEERING AND ARCHITECTURAL JURISPRUDENCE.

A PRESENTATION OF THE

LAW OF CONSTRUCTION

FOR

ENGINEERS, ARCHITECTS, CONTRACTORS, BUILDERS, PUBLIC OFFICERS, AND ATTORNEYS AT LAW.

BY

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"All laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. 'No one shall be permitted to profit by his own fraud, to take advantage of his own wrong, to found any claim upon his own iniquity, or to aquire property by his own crime.'"—Justice EARL, in Riggs v. Palmer, 115 N.Y. Reports 506; *accord*, Angle v. Chicago, St. P., M. & O. Ry. Co., 151 U. S. Reports 1, 14 Sup. Ct. Rep. 240.

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PREFACE.

In the autumn of 1887 the author found himself an Instructor in Engineering at Harvard University, with some leisure time and with every opportunity open to him for special study in any subject. His experience had been that of many other engineers. He had had a good preliminary training in Engineering at Cornell University, and had devoted several years to active practice. He had prepared specifications and contracts for engineering works by copying those that had done service for other jobs, had found them misfits, and had been through more or less litigation in consequence, and had felt, as have thousands of other engineers and contractors, the need of some advice and understanding as to the legal rights and liabilities of the contractor and owner, and as to his own duties and responsibilities. He had consulted older members of his profession in regard to these matters, who thought they were questions of law; and from lawyers he had received the reply that they were not familiar enough with the duties of an engineer or architect and with the customs and usages of the building trades to venture an opinion. Lawyers invariably answered that they should have to inquire more especially into the nature of an engineer's duties and his relations to the work, and to his employer and to the contractor, before they could answer, and that it seemed to them a matter for a *specialist*. Specialists the author did not find, and he determined to become one himself, well knowing the meaning of the term in its modern acceptation, and fully realizing the labor it involved. He knew that to become a specialist required one first to acquire a general knowledge of the subject, to accomplish which he entered the Harvard Law School and completed a three years' course in the study of law, enjoying special privileges in the libraries of the School and University by reason of his position.

During and subsequent to this period the author delivered each year a brief course of lectures upon the subject of Engineering Law to the technical students in engineering, the attendance of which fully satisfied him of the interest that the subject had for students in engineering, and gave him some impressions of its value to the profession. The outgrowth of those lectures is this book

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The subject of Architectural Jurisprudence is not a new one, as is generally supposed. A book was published on the subject as early as 1827 in England,* and the French law of Engineering and Architecture has been thoroughly digested in several volumes published in 1879.† Since then the growth and development of the industrial professions has made the need of such works more imperative, and it is a matter of surprise that the subject has not long since received the attention which it merits. This is doubtless due to the fact that to undertake such a task required a preparation and experience not often acquired by a single person.

The need of a book on the subject of Engineering and Architectural Jurisprudence is more apparent since the engineer's and architect's field of practice has been extended. Their duties are no longer confined to designing and supervising the construction of works, but they have become counselors and advisers in the investigation and promotion of enterprises, and in the examination of experts and the rebuttal of their testimony. European engineers have long since enjoyed this practice, while the general employment of American engineers in such a capacity in this country is comparatively recent. In preparing this book the author has hoped to enlarge this practice, and to create a better understanding between attorneys and engineers or architects. If the engineer understand, fairly well, the rights and liabilities of his employer and the contractor, and his own duties and obligations; if he appreciate the dangers and legal liability of his employer incident to construction work, and be fairly informed as to what is required in the conduct of a trial,—his services will without doubt be more valuable and more in demand.

Attorneys at law are not often familiar with the difficulties and dangers attending construction work, nor the methods employed. Even the terms employed are not often acquired by members of the legal profession, to say nothing of the technical knowledge required to skillfully conduct the examination of experts in science and mechanics. To undertake such cases as arise in manufacture and construction, a lawyer must make a special study of the subject-matter of the case in hand, as best he may in the short time he has and under the pressure of other professional duties. He attempts in a few days or months to acquire what the engineer has devoted the best years of his life to accomplish, and with what success he knows as well as anybody. Lawyers are astute, and the showing that they frequently make in court before the jury is truly wonderful; but their technical knowledge is generally superficial, and the results are often what might be expected. They justify their course, however, on the ground that engineers are ignorant

* Elmes' Architectural Jurisprudence, 1827.

† Nouvelle Jurisprudence et Traité Pratique sur la Responsabilité des Architectes, Ingénieurs, Experts, Arbitres et Entrepreneurs; Honoraires des Architectes; Devis Dépassés et Travaux Supplémentaires, etc., par O. Masselin.

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of the rules of evidence and court procedure, and that the suggestions they make are usually shortsighted and impracticable,—which cannot be denied. Lawyers do not enter into the study of specialties from choice, but from what they feel is a necessity. The reader has but to read the Chapter on expert testimony to appreciate the force of these remarks, and to feel that the author's attempt to render the services of experts of greater value to attorneys should not be in vain.

It must not be inferred that an engineer can, by a few weeks or months of study of law-books, undertake the practice of law or conduct his own cases in court, or even give advice in regard to matters of law. The author wishes expressly to disclaim any such purpose in the preparation of this work. The *lay* reader should keep constantly in mind that this work is not intended to enable him to go into court to defend an action at law or to prosecute a claim, but is written primarily to assist him in avoiding trouble and litigation, and to aid him in protecting his employer's and his own rights when they are assailed. If a man's rights are usurped, he had best consult a man who makes some profession of knowing what his rights and liabilities are; if they involve his spiritual as well as his legal status, he will consult his pastor; and if there be questions involving engineering and architecture, he may reasonably be expected to consult his engineer or architect.

It is hoped that the book will fulfill another mission—that of guiding and strengthening the younger and inexperienced members of the industrial professions in a proper understanding and appreciation of business and business relations. Young men in the engineering and architectural professions often obtain in their technical-school training a contracted view of their professional duties and labors. They are likely to narrow their professional work to the ministerial duties of the drafting-room, the shop, or the field. Too many well trained and educated men remain in the shop or drafting-room, while less skillful men from the accounting-room and office, but with a good business experience, become superintendents, managers, and presidents of the concerns employing them; and it should be said that frequently the latter are more justly entitled to the place. The education of an engineer should fit him for a higher sphere than that of a delineator of lines. Supplemented with a good business experience, his training eminently fits him for the direction and superintendence of large works; and that is his proper field. If this book cultivates in young men a better appreciation of business relations and business principles, and a due sense of their duties, liabilities, and responsibilities, one of its chief missions is accomplished.

Another benefit that the author has hoped to confer upon engineers and architects is to assist them in successfully undertaking contract work. There is no field for which they can better fit themselves and that is likely to prove more profitable. A good knowledge of the cost of work and materials, acquired by close observation while in charge of works, together

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with the necessary qualification possessed by every engineer, the capacity to estimate, design, and direct works, would seem to be all that one would require to undertake construction work and become a successful contractor and builder. Yet how few engineers or architects are to be found in the rank and file of contractors and builders. For this there must be reasons,—one of which is, that professional men, being ambitious, start at contracting earlier than their less-favored colleagues, and before they have had the requisite experience to foresee and guard against the dangers and liabilities attending construction, and they *fail*. It is believed that the experiences related in this work, together with the decisions given, will better qualify its readers, be they engineers, architects, or mechanics, to become prudent, judicious, and thrifty contractors and builders; and it is confidently expected that an engineer or architect who has supervised work, with some understanding of his own duties and the rights and liabilities of the owner and contractor, will be better able to undertake the duties of the latter.

To attorneys and counselors at law the author offers this, his first law-book, with some apprehensions, and a full appreciation that it will be subject to criticism. The author believes that the book will be found a convenient and ready means of ascertaining the law as decided in the several thousand cases cited. In the small space of one volume it is impossible to go very exhaustively into all the subjects taken up in the book; but in the subjects bearing expressly upon the duties and liabilities of the engineer and architect, and the decisions rendered by the courts upon the special provisions common to construction contracts, the author confidently believes that he has compiled the largest and best collection of cases yet made. He regrets that he has not been able always to give the references to the official State reports, but many are given in the table of cases that are not cited in the foot-notes, and the reader is recommended to refer to the table of cases, if he has not ready access to the reports referred to in the foot-notes. It may save time in any case to verify the citation by reference to the table of cases. The year and State in which the case was decided is usually given, which will assist in finding the cases in any report containing them. The number of citations is large, there being more than five thousand, which are collected in a table; and thousands of other cases are indirectly referred to in text-books, treatises on law, and in the first edition of the American and English Encyclopædia of Law. In referring to standard works of very large circulation, like the latter, the author has not deemed it advisable nor necessary to add to those already collected, but has been content to refer the reader to such standard books and to the cases there collected.

Though the number of cases is very large as it stands, it contains only about one third of the number collected in the preparation of the book. In the original plan of the work the author misjudged the number and extent of the subjects fairly to be treated under the title adopted, and has had to

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omit one whole *Part* and to abbreviate several *Chapters* for which he had collected materials.

The *Part* in question, on "Surveys and Surveyors; or, Field Operations and The Law of Boundaries," will be the subject of a later volume; while the *Chapters* mentioned are those upon the subjects of Mechanics' Liens, Injunctions, Strikes and Boycotts, Assessments, and other subjects which, though of much interest to the reader, are too cumbersome to include in any one volume The author has had to be content to briefly mention these subjects, and to refer his readers to excellent books specially treating them and already published.

Scrutinizing and discriminating as lawyers are, the author expects that some will take exception to the plain and unqualified statements of the law frequently made. A plain statement of the law or of a party's rights in any case is well-nigh impossible, because they are subject to so many technical considerations, conditions, and circumstances. In perusing the different parts of the book statements will be found which are seemingly contradictory, but it is submitted that frequently they will be reconciled by reading to the end. The author would warn the reader that he must not read a line nor a sentence nor a page, and then draw conclusions, which the rest of the text on the same subject may disclose to be erroneous. If he read, he should read all that has been written on any subject, including the sections referred to at the bottom of the pages. The author has made plain statements of the law under the circumstances described and under the conditions which usually exist (if not described), in the belief that it will meet the approval of the reader better than if he surrounded every statement with a confusion of facts, refinements, and technicalities that exist perhaps not once in a thousand cases. So far as the courts have made exceptions, the author has endeavored to present them in as brief a space as possible. Lawyers rarely make unqualified statements of the law without knowing all the circumstances of the case, and then often they find it necessary or convenient to qualify them with "ifs" or conditions, so that their clients get little idea of their legal rights and liabilities. Especially is this true of conscientious lawyers and profound scholars, but it is not what the average business man, engineer, or contractor wants. What is given in these pages is confidently believed to be the practical application of the law to the case presented.

The contract stipulations given and discussed have been chosen from a collection of several thousand specifications and contracts made by the author, and which have been in use by the governments, principal cities, and largest corporations of the United States, Canada, England, and Scotland The contract clauses have been selected for the double purpose of furnishing matter for discussion, and as examples to be employed in drafting construction contracts In many instances they are more full and comprehensive than would be recommended for general use, but short forms

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have also been given so that the draftsman may have a selection. The full phraseology has been given to furnish the reader the variety of language in which the provisions have been expressed. These stipulations have been indented and made solid, so that they may be distinguished readily.

Many of the contract clauses adopted for discussion in the book have been divided into parts so that the condition might be separately discussed, and such forms of a contract are to be preferred to those in which several conditions or covenants are mixed up in one sentence or paragraph, even at the expense of brevity. When stated separately, it removes all doubt that the stipulation was considered.

The author has refrained from giving a full contract form for general use in construction work, and he would warn his readers of the mischief that often results from the adoption of such forms for special cases. The adoption of a single clause, without the careful consideration that the questions presented deserve, is discouraged. Much trouble and litigation are the result of adopting loosely or carelessly prepared contracts for construction work.

The author wishes to express his heartfelt thanks to the owners and officers of the libraries to which he has had access in the preparation of this work for the many courtesies which he has received, and especially to the Harvard Law School Library of Cambridge, the Social Law Library and the Massachusetts State Library of Boston, the Law Institute Library of New York City, the Library of the Court of Appeals at Syracuse, and the private Library of Justice D. L. Follett of Norwich, N. Y. Without the free use which the author has enjoyed of these large libraries the completion of the book in its present state could not have been accomplished.

The author has necessarily made a legitimate use of other works, and he has made frequent reference to text-books and other treatises; but special acknowledgment is due to the several works upon Railroad Law by Redfield, Pierce, Wood, Hodges, Godefroi and Shortt, and to Lacey's Digest; to Phillips' Mechanics' Liens; to the respective works of Story, Evans, and Meechem on Agency; to Meechem on Public Officers; to Lawson's works on Expert Evidence and Custom and Usage; to Dillon's Municipal Corporations; to Emden on Building and Building Leases; and to the American and English Encyclopædia of Law, which is frequently referred to for collections of cases. These works are to be found in almost every library, and the author has had to refer the reader to them for more detailed information of some subjects than could possibly be given here.

To his many friends in the engineering professions and numerous industrial vocations who encouraged him in his earlier efforts to undertake and complete such a work the author sends greetings, and earnestly hopes that the book may prove to be all that they had hoped for and anticipated. The task proved more arduous than was anticipated. The words Architect, Engineer, Contractor, and Builder are rarely found in the indices of law-

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books, and the cases cited herein have been discovered and gathered together only after a diligent and prolonged search through reports, digests, and periodicals, guided and directed by referring to legal terms quite foreign to the subject-matter of this book. This, together with the fact that the author has been almost constantly engaged in professional work, accounts for the delay in bringing out the book. It is hoped, however, that the book is better for the delay.

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September 15, 1897.

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ENGINEERING AND ARCHITECTURAI JURISPRUDENCE.

PART I.

LAW OF CONTRACTS IN GENERAL.

CHAPTER I.

LAW OF CONTRACTS IN GENERAL.

ESSENTIAL ELEMENTS OF A CONTRACT. LEGAL AND ILLEGAL CONTRACTS. THE PARTIES TO A CONTRACT.

1. **Introduction.**—Engineering and architectual construction is rarely undertaken by the owners or proprietors of the structure. Works of magnitude or importance require the services of engineers, architects, and skilled mechanics who have had practical experience. Structures are not erected by the parties who own them and are to control them, but by parties who have no interest in them except what they assume for hire, or the profit that they can make out of the job. The relations created are those of an employé or of an independent contractor, and whichever rôle is assumed, they are relations and obligations growing out of an agreement or understanding called a contract. All work of importance is the subject of a contract, and it is manifest at the beginning, that a clear understanding of the legal status of the parties engaged upon construction will require some knowledge of the law of contracts. The reader is first introduced, therefore, to the principles underlying the law of contracts.

To assume contract obligations, the law requires that the parties shall observe certain formalities and that their intentions shall be evidenced by overt acts, which may be made a matter of record. Part of the requirements are fundamental principles of the English common law, some are the effect of statutory limitations, while others are the result of court procedure, and not a few rest upon that broad, yet vague, ground of "public policy."

2. **Essential Elements of a Contract.**—Every binding contract must contain four essential elements, viz.: 1. Two parties with capacity to contract. 2. A lawful consideration: a something in exchange for its legal equivalent,

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a *quid pro quo*. 3. A lawful subject-matter, whether it be a promise, an act, or a material object. 4. Mutuality: a mutual assent, a mutual understanding, and a meeting of the minds of the parties.[1] These elements of a simple contract are of the foundation of the English common law, and no agreement, so called, is a binding contract unless it embodies each and all of these essentials. Without them our courts decline to recognize the binding effect of the agreement and the parties are free to fulfil their obligations or not at their pleasure.[2]

The order in which these elements are given was adopted because it seems the safest and most rational treatment of the subject of contracts A contract requires that there shall be, first, two competent parties; secondly, a lawful consideration; thirdly, a lawful subject-matter; and lastly, a meeting of the minds of the parties with regard to the parties, the subject-matter, and the consideration. If these essentials were considered in the order given, there would be fewer cases of hardships and less litigation over contract rights. The mischief frequently results from the parties mutually consenting to be bound and exchanging the considerations before the questions of competency of the parties and the legality of the act undertaken have been considered. The order adopted is that usually followed in written contracts. The author has followed, as closely as a liberal treatment would seem to permit, the lines of an engineering and architectural construction contract, and throughout, so far as possible, he has cited cases that have arisen under such contracts.

3. The Introduction to a Contract.—Contracts are generally begun by introductory clauses peculiar to the law, though no special form is required. The forms employed are as various and eccentric as the persons who frame them; but of them all, it is submitted that either of the following forms will answer in any contract for construction work:

[Heading.]*

"THIS AGREEMENT, made and entered into [concluded] this .....day of.....in the year .....by and between.....etc., etc.,"

is a concise and direct introduction, and it is the most common form used in all contracts.

"[THESE] ARTICLES OF AGREEMENT, made and entered into between.....of.....and.....of.. .....on this.....day of....."—

is a good and popular clause. These are mere forms, and their selection a mere matter of taste with the draftsmen.

[1] If the contract be a written instrument it must be delivered. Leonard *v.* Kebler's Adm'r (Ohio Sup.), 34 N. E. Rep. 659.

[2] A finding that a written contract was void is equivalent to finding that there was no written contract at all. Rebman *v.* San Gabriel Val. Land & Water Co. (Cal.), 30 Pac. Rep. 564.

* *See* Sec. 200, Chap. VIII, *infra*.

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4. Designation of the Parties.—

—"by and between..... (name of owner, company, board, city, university, or other corporation)....., of the City of [Town of]....., County of....., State of....., party of the first part, and..... (name of contractor or company) of the City of....., County of....., State of....., party of the second part."

The parties of a contract are designated as *party of the first part* and *party of the second part*, the former being conventionally applied to the person who contracts to sell, to lease, or to have performed the subject-matter of the contract, and the latter title to the person agreeing to take or purchase the article or to perform the contract. These terms are frequently avoided by using instead the names of the parties, referring to them as the *Said.....*, the *Said Contractor*, the *Said Owner*, the *Said Board, City, Company, University, etc.* This avoids confusion and the danger of the parties forgetting to which party he or they belong. A man will hardly fail to recognize his own name or that he is a contractor, when he might not remember that he is the party of the second part. When reference is made to the parties as the *City, Board, Company, etc.*, or as the *Contractor* or the *Engineer*, it is customary and prudent to insert a clause explaining who is intended and included within the terms, as in the following clauses:

> "That whenever and wherever in this contract the phrase 'party of the second part,' or the word 'Contractor,' or a pronoun in place of either of them is used, the same shall be taken and deemed to mean and intend the party of the second part to this agreement (his [their] heirs, executors, administrators, or assigns).
>
> "That whenever the word 'Engineer' is used in these specifications, or in this contract, it refers to and designates the Chief Engineer of the owner, company, or city for the time being, acting either directly or through the Deputy Chief Engineer or any Assistant or Division Engineer having general charge of the work, or through any Assistant or any Inspector having immediate charge of a portion thereof, limited by the particular duties entrusted to him.
>
> "That whenever the word 'Owner,' 'Company,' or 'City' is used in these specifications, or in this contract, it refers to and designates the parties of the first part to this agreement (his [their] heirs, executors, administrators or assigns) (or its successors or assigns)."

AS REGARDS THE PARTIES.

5. Parties to the Contract.—There must be *two* parties to every contract, the one who is bound to perform the contract and the other who is entitled to have it performed.[1] A person cannot contract with him-

[1] A contract may be made to pay some unknown party to be ascertained a some future time upon a contingent event. Notes payable to bearer, or to an indorser, may be mentioned as such contracts, though by the law of merchants' bills and notes are placed upon a footing peculiar to themselves. An advertisement offering a reward is an offer only, and is not a contract until accepted by the person who per-

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self ;[1] and a promise to pay money to oneself is not a promissory note.[2] One and the same person cannot be party to a contract on both sides; such an instrument can create no liability or right to a contract. Companies are sometimes formed into departments and their accounts kept separate and distinct, but such departments cannot enter into agreement between themselves, nor assume obligations that can be enforced. The departments must each be independently incorporated and have a separate existence.[3] The same person cannot be party to both sides, although other parties are joined with him on one side or the other; and an agreement in such a form creates no legal right or liability. The reason of this is that it is impossible for a man to sue himself.[4] Notes or contracts made by several, jointly or severally, cannot, however, be avoided for this reason.[5] For the same reason it has been held that a partner cannot contract with his firm, and that two firms having a common partner could not incur liability by contract.[6] It has been held (1824) that the engineer of a bridge who was a shareholder in a bridge firm could not maintain an action against his firm, being himself a partner.[7] The tendency to-day is to regard a partnership in the same light as a corporation, to treat it as an entity, an artificial body independent of the partners who comprise it. On this theory it has been held that firms having a common partner can sue each other in equity or in those states where the code is established.[8] Agreements between partners have been allowed in equity as matters of account in settling affairs of the partnership.[9] It is hardly necessary to say that one company may contract with another even though there are directors in one that hold a like office in the other; the company or corporation being regarded as a creation of itself, independent of the persons who represent it.

6. Only Parties to Contract are Bound.—Generally speaking, the legal effect of a contract is restricted to the parties and no right or liability can result to a person who is not a party.[1] When a contract is made with two or more persons for some act to be done or payment to be made to one of them only, the right to have it done or paid accrues to all the persons, who must all join in suing upon it, although only one is to have the benefit.[2]

7. Legal Representatives of the Parties.—In drafting construction contracts it is usual to provide for the death or incompetence of either party by making the party's heirs, executors, administrators, or assigns of a person, or the successors and assigns of a corporation, parties to the contract, after the following manner:

forms the services for which the reward is offered.

[1] 2 Wall. 78, 86 Fed. Rep. 218.

[2] Commonwealth *v.* Dallinger, 118 Mass. 439; *other cases in* Ames' Cases on Bills and Notes 133

[3] Grey *v.* Ellison, 1 Giff. 433.

[4] Leake's Digest of Contracts 440.

[5] Moneypenny *v.* Hartland, 1 Car. & Payne 352.

[6] Ames' Cases on Partnership, chap. vi.

[7] Leake's Digest of Contracts 440.

[8] 8 Amer. & Eng. Ency. Law 868.

[9] Leake's Digest of Contracts 442.

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"The said Party of the Second Part [the said ...., or the said Builder, or the said Contractor] does hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said Party of the First Part [the said ...., or the said owner, company, or city], his (their) executors, administrators, or assigns [or its successors and assigns], that he, the said ...., his (their) executors, administrators, etc., shall or will, for the considerations hereinafter mentioned, etc., erect, build, etc."[1]

In case of death or assignment these parties, who may be called secondary parties, become the representatives of the principal party and take his place, so far as is possible.

8. The Representatives after Death, or Changes Effected by Law.— Executors and administrators are the personal representatives of a party as to his personal estate after his death. The right to enforce certain contracts of the party whom they represent has been recognized from the earliest times.[2] This right belongs exclusively to the executor, or administrator, or successors, and it cannot be transferred to other parties by words introduced into the body of the contract. The personal representative may maintain an action to recover money payable to the person he represents, though the contract failed to make the money payable to his executor or administrator. If the contract made it payable to the contractor or his assigns, or to his heirs or executors, the personal representative may recover without even averring that the money has not already been paid to the heirs.[3] So, too, the personal representative is liable on the contract, although not named in the terms.[4] The executor or administrator has been held liable even when the heirs were named and the executors were not.[5] If a house is to be completed before a certain time, the contractor's executor or administrator is bound to perform the contract, or to enforce its performance on the part of the owner. The heir cannot enforce its performance even if the profits are partly in lands.[6] In the interests of the estate the personal representative may rescind the contract of his decedent, with the consent of the company or other party.[7] It is a presumption of law that parties to a simple contract intend to bind not only themselves but their personal representatives.[8]

9. Executor or Administrator Takes Benefits and Burdens of Contract.— An executor becomes entitled to the benefit of the contracts of a deceased contractor for the supply of materials, or for the execution of works remaining incomplete at his death that do not involve the personal skill and ability of the contractor; and he is entitled as executor to complete the

[1] The representative may be mentioned as in the form given in Sec. 4, page 3, which is simpler in that it avoids the constant repetition of the words "heirs, executors, administrator, or assigns" in the text of the contract.

[2] Pollock on Contracts 206.

[3] 7 Amer. & Eng. Ency. Law 262.

[4] 7 Amer. & Eng. Ency. Law 326.

[5] 7 Amer. & Eng. Ency. Law 327.

[6] Crans *v.* Kans. Pac. R. Co., 131 U. S. clxviii (1879).

[7] 7 Amer. & Eng. Ency. Law 327.

[8] 2 Parsons on Contracts (6th ed.) 530.

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works, and to recover their value for the benefit of the contractor's estate In the case of an ordinary building contract undertaken and commenced by the deceased builder, the executor may complete it and recover the price in his representative character.[1] A contract to build a lighthouse was held to be discharged by the death of the contractor, on the ground of its being a matter of personal skill and science.[2]

10. Contracts for Personal Skill of Contractor.—Whether or not the executor or administrator of an estate can carry out and receive the benefits of the contractor's contracts depends upon the character of the work. It may well be doubted that the representative of a physician, lawyer, or engineer would be allowed to step into the shoes of the deceased. A contractor or builder may have acquired a reputation in the construction of a particular kind or class of work, in which his personal skill and proficiency are the important consideration in employing him. If this can be proved, then the contract cannot be performed by the executor, administrator, or the assignee.[3] If the contract is not founded upon personal relations, or does not require personal skill, it survives to the executor or administrator, and the estate may be held liable for a breach committed after as well as before the death of the contractor.[4] It has been held in New York State that a contract to do certain repairs on a building for a specific sum is not a personal contract, which is terminated by the death of the owner, but the contractor can recover of the administrator for work done thereunder after the death of the owner, though the owner devised the property and the devisee directed the contractor to continue the work. Ordinary contracts for engineering and architectural work pass to the contractor's legal representatives, who take the burdens as well as the benefits.[5] A coat ordered of a tailor, who began to make it and died before completion, was completed and delivered by his administrator, who recovered the price in his representative character.[7] *

11. Executor Named in Contract.—It is not necessary that the executor or administrator be named in terms; if the contract be of such a character that it survives, the personal representative of the contractor is liable upon it.[8] If the executor be named, it is evidence that the parties did not consider the contractor's services as personal. If the contract is between a city

Stellman *v.* Northup, 109 N. Y. 473; Pollock on Contracts 206; 126 N. Y. 45.

[1] Leake's Digest of the Law of Contracts, 1254.

[2] Wentworth *v.* Cock, 10 A. & E. 45.

[3] Robinson *v.* Davidson, L. R. 6 Exch. 269; *and see* Lloyd's Law of Building, § 12.

[4] Cooper *v.* Jarman, L. R. 3 Eq. 98; 7 Amer. & Eng. Ency. of Law 326.

[5] Russell *v.* Buckhout (Sup.), 34 N. Y. Supp. 271, Dykman, J., dissenting.

[6] Wentworth *v.* Cock, 10 A. & E. 45; Siboni *v.* Kirkman, 1 M. & W. 418.

As to what contracts will be considered personal, see Robinson *v.* Davidson, L. R. 6 Exch. 269, 274; Cooper *v.* Jarman, L. R. 3 Eq. Cas. 98; Dickinson *v.* Callahan, 19 Pa. St. 227.

The contract of an author to write a book is discharged by his death Marshall *v.* Broadhurst (Eng.), 1 C & J. 403.

[7] Werner *v.* Humphreys, 2 M. & G. 853.

[8] Quick *v.* Ludburrow, 3 Bulst. 20; 7 Amer. & Eng. Ency. Law 326.

* *See* Sec. 12, *infra*.

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and a corporation, "its successors and assigns," for erecting waterworks and furnishing water to the city, it is assignable by the corporation.[1] If a party contract for himself and his executors to build a structure and die, the executors must go on or they will be liable for damages for not completing the work. If they do go on, they may recover as executors and the money when recovered will be assets in their hands.[2] Hence the advisability of a contractor's making his executor or administrator a party to his contract.[3] Contracts founded on personal qualifications, as skill, ability, or integrity, such as the employment of an agent, a servant, an artist, an author, an architect, and an engineer, terminate with the death of the employer or employee in the absence of express stipulation.[4]

A contract for the employment of an agent by a partnership is discharged by the death of one of the partners.[5] Therefore the legal representatives cannot enforce such agreements; and frequently, if the contract be for a completed structure or piece of work, the representatives cannot recover for the services performed.

12. Executor's Liability on Contracts and for Torts of Party.—An executor or administrator has power to complete a contract made by the person he represents, but he cannot by virtue of the general powers of his office make contracts which shall bind the decedent's estate. The effect of such contracts is to bind the representative.[6] For goods or materials purchased for the benefit of the estate he incurs a personal liability.[6] This would not apply probably to materials purchased in the execution of a building contract of decedent, as executor or administrator.

At common law no action could be brought against the executor or

[1] Carlyle L. W. & P. Co. *v.* City of Carlyle (Ill. Sup.), 29 N. E. Rep. 556.

[2] Marshall *v.* Broadhurst, 1 C. & J. 403.

[3] It may be asked why the word "heir" is employed, as if it were possible for a party to bind his heirs to perform covenants to build, or to assume contractual obligations, since the courts have held that the executor is the one who is liable though he be not mentioned in the contract. By the common law contractual rights went to the executor and administrator on death of the contractor, with all personal property, choses in action, etc. His estates in fee simple were liable in the hands of the heir only, for debts by specialty in which the heir was named. 4 Gray's Cases on Real Property 642 It therefore was necessary that the heir should be named in the contract, and that it should be under seal, if the owner or company would have any claims on the real estate; by which it is probable that it became the custom to draw construction contracts as specialties In the United States generally, a man's property, real and personal, is liable for his debts, and the distinction between real and personal assets is not so marked in considering contract obligations. 4 Gray's Cases on Real Property 643. There is little use of the word, but it is and will be used, for lawyers are slow to make changes in old and established forms. Like the expression "work and labor" in the common counts, it is used because others have used it, but it would be difficult to distinguish between work and labor To be safe and avoid unforeseen complications both the words are used, and it is recommended that the word "heirs" be inserted, as it is good usage. The reader may reasonably exclaim, What a blessing it would be if some profound scholar of law would come forward and explain away the abundance of meaningless words that pervade legal documents, and expunge the surplusage imposed by ancient laws and practice that still pervades our legal instruments!

[4] 7 Amer. & Eng. Ency. Law 262 and 326.

[5] 7 Amer. & Eng. Ency. Law 326.

[6] 7 Amer. & Eng. Ency. Law 299.

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administrator for a tort committed by the deceased person whom he might represent. The word "tort" includes acts of trespass, trover, false imprisonment, assault and battery, slander, deceit, etc. Under that law it has been held that a complaint alleging that a contractor was prevented by owner from performing work under his contract and asking damages resulting from the loss of profits which he expected to make was an action in tort, which did not survive the death of the owner.[1] It has been held that if by reason of a tort the estate of the deceased person has derived pecuniary profits, that the representative could be compelled to account to the party injured.[2]

13. Assignee of Contractor or Owner.—The word *"assigns"* is in common use and is a desirable, though perhaps not a necessary word. It should be omitted if the contract is a contract for personal skill or if it contains a clause forbidding an assignment, as it tends to show a contrary intention. An assignee would probably be bound without being named in the contract, or at least he could take no benefit without assuming the burdens.[3] An assignment of a contract in express violation of a positive prohibition is void, and the party claiming through such an assignment is entitled to no relief in equity.[4] *

Contracts for the performance of personal duties or services are not assignable so as to confer the right upon the owner to command the services or to compel him to accept performance by the assignee. One who has contracted to perform work which requires skill and science cannot impose another in his place without consent of the other party.[5] If the contract is given to the contractor because of his peculiar proficiency and skill in executing the work required to be done, then it can be assigned only by consent of the parties to the contract, which may be properly established by facts and circumstances showing his assent. Evidence tending to show such assent is admissible.[6]

A contract for the erection of a lighthouse has been held one for personal services which could not be completed by the representatives of the contractor.[7]

The introduction of the word *assigns* in the instrument may be evidence that the parties anticipated the possibility if not the probability of its assignment, and it is therefore sometimes omitted rather than to raise such a presumption. Thus an agreement or promise to a company, its assigns or successors, will enable the assigns and successors to complete works started by the company, and to enforce promises made to it, when the execution of the work is the essence of the agreement.[8]

[1] Jenkins *v.* Bennett (S. C.), 18 S. E. Rep. 929.
[2] 7 Amer. & Eng. Ency. Law 333.
[3] 29 Amer. & Eng. Ency. Law 978.
[4] Griggs *v.* Landis, 19 N. J. Eq. 350 [1868].
[5] 1 Amer. & Eng. Ency. Law 832; Munsell *v.* Temple, 3 Gillman 93; Lansden *v.* McCarty, 45 Mo. 106; Bethlehem *v.* Armis, 40 N. H. 34; Haskell *v.* Blair, 3 Cush. (Mass.) 534.
[6] Crawford *v.* Wolf, 29 Iowa 567 [1870].
[7] Wentworth *v.* Cock, 10 A. & E. 45.
[8] Michigan M. & C. R. Co. *v.* Bacon, 33 Mich. 446 [1876].

* *See* Secs. 289–296, *infra.*

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14. What Contracts and Claims are Assignable.—Construction contracts are in general assignable, if there be no clause contained expressly forbidding an assignment, and if the statute authorizing the work does not prohibit it, and such an assignment is valid. Any executory contract, not necessarily personal in its character, and which is consistent with the rights and interests of the adverse party, may be as fairly and sufficiently executed by the assignee as by the original contractor, if the contractor has not disqualified himself from its performance.[1] A contract to do work on a street can therefore be assigned, and if the assignee fulfills the conditions of the contract he can enforce it and recover the contract price.[2] The assignment of a contract for cleaning streets is not against public policy so long as the city retains the personal obligation of the original contractor and his sureties,[3] and an assignee can maintain an action in equity for a division of the profits of a building contract if he has performed his undertakings.[4] A contract to put on a gravel roof, to be done in first-class shape and guaranteed for a certain time,[5] and a contract to drill an oil-well,[6] have been held such contracts as might be sublet or assigned, when it was not shown that the contractor was specially fitted to do the work and was employed on account of his knowledge, experience, or pecuniary ability.

15. Contracts Awarded to Lowest Bidder may be Assigned.—Contracts awarded to the lowest bidder after advertising for proposals are not of a personal character, requiring rare genius or extraordinary skill, but may be assigned. The public are invited to bid for and take these contracts regardless of professions, trades, or occupations. Aside from the discretion usually vested in the board to reject all bids when they deem it for the public good, or the bid of any party who may have proved delinquent or unfaithful in any previous contract, there is no restriction upon the capacity of the contractor. He is not expected or required to do the work in person. Whether he knows anything about the work, or can tell the difference between a mud turnpike and a Nicholson pavement, or whether a sewer should be constructed in the shape of a longitudinal section of an egg-shell, or which end of the section should be uppermost, is of no consequence, for the contract is not awarded him because of his superior knowledge or skill, but because his bid is the lowest and his bond for the performance of the work in a workmanlike manner and according to the specifications is good. Moreover, by the terms of the contract, the work is to be performed under the direction and to the satisfaction of the engineer; it is *his* skill and genius therefore which gives form and excellence to the work, and it is there-

[1] Bates *v.* Lumber Co. (Minn.), 57 N. W. Rep. 218. 29 Amer. & Eng. Ency. Law 978, *and cases cited.*

[2] Taylor *v.* Palmer, 31 Cal. 241.

[3] Devlin *v.* Mayor et al., 63 N. Y. 8 [1875]; *and see* Little *v.* City of Portland (Ore.), 37 Pac. Rep. 911.

[4] Dougherty *v.* Grouff (Neb.), 36 N. W. Rep. 351, [1888].

[5] Curran *v.* Clifford (Colo. App.), 40 Pac. Rep. 477.

[6] Galey *v.* Mellon (Pa. Sup.), 33 Atl. Rep. 560.

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fore in his genius and skill, if anywhere, that trust and confidence are reposed.[1] *

In New York State everything that could be transmitted to the assignor's personal representatives is assignable. The test is, whether or not the thing assigned would pass to the executors and administrators of the assignor at his death.[2]

16. What Interest does an Assignee Take.—Where the assignees of a contract to construct a railroad agree to save the assignor harmless from all liability by reason of subcontracts previously let by him, a failure to pay the amounts due on such subcontracts is a breach by the assignees for which the assignor can recover without first showing payment by himself.[3]

An assignment of money due and to become due on a building contract effects an immediate and present transfer to the assignee of a right to demand and receive the money assigned without notice to the debtor.[4]

To complete the assignment notice should always be given the debtor to establish priority o claims of the assignee over those of materialman, other assignees, and creditors. Until informed of the assignment the debtor may regard the contractor or assignor as the creditor and may pay him and accept a release, or settle the claim with him, or purchase a debt which he owes and use it as set-off.[5]

When a contractor assigns his contract with a city to build a structure it seems there is no implied warranty on his part of its validity, and if it turns out to be invalid and worthless the assignee cannot avoid the payment of notes he has given in consideration of such assignment, there being no misrepresentation, concealment, or fraud on the part of the contractor.[6]

The cases are common where contractors have assigned to subcontractors,[7] and the latter may maintain an action on such assignment, but subject to defenses existing against the assignor or principal contractor. Moneys not yet earned, but expected to be earned in the future under an existing contract, may be assigned,[8] as can the lien of a mechanic or materialman,[9] but the lien must have been perfected first. An assignment of claims for work done or materials furnished was held to give no right to the assignee to a lien.[10] The assignment by a subcontractor of his account for work performed

[1] Emery *v.* Bradford, 29 Cal. 75; Taylor *v.* Palmer, 31 Cal. 240 [1886].

[2] 1 Amer. & Eng. Ency. Law 832.

[3] Mills *v.* Allen, 10 Sup. Ct. Rep. 413.

[4] Board of Education *v* Duquesnet (N. J. Ch.), 24 Atl. Rep. 922; Union Pac. Ry. Co. *v.* Douglas Co. Bank (Neb.), 60 N. W. Rep. 886.

[5] 1 Amer. & Eng. Ency. Law 840.

For a case where notice was given in English to one who could not read English, *see* Renton *v.* Monnier, 77 Cal. 449.

[6] Gould *v.* Bourgeois, 51 N. J. Law 361 [1889]; *but see* Humphreys *v.* Jones, 5 Exch. 952.

[7] Chambers *v.* Lancaster (Sup.), 38 N. Y. Supp. 253; Dirimple *v.* State Bank (Wis.), 65 N. W. Rep. 501.

[8] Perkins *v.* Butler Co. (Neb.), 62 N. W. Rep. 308; Tracy *v.* Waters (Mass.), 39 N. E. Rep. 190

[9] Milwaukee Mechanics Ins. Co. *v.* Brown (Kans. App.), 44 Pac. Rep. 85.

[10] Jenckes *v.* Jenckes (Ind. Sup.), 44 N. E. Rep. 632.

* *See* Secs. 132–200, 499–507, *infra.*

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as collateral security does not defeat his right to perfect a mechanic's lien therefor.[1]

17. Third Parties, Strangers, and Beneficiaries.—Persons not parties to a contract may subsequently acquire rights under it by assignment and operation of law, as the right of administrators, receivers, and successors in office, but, as a general rule, strangers can not sue on a contract. If the contract, not under seal, be made for the benefit of a third party, it has been repeatedly held that the third party can bring an action to recover what he is fairly entitled to under the contract. Evidence may be introduced to show that a written contract was made in behalf of parties other than those named, and to charge such other persons.[2] A third person, who is only indirectly or incidentally benefited by the contract, will not be allowed to sue upon it. For example, a stipulation in an engineering contract, by which the contractor is to indemnify the owner for damages, does not give to a party injured a cause of action against the contractor.[3] * A provision in a contract that a city may retain money until the contractors shall have paid his laborers, does not give the laborers any rights against the city when the contractor has been paid in full.[4] †

A provision that the owner shall retain a certain percentage of the contract price till the completion of the work is for the benefit of the owner, and does not afford a ground of personal liability by the owner to subcontractors.[5]

The third party cannot sue on the contract, unless it is perfectly clear that both parties to the contract intended it for his benefit. The mere fact that the third party might be benefited is insufficient.[6] It has been held, however, that a bond *to a city* by contractors, providing that they will pay for all labor and materials furnished, is a promise for the benefit of all persons furnishing labor and materials, and such persons may sue on it,[7] especially when the city or county is required by statute to secure its laborers and material men by a bond that the contractor will pay them.[8] If the bond be to pay for all materials furnished, the contractor is not liable either under his contract or on the bond to creditors of subcontractors for materials furnished, and the contractor's assignee is no more liable.[9] It has frequently

[1] Ittner *v.* Hughes (Mo. Sup.), 34 S. W. Rep. 1110.

[2] Ropes *v.* Arnold, 30 N. Y. Supp. 997.

[3] French *v.* Vix (N. Y. App.), 37 N. E. Rep. 612.

[4] Old Dom. Gran. Co. *v.* District of Columbia, 20 Ct. of Claims 127; Sayre Lumb. Co. *v.* Union Bank (Colo. App.), 41 Pac. Rep. 844; Lawrence *v.* United States (C. C.), 71 Fed. Rep. 228.

[5] Steele *v.* McBurney (Iowa), 65 N. W. Rep. 332; Weller *v.* Goble, 66 Iowa 113.

[6] Wright *v.* Terry (Fla.), 2 So. Rep. 6 [1887].

[7] Lyman *v.* Lincoln (Neb.), 57 N. W. Rep. 531; Kauffman *v.* Cooper (Neb.), 65 N. W. Rep. 796; St. Louis *v.* Von Puhl (Mo.), 34 S. W. Rep. 843.

Bd. of Ed. *v.* Grant (Mich.), 64 N. W. Rep. 1050; Gilmore *v.* Westerman (Wash.), 43 Pac. Rep. 845; Wilson *v.* Webber (Sup.), 36 N. Y. Supp. 550; *but see contra*, Buffalo Cement Co *v.* McNaughton (Sup.), 35 N. Y. Supp. 45 ; *see* 17 Amer. & Eng. Ency. Law 527-9.

[8] Brower *v.* Thompson Lumber Co. (Oreg.), 43 Pac. Rep. 659.

* *See* Sec. 638, *infra*.

† *See* Sec. 758, *infra*.

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been held that the right of a third party to a contract to sue upon it does not extend to the case of a contract under seal.[1]

For like reasons, a subcontractor is not liable to the owner for negligently and unskillfully doing his work by which the owner is injured, there being no contract between them. The owner should bring suit against the principal contractor.[2] A subcontractor can not hold a company or proprietor liable on their contract with the principal contractor; nor can the theory that the contractor was an agent of the company be a ground on which to hold it liable.[3]* A wife is not liable for a contract for sinking a well upon her property, made by the husband without her authority, as his own enterprise and in his own interest.[4] A third party is not liable to a contractor for work done on the representation, by the owner and employer, that the said third party would pay for the work, the contractor never having communicated such representation to the third party nor having obtained his assent to it.[5] A property owner on a street is not a party to a contract for the improvement of the street made between the contractor and the superintendent of the streets;[6] and where a city has entered into a contract to furnish certain things to its citizens, the city, and not a citizen, is the proper party to bring action against the company for a breach of such contract.[7]

Where one buys at sheriff's sale the property of a contractor who has failed and, taking the place of the contractor, under a partly performed building contract, completed the work for him, he is entitled only to the amount which would have been due the contractor, who had been overpaid for the work already done by him.[8]

18. Third Party—Sureties.—When the contractor fails or refuses to complete his contract, it frequently happens that the surety of the contractor assumes the contract and completes the work, in which case he takes the place of the contractor, assumes all the burdens, and takes the benefits. He may be mentioned in the body of the contract as a party, or he may assume the work under an assignment from the contractor, or by permission of the owner of the works.

While not strictly a party to the contract, as contracts are usually expressed, yet the surety is frequently the responsible party behind the contractor, and the party to whom the company or owner looks for the ultimate performance and completion of the contract. The contractor is employed for his skill and competence to do the work, and the surety is regarded as the backer who will see to it that it is completely performed. It is, therefore,

[1] 3 Amer. & Eng. Ency. Law 866. *See the codes of several states, which allow actions when the common-law practice would not.*

[2] Bissel *v.* Roden, 34 Mo. 63 [1864].

[3] Blanding *v.* Davenport (Ia.), 55 N. W. Rep. 81; Epeneter *v.* Montgomery Co. (Iowa), 67 N. W. Rep. 93.

[4] Devine *v.* McMillan, 61 Ill. App. 571.

[5] Stidham *v.* Sanford, 36 N. Y. Super. Ct. 341 [1873].

[6] Dyer *v.* Barstow, 50 Cal. 652 [1875].

[7] Cleburne W. I. & L. Co. *v.* City of Cleburne (Tex.), 35 S. W. Rep. 733.

[8] Marshall *v.* Brick (Pa. Sup.), 34 Atl. Rep. 520.

* *See* Sec. 765, *infra.*

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important that the relations of the surety to the parties and the contract be understood. The suretyship of a party is created usually, not in the contract, but in a separate instrument, called a bond. Frequently there is no mention of the surety in the contract, yet upon the execution of the contract may depend the binding effect of the bond.

19. Third Parties, Sureties are Not Liable to Them.—If the bond guaranty that the contractor shall pay for all labor and materials furnished him in executing the contract, it seems that laborers and materialmen have certain rights.[1] A contract of guaranty that a contractor should perform his contract to erect buildings, and to pay for the materials and labor so that there should be no liens, does not give a materialman a right to sue the guarantor.[2] * Sureties on a bond conditioned that the building should be turned over to the owner free from all liens for labor and materials, are not liable for labor and materials furnished to the contractor and subcontractors on their individual credit.[3] † A surety on a bond conditioned that the contractor shall pay all debts incurred by the contractor is not liable to subcontractors for labor and materials furnished.[4] For a creditor of the contractor to recover from the surety, it must appear that the creditor knew of the agreement on the part of the surety to pay, before he performed the work or furnished the materials.[5] In other words, he must have trusted the contractor on account of or by reason of the additional security.

20. Surety Released by Unauthorized Changes in the Contract.—A surety is one who has assumed certain obligations in relation to a contract but who is not a party to the contract. He is bound in the manner and to the extent provided in the obligation and no further. If he has undertaken to guaranty the performance of an express contract under certain circumstances, he cannot be held to fulfill his obligation with respect to a different contract or under different circumstances. A variation or alteration made in the contract by the parties thereto without the surety's consent is fatal to his obligation.[6] It is not necessary that he should sustain injury in consequence of the change; he may stand upon its terms, and if a change is made without his consent it is fatal to his liability,[7] even if the change is for the benefit of the surety.[8]

[1] Doll *v.* Crume (Neb.), 59 N. W. Rep. 806.

[2] Weller *v.* Goble, 66 Iowa 113; *accord* Stetson *v.* McDonald, 82 Pac. Rep. 108; *see also* Kelly *v.* Kellogg, 79 Ill. 477; McChesney *v.* Syracuse, 22 N. Y. Supp. 507; *and* Bell *v.* Paul (Neb.), 52 N. W. Rep. 1110.

[3] Stetson *v.* McDonald, McChesney *v.* Syracuse, Bell *v.* Paul, *supra.*

[4] Swindler *v.* State (Ind. App.), 44 N. E. Rep. 60.

[5] Ball *v.* Newton, 7 Cush. (Mass.) 599.

[6] St. Albans Bk. *v.* Dillon, 30 Vt. 122; Watriss *v.* Pierce, 32 N. H. 550; Gen'l St. Nav. Co. *v.* Rolt, 6 C. B. (N. S.) 550.

[7] Simonson *v.* Thori (Minn.), 31 N. W. Rep. 861 [1887]: Berks Co. *v.* Ross, 3 Binn. (Pa.) 520; 24 Amer. & Eng Ency. Law 838; 29 Amer. & Eng. Ency. Law 796; *but see contra,* Huone *v.* Dambach, 4 Pa. Co. Ct. Rep. 833; Commissioners, etc., *v.* Ross, 3 Binney (Pa.) 520; Miller *v.* Stewart, 4 Wash. C. C. 26; *per* Story in Miller *v.* Stewart, 9 Wheat. 680 [1824].

[8] Weir Plow Co. *v.* Walmsley, 110 Ind. 242; *but see* Hamilton *v.* Woodworth (Mont.), 42 Pac. Rep. 849.

* *See* Sec. 71, *infra.*

† *See* Secs. 761-5, *infra.*

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A departure from the terms of the contract by making payments on orders of the contractor without reference to the state of the work or the terms of the contract, or in excess of the installments or percentage due under the contract, is sufficient variation to discharge surety from his obligation.[1] The provision that the last of several installments shall be paid when the structure is completed operates as a security to the owner, and the surety is entitled to the benefit thereof. If deprived of any part of such security he is discharged from liability to that extent.[2] The contractor should not be overpaid nor should his compensation be increased.[3]

The enforced payment or deduction of claims of creditors against the contractor held by the owner as attorney for said creditors is not such a breach of contract as will release the sureties on the contractor's bond.[4] It does not matter, it seems, that the overpayment was made on the fraudulent representations of the contractor that the work was half done, when the contract provides that the payments shall be estimated by the engineer. The sureties are discharged.[5] If the contract stipulates that payments shall be made as the work progresses, on the estimates of the architect, payments must not be made without such estimates or in excess of them, without the consent of the surety.[6] The payments may be made without the architect's certificates, it seems, if not in excess of what the architect's estimates would have been.[7]

If by the contract the architect's estimate is made conclusive and a certain per cent. of such estimate is reserved until completion, it is as much for the indemnity of the surety as for the owner. If the surety has executed a written guaranty for the faithful performance of the contract by the contractor, the surety is bound by the engineer's estimate, and is not released by the fact that the owner has paid more than the agreed per cent. of the work done according to the contract price, but not more than the correct per cent. of the architect's estimate.[8]

However it has been held that the making and giving to a materialman of an order by the contractor, and the acceptance of the same by the owner, for an amount greater than the estimate of amount due to contractor, did not constitute an advance payment which would release the surety.[9]

[1] Simonson *v.* Grant, 36 Minn. 439 [1887]; *and see* 39 Minn. 493; Evans *v.* Graden (Mo.), 28 S. W. Rep. 439; Bell *v.* Paul (Neb.), 52 N. W. Rep. 1110; General S. Nav. Co. *v.* Ro't, 6 C. B. (N. S.) 550; Gordon *v.* Rae, 8 El. & Bl. 1065; *but see* Kauffman *v.* Cooper (Neb.), 65 N. W. Rep. 796.

[2] Pickard *v.* Schantz (Miss.), 12 So. Rep. 544.

[3] Warden *v.* Ryan, 37 Mo. App. 466.

[4] De Mattos *v.* Jordan (Wash.), 46 Pac. Rep. 402.

[5] Board of Commissioners *v.* Branham (C. C.), 57 Fed. Rep. 179.

[6] Bell *v.* Paul (Neb.), 52 N. W. Rep. 1110; Kane *v.* Thuener, 1 Mo. App. 725; Gato *v.* Warrington (Fla.), 19 So. Rep. 883, *receipted weekly pay-rolls and materials delivered.*

[7] Smith *v.* Mo'leson (N. Y. App.), 42 N. E. Rep. 669; *but see* Brennan *v.* Clarke, 29 Neb. 385.

[8] Finney *v.* Condon, 86 Ill. 78 [1877].

[9] De Mattos *v.* Jordan (Wash.), 46 Pac. Rep. 402.

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When the obligation of the contractor was to furnish, prepare, and set granite, and the owner was to make monthly payments of a certain per cent. of the estimated value of the work "performed on the building," payment for granite prepared as well as granite actually put in the building was held not to release the contractor's sureties.[1]

Payment in full to a contractor upon completion of his contract,[2] or partial payments when the work has been substantially completed to the required stages,[3] or payment to contractors who have fraudulently concealed defective work,[4] will not discharge a surety even though the owner paid the contractor without retaining enough to cover the claims of lienmen, when his contract authorized him to do so.[5]

Many changes made in a construction contract for a consideration and without the consent of the surety have been held to discharge or release him from liability—thus an extension of the time for completion.[6] To obtain his discharge the surety must plead the extension in his answer and he must prove it at the trial.[7] It has been held that an extension of time and overpayment did not release a surety on a bond providing that the contractor should pay for all labor and materials furnished him, as to the rights of laborers and materialmen.[8] The extension of time of payment must be for a definite time, and on a sufficient consideration to discharge the suretv.[9] The act of materialmen in allowing a contractor thirty days in which to pay for materials furnished does not release a surety obligated to pay for all materials furnished.[10]

Failure of the owner to insure property as agreed,[11] or a change in the person of the architect without the surety's knowledge or consent;[12] or a refusal by the owner to have the price of alterations fixed as provided in the contract, by arbitrators;[13] or if certain matters are to be determined by arbitration and certain other matters are afterwards included in the submission without the knowledge or consent of the surety,[14] then the surety may be discharged.

Sureties are released by a departure from the terms of the contract in respect to plan and materials, without the knowledge and consent of the

[1] Smith *v.* Molleson (N. Y. App.), 42 N. E. Rep. 669.
[2] Duluth *v.* Heney, 43 Minn. 155.
[3] Stimson Mill Co. *v.* Riley (Cal.), 42 Pac. Rep. 1072.
[4] Kingston *v.* Harding, 2 Q. B. 404 [1892].
[5] Casey *v.* Gun, 29 Mo. App. 49.
[6] Todd *v.* School Dist., 40 Mich. 294; *and see* 61 Mich. 426; Hall *v.* Johnston (Tex.). 24 S. W. Rep 861; Samuell *v.* Howarth. 3 Mer. Ch. 272; Hill *v.* Witmer, 2 Phila. (Pa.) 72; Mayhew *v.* Cricket, 2 Swanst. Ch. 185.
[7] Hayden *v.* Cook (Neb.), 52 N. W. Rep. 165; *but see* Hanks *v.* Gerbracht, 26 N. Y. Supp. 1097.
[8] Doll *v.* Crime (Neb.), 59 N. W. Rep. 806; Conn *v* State, 125 Ind. 514; Steffes *v.* Lemke, 40 Minn. 27.
[9] Houston *v* Braden (Tex. Civ. App.), 37 S. W. Rep. 467.
[10] Wilson *v.* Webber (Sup.), 36 N. Y. Supp. 550.
[11] Watts *v.* Shuttleworth. 5 H. & N. 235.
[12] Kane *v.* Thuener, 1 Mo. App. Rep 725.
[13] Truckee Lodge *v.* Wood, 14 Nev. 293.
[14] Cooke *v.* Odd Fellows (Sup.), 1 N. Y. Supp. 498.

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surety.[1] An agreement between the owner and contractor to add another story to a building;[2] to substitute steam heat for stoves and a gravel roof for a tin roof;[3] to increase the cost of plastering by $221, and adding to the expense a bulkhead for sewer connections, and changing the arrangements of the closets;[4] an interlineation in the specifications and addition of the words, "sliding doors between hall and parlor" and "bath-room,"[5] have each been held to release the surety on the contractor's bond.

An agreement, endorsed on a building contract by the owner and contractor, providing for additional work for additional compensation, has been held not such an alteration of the contract as will release the contractor's sureties.[6] A surety for a subcontractor between him and the contractor is not released by changes made in the specifications and plans by the subcontractor under an agreement with the owner and without the knowledge of the contractor;[7] and alterations without the knowledge or consent of the owner will not discharge the surety on the bond.[8] If the contractor simply consent to certain changes in the minor details of the work but without binding himself to conform to such changes and without any agreement as to the modification of the original contract, it will not discharge the surety.[9] Such agreements to change the terms of a contract, by which the surety will be discharged, need not, it seems, be in writing nor in any precise form of words, nor even in express language; they may be inferred from acts, declarations, circumstances, and facts.[10]

If the contract provide that the contractor should make any alterations or additions required by the owner, the price to be subject to addition or deduction therefor as might be agreed on, the sureties cannot defend against liability, because the owner, in completing the building after its abandonment by the contractor, as was authorized by the contract, deviated from the specifications, nor because changes were made before the abandonment with the assent of the contractor.[11]

21. Changes which Will Not Release the Surety.—When the contract provides that the owner, at any time during the progress of the work, shall have the right to make alterations, changes, or additions to the structure, and that the same shall not invalidate the contract; changes and additions made by him will not release the surety on the contractor's bond.[12] If

[1] Erickson *v.* Brandt (Minn.), 55 N. W. Rep. 62.
[2] Judah *v.* Zimmerman, 22 Ind. 388.
[3] Evans *v.* Graden (Mo.), 28 S. W. Rep. 489.
[4] Beers *v.* Strimple (Mo. App.), 22 S. W. Rep. 620.
[5] Lancaster *v* Barrett, 1 Pa. Sup Ct. Rep. 9.
[6] Barclay *v.* Alsip (Pa. Sup.), 24 Atl. Rep. 1067.
[7] Henricus *v.* Englert (N. Y. App.), 33 N. E Rep 550.
[8] Consaul *v.* Sheldon (Neb.), 52 N. W. Rep. 1104.
[9] Henricus *v* Englert, *supra.*
[10] Brooks *v.* Wright (Mass.), 13 Allen 72; Miller *v.* Stewart, 4 Wash C C. 26.
[11] De Mattos *v.* Jordan (Wash.), 46 Pac. Rep. 402.
[12] Hayden *v* Cook, 34 Neb. 670; Moore *v.* Fountain (Miss.), 8 So. Rep. 509 [1891]; Smith *v.* Molleson (N. Y. App.), 42 N. E. Rep. 669; McLennan *v.* Wellington, 48 Kans. 756.

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the owner refuses to have the prices of such changes determined in the manner provided by the contract, then the sureties will be released.[1] The changes must be reasonable, and not materially increase the cost of the structure beyond the contract price.[2] A change in the plan of a building by moving the wall out two inches, and in the specifications by substituting walnut, cherry, and poplar, instead of pine, in certain parts of the building, has been held reasonable, and that the sureties were *not* released by reason thereof.[3] A change from stone window-lintels to railroad iron has been held *not* to affect the obligation of the surety,[4] nor a change of the fronting of a building when the sureties had never seen the original plans.[5]

When the contract provides that no new work shall be considered as extra work unless a separate estimate be submitted by the contractor, and signed by the engineer and owner, and that only such work shall be paid for as has been authorized in writing, the owner may waive compliance with the provision, and the sureties on the contractor's bond have been held not to be discharged because the provision had been disregarded.[6] A different view seems to have been taken where the contract provided that the superintendent might make alterations without invalidating the contract; that any difference in the expense should be determined by him, and that in case of any such alteration the expense must be agreed on in writing, and signed by said parties and the superintendent before the work was done, and any allowance made therefor; it was held that the superintendent had no authority to make alterations without consulting the surety.[7] A surety for the owner has been held to be entitled to the benefit of a provision in the contract that the final payment shall not be paid until thirty days after the work is completed, and only on the certificate of the engineer.[8]

22. Surety Discharged by Other Causes.—A surety may be discharged from his obligation by the death of the contractor; but where the contractors make a partnership, the dissolution of the partnership does not release the surety on a bond to pay for all labor and materials furnished,[9] nor does the assignment of one contractor to the other joint contractor without notice to the surety release him.[10] The fact that the performance of the contract has become impossible, without any neglect or fault of the contractor, will release the sureties. An instance of the latter case is where the particular subject-matter is dead, or has been destroyed, and cannot be rebuilt or replaced, as the delivery of an animal which has died.[11]

[1] Truckee Lodge *v.* Wood, 14 Nev. 293.
[2] Consaul *v.* Sheldon (Neb.), 52 N. W. Rep. 1104.
[3] McLennan *v.* Wellington (Kan.), 30 Pac. Rep. 183.
[4] Howard Co. *v.* Baker (Mo.), 924 S. W. Rep. 200.
[5] Dorsey *v.* McGee, 30 Neb. 657.
[6] Consaul *v.* Sheldon (Neb.), 52 N. W. 1104; *semble*, Smith *v.* Molleson (N. Y. App.), 42 N. E. Rep. 669.
[7] Beers *v.* Strimple (Mo.), 23 S. W. Rep. 620.
[8] Beharrell *v.* Quimby (Mass.), 39 N. E. Rep. 407.
[9] Kauffman *v.* Cooper (Neb.), 65 N. W. Rep. 796.
[10] Abbott *v.* Morrissette, 46 Minn. 10.
[11] Steele *v.* Buck, 61 Ills. 343 [1871].

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PERSONS AS PARTIES.—WHO MAY CONTRACT.

23. Disabilities to which Persons are Subject.—The rights of parties to enter into and enjoy the rights of a contract are modified by the special condition or status of the parties. Natural persons may be affected by various private conditions: such as infancy, marriage, and conditions affecting the mind, or by their political and social status; while the powers of artificial persons, known as corporations, are defined and limited by the law of their creation. The extent of the latter must be sought in the act of sovereign power, by which they exist. The incapacities created by the private conditions of persons are subjects of greater practical importance than those of the political and social standing of the parties.[1]

They are based upon the fundamental principle that a contract cannot be created unless there is mutual consent of the parties and an intelligent understanding of its terms. Any mental infirmity of either or both parties that precludes the possibility of a just apprehension of the terms of the agreement, or of an intelligent assent to them, destroys one of the essential elements of a contract.[2]

24. Infants.—Persons under twenty-one, and, in some states, women under eighteen years of age, commonly known as infants, are regarded by the law as lacking in judgment and understanding sufficient to enable them to guard their own interests, and the law protects them against their own improvidence, or the designs of others, by allowing them to avoid acts, contracts, or conveyances to which they are parties, and that are not manifestly to their interests. Before that age the law presumes their faculties to be immature and incompetent, and seeks to guard against the artifice and cunning of the world. This protection is afforded by allowing them certain privileges of avoiding their acts and agreements, or by declaring them voidable and not binding. The privileges are entirely personal, and the infant alone can take advantage of them. If the other party to the contract be an adult, the reason which permits the infant to escape its force does not apply to the adult, and he is bound thereby, despite the want of reciprocal responsibility on the infant's part. The adult is bound by the agreement, though the infant may avoid it. This may not seem strict justice, but it is founded upon the theory that the adult has entered into the contract with all the experience and knowledge requisite to avoid fraud and imposition, which it is presumed the infant has not. For the same reason a third person not a party to the contract cannot take advantage of the infancy of one of the parties to avoid it unless it be void from the beginning.

An infant's contract is not necessarily void and without binding force; some contracts are voidable at the option and discretion of the infant, and

[1] Leake's Digest of Contracts, p. 537.

[2] Story on Contracts, chap. 2.

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others are binding. If the agreement be positively injurious[1] to him, and can only operate to his prejudice, it is absolutely void, for it is self-evident that unfair advantage and influence has been exercised over him. Such is a bond executed by him as a surety.

Contracts that are for his benefit may be affirmed or avoided by him when he arrives at age, when he is presumed to have arrived at years of discretion. Executory contracts of an infant are generally voidable, and he may refuse to perform during infancy, or disaffirm them when he becomes of age, and leave the other party without remedy. But if a contract is completely executed, and it is beneficial to the infant, and was entered into in good faith, the infant cannot rescind it unless he can restore what he has received and put the other party in the same position that he occupied before the contract. An infant is also liable for the fair value of necessaries supplied to him, not on his express contract, but on a contract implied by law, which gives a reasonable price to those who furnish necessaries, "since an infant must live, as well as a man."[2]

Though an infant may not contract for himself, he may act as agent for another, and his acts are as binding upon the principal as an adult's.[3] He cannot appoint an attorney, nor sue or be sued, except by next friend or guardian, and in general has no legal capacity to act for himself.[4] An infant is liable for injuries to property or persons wrongfully committed by him. As is often said, "his privilege of infancy is given to him as a shield, and not as a sword." He is not, however, liable for the evil consequences of a breach of contract.[5]

25. Imbeciles, Inebriates, and Lunatics.—For the same general reasons a contract made by an idiot, a lunatic, or drunkard may be avoided in the same ways as those recited for infants, if it can be proved that the party is incapable of reasoning and judging of what is for his benefit. Much that has been said of the infant may be repeated for them. Their contracts are voidable only and may be ratified upon their returning to reason. If a person has agreed to sign a contract when sober, the fact that he was intoxicated at the time he did sign it will not excuse him from liability.[6] And the contract of an habitual drunkard is good if made in a sober interval.[7]

"Mere weakness of mind is no ground for incapacity, and does not afford

[1] A later doctrine exists that all contracts of an infant are voidable which relieves the court of the responsibility of deciding what is necessarily injurious to the infant. 10 Amer. & Eng. Ency. Law 628 *et seq.*

[2] Story on Contracts 103–130. As to what are and what are not necessaries is sometimes a nice question, not perfectly well settled.

[3] 1 Amer. & Eng. Ency. Law 334.

[4] Robbins *v.* Mount, 33 How. Pr. 24 [1867].

[5] 10 Amer. & Eng. Ency. Law 674–8.

[6] Page *v.* Kreky (Sup.), 17 N Y. Supp. 764 [1892].

[7] Ritters' Appeal, 9 P F. Sm. 9; Caulkins *v.* Fry, 35 Conn. 170; Evans *v.* Horan, 52 M. D. 602; Wait *v.* Maxwell, 5 Pick. 217; Elston *v.* Jasper, 45 Texas 409; Breckenridge *v.* Ormsby, 1 J. J. Marsh. 236. For more about the insane, or idiots, *see* Pollock on Contracts, p. 419, *and notes.*

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sufficient ground for setting aside a contract, but it may support an inference of fraud and unfair practice when the contract is entirely to the disadvantage of the weaker party. A contract obtained by fraud will be void in any case, whatever be the comparative intelligence of the parties, but a court of equity will set aside a contract where it is evident that advantage has been taken of a weak-minded person, when it would not give relief to the same contract between parties of sound understanding." As in the case of an infant, if the mind of one party had become impaired by age, the contract is none the less operative against the other party if the latter be in full possession of his faculties.[1]

The ground of relief in all these cases is based upon two principles: First, that of mutuality—a capacity to comprehend the agreement into which they have entered, and an understanding of the terms of the agreement; secondly, that no fraud be practised or unlawful advantage be taken of either party. This protection is given to all parties, infants or adults, sane or insane, intelligent or idiotic, sober or drunk, and, in the language of a prominent English jurist, "it is unaccountable that a man shall not be able to excuse himself by the visitation of heaven, when he may plead duress from men to avoid his own acts." Justice will not permit the strong to take advantage of the weak. It is sufficient to invalidate any contract if it clearly appear that the party contracting did not at the time understand what he was about.

Intoxication may afford relief from a contract only when the party is so drunk that he cannot exercise his judgment. It must be so excessive and absolute as to suspend the reason. "The merriment of the cheerful cup, which rather revives the spirits than stupefies the reason, is no hindrance to the contracting of just obligations." If the lunatic contract during a lucid period, or the idiot when his reason is restored, or a drunkard when he knows what he is about, the contract may be established, and will be sustained.[2]

Many fine questions arise upon this subject upon which volumes have been written—questions as to what constitutes a ratification or new promise of an infant at his maturity, what are necessaries, what degree of weak-mindedness, or insanity, or intoxication will afford relief, etc., but they are too cumbersome to treat at length in this work.[3]

Generally speaking, each and all are liable for necessaries furnished in good faith, and on executed contracts. To escape liability they must restore to the other party what they have received on the contract. If a contract shows on its face good judgment on the part of the imbecile as a shrewd

[1] Harmon *v.* Harmon (Cir. Ct.), 51 Fed. Rep. 113.

[2] *See* Sands *v.* Potter (Ill. Sup.), 46 N. E. Rep. 282.

[3] *See* Story on Contracts, Part 2; Amer. & Eng. Ency. Law (subjects), Pollock on Contracts, Leake's Digest of Law of Contracts, and other standard works on the subject.

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bargain, and it is to his benefit, the rule ought not to apply. Parties who have been adjudged insane or idiotic by a court and a guardian has been appointed, are wholly incapacitated from contracting, and contracts entered into by them are void.[1] To enforce a contract with a person habitually insane there must be proof that the same person was sane and capable of contracting at the time of the transaction.[2]

28. Married Women.—At common law a married woman could not contract, sue, or be sued in her own name. To prevent domestic discord and create a legal unity, the will of the husband was made paramount. Man and wife were regarded as one person in their legal status, and whatever a married woman did her husband should join in it. The common law still prevails in some parts of the United States, but in most states it is modified by statutes, which are so different in the several states that it is thought inadvisable to attempt to discuss them. Suffice it to say that a married woman should not be made a party to a contract, without the statutes of the state expressly grant the power to contract, independent of her husband, and then the requirements of the statute should be carefully studied and explicitly followed. Much trouble and loss have been experienced by contractors by neglecting to inquire into the marital relations of parties and the law governing them, peculiar to the jurisdiction. Contracts have been made and structures erected for which no recovery could be had, because the contract was void or the structure has been erected upon land owned by the wife when the husband has assumed the obligation to pay. For like reasons it has been held that a woman cannot contract with her husband, and such contracts have generally been held not binding. In the absence of a statute giving such authority, the legal incapacity to contract remains as at common law. At common law a contract or promissory note between husband and wife was absolutely void.[3] And the same has been held in New York state, where no statute had been passed as late as 1889. But, although contracts between husband and wife are invalid in a court of law, courts of equity may give effect to agreements and transactions between them so far as they are just and fair and equitable and ought to be enforced. The agreement should not be voluntary, but should be for some consideration.[4] The difficulty doubtless has been that such contracts could not be enforced, as the courts would entertain no action on them. The law has been modified in many states.

A woman may employ her husband to act as her agent to transact any and all of her business, and it has been held that she might contract with him to do all her work; that she could contract with him for the construction of a building or any part of it for a stipulated price and by the job. If he employed subcontractors to perform the work he had undertaken, it was

[1] 11 Amer. & Eng. Ency. Law 134.
[2] Ricketts v. Jolliff, 62 Miss 440 [1884].
[3] Knell v. Eg eston, 140 Mass. 202 [1885], *and cases cited.*
[4] Hendricks v. Isaacs, 117 N. Y. 411 [1889].

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intimated that the subcontractor must look to the husband for his pay, even though he supposed the husband to be the owner of the property; but that for work the subcontractor had done with the wife's knowledge that was not a part of the husband's contract work, she must pay him for as if it were in fact *her* work.[1] A contract between a husband and wife who had parted has been held *not* void.[2] In most states a woman has the legal right to bind herself by a contract, and she and her own property will be liable for debts so incurred. She may contract for the erection of buildings upon her property.[3] A married woman may contract as an agent of her husband or as agent of third parties. She may contract for necessaries and bind her husband to pay therefor, but it is on his behalf and she assumes no responsibility herself.

27. Other Conditions Affecting a Person's Capacity to Contract.—Disabilities and forfeitures incurred on account of political and social conditions of parties are nearly obsolete in this country. Outlawry is almost wholly unknown. Attainder is prohibited by our constitution, and in times of peace a contract made and obligations assumed by an alien or foreigner will be enforced by our courts. If war be declared by or against the country of which he is a citizen he becomes an alien enemy; his legal right to sue upon the contract is suspended until peace is declared. A contract entered into during war between an alien and citizen is utterly void, for the law declares such contracts illegal, because if permitted, an enemy would thereby be enabled to disturb a nation's finances and wage war on the internal business and credit of a country, to the destruction of its resources. The law of nations prohibits every kind of trading, commercial dealing, or contract between citizens of two countries at war which tends to increase the resources of the enemy or weaken the power of home government.

Seamen are special wards of the law. The general recklessness, thoughtlessness, and ignorance of this class of men is considered and specific favor is shown them. The law of the United States protects them from recovery of any debt greater than one dollar incurred during a voyage, and a sailor need only produce his shipping papers to be dismissed from court. Contracts of seamen for services constitute the bulk of this class of cases, and as they are remote to engineering, the profession is referred to books specially treating the subject.

In some jurisdictions bankrupts receive the special protection of the law. Since the solvency of a person or corporation is one of the most necessary things to inquire into, it can hardly be thought that any one will undertake to enter into an agreement with a bankrupt without first ascertaining his resources or requiring a bond as security.

The infirmities of a contract arising from the parties not being *sui juris*

[1] Fairbanks *v.* Mothersell, 60 Barb. 406 [1871].

[2] Duryea *v.* Bliven, 12 N. Y. 567.

[3] Greenleaf *v.* Beebe, 80 Ill. 520 [1875].

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and capable of contracting are not cured by an assignment of his interest by one of the parties thereto.[1]

28. Either Party Under Duress.—Neither party to a contract should have been under duress of person or goods,[2] nor under great excitement, or fear, or compulsion when the contract was made.[3] Mere angry or profane words, or strong or earnest language will not constitute such duress as will relieve a party from his contract. Duress by threats which will avoid a contract only exists where such threats excite or may reasonably excite a fear of some grievous wrong, as bodily injury or unlawful imprisonment.[4] To make a payment compulsory such pressure must be brought to bear upon the person paying as to interfere in some way with the free enjoyment of his rights of person or property.[5] The imprisonment, threatened or feared, must have operated on the mind so far as to deprive the contract of the character of a voluntary act.[6] So it has been held that a contract was not signed under duress when a contractor who had commenced work under a parol contract for grading one mile of roadbed was required to sign a contract for one-half a mile only, and on his refusal to sign the contract the owner said to contractor's men: "I will stand good for no more work you do for contractor." Contractor being unable to continue the work unless the owner paid the men, he signed the contract.[7] A wife may avoid her contract extorted by a threatened criminal prosecution of her husband on the ground of duress. The fact that the husband has destroyed the forged papers incriminating him, which papers had been surrendered when the wife gave her note, does not prevent the wife from avoiding her note extorted under threats of prosecuting her husband.[8] Threats of lawful arrest of a person justly amenable to criminal prosecution without circumstances of oppression or frand do not constitute duress or menace, for which a deed executed under pressure of such threat can be cancelled.[9]

29. Agency—Parties Acting by or through their Agents.—

—"by and between ....(name of owner or corporation.) ....., acting by and through.....President, Treasurer, Engineer, Attorney, Agent, by virtue of the power vested in him by power of attorney of the.....day of .....18..... a copy of which is hereto annexed;" or "acting by and through the .....Commissioners.....Board of Public Works, by virtue of the power vested in them by chapter.....of the Laws of 18.....of the State of.....and the amendments

[1] McCorkle v. Goldsmith, 1 Mo. App. Rep. 172.

[2] 6 Amer. & Eng. Ency. Law, pp. 57, 92, 93; Miller v. Miller, 68 Pa. St. 486 [1871]; Adams v. Scheffer (Col.), 17 Pac Rep. 21; Jordan v. Elliott (Pa.), 15 Cent. L. J. 232 [1882].

[3] 6 Amer. & Eng. Ency. Law 57–59; McCarthy v. Hampton Bldg. Assn., 61 Iowa 287; Lomerson v. Johnson (N. J.), 13 Atl. Rep. 8.

[4] Adams v. Stringer, 78 Ind. 175 [1881].

[5] Stover v. Mitchell, 45 Ill. 213 [1867].

[6] Berrett v. Weber, 125 N. Y. 18 [1890].

[7] McCormick v. Dalton (Kan.), 35 Pac. Rep. 1113.

[8] City Bank v. Kusworm (Wis.), 59 N. W. Rep. 564.

[9] Gregor v. Hyde (C. C A.), 62 Fed. Rep. 107.

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thereto ....." "or a Board authorized by virtue of an act of stockholders of said company, to construct a....."

These are clauses that should never be omitted where the contract is executed by parties other than those on whose behalf it is made. It is a clause that will protect the engineer, agent, or board, and will afford the contractor information by which he can learn the duties, powers and resources with which the parties propose to act. This is imperative with the contractor, for if the contract is executed by an engineer, officer, or board who has not the requisite authority, the contract is void, and the contractor finds he has done work unauthorized by the principal and for which he may not recover.

30. Principal should be Made the Party — If Agent Assumes the Obligation He will be Liable.—The principal or proprietor should be made the party to the contract, and his [its] name be signed at the end. If the contract is executed by or through an engineer, officer, or agent, the intention must be perfectly plain. The proper form for such a contract is the one given above, although other forms may be binding and the engineer or agent escape liability. Thus in an agreement in the form "Memoranda of agreement between C. [the contractor] and E. [the engineer] on the part of A [the company], the said E. hereby agrees.....signed E," E. was held liable.[1] In another case, the contract read: "On behalf of B. we hereby consent.....money to be paid to A. and E.; E. to supervise certain work. [Signed, A. and E.]" A. and E. were held liable because A. and E. were to receive payment.[2] This case has been criticised by good authority, but it nevertheless stands on record.

In a contract of sale where E. as agent for A. agrees.....[signed] E., E. was held personally liable on the contract.[3] The tendency seems to be to get away from these precedents, and to interpret the contract, according to the intention of the parties,[4] but they are established decisions and may be followed.[5]

A mere description in the body of an instrument of a person as agent, without words or necessary implications showing that he signs as agent only, will not exempt him from liability on the contract. So it was held that a contract for the sale of wheat in the following form: "Sold C. 200 quarters wheat [as agents for, etc.], and signed E.," made E. liable upon the contract.[6] An engineer or agent who uses his own name instead of that of his principal (company) when he intends to bind the latter, renders himself liable. The word "engineer or agent" appended to his name is universally

[1] Norton *v.* Herron, Ryan & Moody 229.
[2] Tanner *v.* Christian, 4 E. & B 590.
[3] Paice *v.* Walker, L. R 5 Exch. 173; Stone *v.* Wood, 7 Cowen 453.
[4] Deering *v.* Thorn (Minn.), 13 Rep. 757.
[5] Haskell *v.* Cornish, 13 Cal. 47; Quigley *v.* De Hass, 82 Pa. St. 267; *see also* Hutchison *v.* Eaton, 13 Q. B. D. 861.
[6] Paice *v.* Walker, L. R. 5 Exch. 173 [1870]; *and see* Fairlee *v.* Fentou, L. R. 5 Exch. 169.

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held a mere description of the person. It is held to afford no relief from personal liability, but amounts to no more than if he affixed the abbreviations of his collegiate degrees, as C.E., M.E., or B. Arch.[1]

If, on a note, the name of the corporation be signed followed by the name of an individual with "Prest." after it, though without the word "per" between the names, it is the promisory note of the corporation and not a joint note.[2] If the president had signed his own name and written "Prest." after the signature, it would not have relieved him from personal liability.[3] If he does not disclose the name of his company he is personally liable, and parol evidence is not admissible to show that a written instrument was made on behalf of another unless there be something on the face of the instrument to indicate it.[4]

31. Proof of Agency.—Some proof it seems may be offered that it was the intention of the agent to bind his company and not himself.[5] Evidence may be given that it was known to the one party that the other party was an agent, and evidence may be admitted on the other hand to show that in this particular case he was acting as a principal, having agreed to pay for the work done out of his own money.[6]

A distinction has been made between contracts with public agents and officers who act on behalf of their governments and those made by agents of a private corporation or a person. If a public officer fails to bind his government and no action can be had against it, yet the officer is not personally liable, the public faith being the only security. In the case of a private corporation, the law requires the agent to see that his employer or principal is legally bound by his act, or it holds him personally responsible.[7] Agency cannot be proved by the declaration of one assuming to act in that capacity nor by declarations of one claiming to act as agent.[8] The extent of his authority cannot be shown by proving his declarations though accompanied by acts, unless such declarations or acts were brought home to the principal.[9] Evidence that there was a general understanding

[1] Hough *v.* Manzanos, 4 Exch. Div. 104; Sayer *v.* Nichols, 5 Cal. 487; *see* Hill *v.* Miller, 76 N. Y. 32 [1879]; Haskell *v.* Cornish, 13 Cal. 47 [1859] Sharp *v.* Smith, 32 Ill. App. 336, "*Directors*" Paige *v.* Walker, L. R. 5 Exch. 173 [1870]; Fullam *v.* West Brookfield, 9 Allen (Mass.) 1, "*Committee*": Sperry *v.* Farming, 80 Ill. 371 [1875]. "*Trustee*"; Pershing *v.* Industrial Co. (Minn.), 59 N. W. Rep. 1084; *see* 29 Amer. & Eng. Ency. Law 863, *note*.

[2] Reeve *v.* Bank (N. J.), 23 Alt. Rep. 853.

[3] Heffner *v.* Brownell, 31 N. W. Rep. 947 [1887].

[4] See collection of cases and references in 8 N. E Rep. 586, *note, and also* Mid Co. Bk. *v.* Hirsh Bros., 4 N. Y Supp. 385 [1889].

[5] Deering *v.* Thorn (Minn.) 13 Rep. 757 [1882]; *and see also* 13 Minn. 106, 187; 14 Minn. 214

[6] Hewes *v.* Andrews (Colo.), 20 Pac Rep. 338 [1889].

[7] Randall *v.* Van Vechten, 19 Johns. (N. Y.) 60.

[8] Brady *v.* Nagle (Tex. Civ. App.). 29 S. W. 943; Burke *v.* Frye (Neb.). 62 N. W. Rep. 476; Fullerton *v* McLaughlin (Sup.), 24 N. Y. Supp. 280; Dowden *v.* Cryder (N. J.), 26 Atl. Rep. 941.

[9] Richardson Co. *v.* School Dist. (Neb.), 64 N. W. Rep. 218.

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among business men that an agency existed has been held admissible,[1] and the agency may be proven by letters and telegrams from the principal.[2]

32. Names of Parties in Body of Contract should Correspond with Signatures.—The names of the parties in the introduction should correspond strictly with the signatures and seals at the end of the contract, for a variance may be fatal to the contract.[3] A contract made in the name of a railroad corporation for grading its roadbed was signed by its engineer, who used his own private seal, subscribing to his signature and seal "Chief Engineer of T., etc., R. Co., and as such its authorized agent to make this agreement." And the court held it was not the corporation's sealed contract; but as the engineer had authority to make a simple contract, that the seal should be disregarded and the contract held a simple contract.[4] This has not been the universal interpretation of such contracts, and unless it can be shown that a simple contract was entered into preliminary to the sealed instrument, it is submitted that the contract would fail. It is difficult to impose upon the parties a contract which they never contemplated or intended, but if they have undertaken to merge an existing simple contract into a specialty and have failed, then the simple contract remains and the written document is evidence of the terms of that contract. It is very unsafe to draw contracts in such a form; the party who covenants should be the party to sign and seal. If the covenantor does not sign and seal, then he is not liable because it is not his seal;[5] and the party who has signed and sealed is not liable, for it is not his covenant. It is important to distinguish between simple contracts and contracts under seal in determining whether the engineer [agent] or principal is liable. In simple contracts the intention of the parties should prevail; in contracts under seal the question is, who signed and sealed the specialty and who made the covenant. Therefore a deed made in the name of a corporation authorized by law to have a common seal, signed by the president and secretary of the corporation, but without authority from the board of trustees and not sealed with the corporation seal, was held void.[6] It seems that a public officer does not bind himself to pay the debt of his principal when, in a sealed instrument, he imposes the obligation upon himself.[7] *

[1] Gregor *v.* Hu son (Tex.), 30 S.W. Rep. 489.

[2] Farrell *v.* Edwards (S. D.), 66 N. W. Rep. 812

As to the prop r manner for corporation officers to sign and indorse negotiable instruments and the liabilities created thereby, *see* 39 N. W. Rep. 640, *note*, and 3 N. Y. Supp. 771, *note*.

[3] Mott *v.* Danville Seminary (Ill.), 21 N. E. Rep. 927.

[4] Saxton *v.* Texas, S. F & N. R. Co. (N. M.), 16 Pac. Rep. 851 [1888]; Haskell *v.* Carnish, 13 Cal. 47 [1889]; Dickerman *v.* Ashton, 21 Minn 538 [1875]

[5] *See* Whitford *v.* Laidler, 94 N Y. 145; Appleton *v.* Binks, 5 East 148; Townsend *v.* Hubbard, 4 Hill, 351; McCauley *v.* Jenny, 5 Houston (Del.) 132.

[6] Mott *v.* Danville Seminary (Ill.), 21 N. E Rep. 927 [1889].

[7] Knight *v.* Clark (N. J.), 2 Atl Rep 780 [1885]; Huthsing *v.* Bausquet, 12 The Reporter 225; *but see* Wing *v.* Glick, 46 Iowa 473 [1881].

* *See* Secs. 789 and 855, *infra*.

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33. Agents should be Duly Authorized to Contract.—"by or through ....., President, Treasurer, Engineer, or other officer or agent." Every person who enters into a contract with officers or agents of a public corporation is bound at his peril to ascertain the extent of their authority.[1] He must know the extent of their power conferred by the act of incorporation, and notice all public limitations on their authority. Rules and regulations of a private corporation made and signed by the officers cannot, however, affect contracts made by third parties with their agents without notice of such rules.[2]

34. Unauthorized Acts of Agent may be Ratified or Adopted.—A private corporation, like an individual, may ratify the acts of its officers or agents done in excess of authority, if it could have authorized the act itself.[3] It is submitted that if a contract with a private corporation or individual were declared void for want of authority in the agent to contract, that the contractor could recover on an implied contract to pay for the benefit it had received, but not upon the contract under which the work was begun.

35. No Claims or Obligations are Created by Contract of Public Officer or Agent who Acts without Authority.—Contracts by *public* officers, or officers and agents of public corporations, must be strictly within the authority delegated by the act of incorporations.[4] Contracts made in excess of such power conferred by the sovereign power will not bind the corporation, nor is there any guaranty on the part of the corporation that the forms of law have been complied with because its officers, without authority, attempt to contract.[5] Those dealing with cities and other public corporations must see to it that its agents have power to act, for no liability is incurred for work done under a void contract.[5] They must ascertain at their peril that officers are acting within the scope of their lawful powers. They must ascertain and take notice of the extent and power of a building committee to bind the city.[6] Likewise a party who undertakes work under an order of a court must see to it that the order as entered by the clerk in the records is in accordance with the terms of his agreement, or run the chances of not recov-

[1] Davis *v.* The City, 3 Phila. 374 [1859]; 1 Dillon Munic. Corp. (Ed 1873). § 372; Baltimore *v.* Reynolds, 20 Md. 1; Hume *v.* United States, 132 U. S. Rep. 406; Wells *v.* Mich. Mut. L. Ins. Co (W.Va.), 23 S. E. Rep. 527; Pearce *v.* Madison & J. R. Co., 21 How. (U S.) 441; Smith *v.* Co-operative D. Ass'n, 12 Daly (N. Y.) 304; Little *v.* Kerr (N. J.), 14 Atl. Rep. 613.

[2] Walker *v.* Wilmington, C. & N R. Co. (N. Car.), 1 S. E. Rep. 366; Griffins *v.* Land Co., 3 Phila 447 (1859); Blanding *v* Davenport, etc., N. R Co. (Ia.), 55 N. W. Rep. 81; R. R. & B'king Co. *v.* Skellie, 16 S. E. Rep. 657.

[3] 4 Amer. & Eng. Ency. of Law 247, *and cases cited.*

[4] Wallace *v.* Mayor of San Jose, 29 Cal. 181.

[5] Daly *v.* San Francisco, 13 Pac. Rep. 321; Hume *v.* United States, 132 U. S. Rep. 406. *and see* Dhrew *v.* Altoona, 121 Pa. St. 411; McDonald *v.* Mayor, 68 N. Y. 27; Smith *v.* City of Newburg, 77 N. Y. 136; Davis *v.* City, 3 Phila. 374; Miller, *v.* Goodwin, 70 Ill. 659; Bateman *v.* Mayor, 3 H. & N. 323.

[6] Cheeney *v.* Brookfield, 60 Mo. 53, 17 Amer. & Eng. Ency. Law 157, 15 Amer. & Eng. Ency. Law 507-509; Keating *v.* Kansas City, 84 Mo. 415; Boston E. L. Co. *v.* Cambridge (Mass.), 39 N. E. Rep. 787; Osgood *v.* Boston (Mass.), 43 N. E. Rep. 108.

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ering for his work. This was a contract to survey, subdivide, map, and classify school lands by a person who had no personal fitness to perform the work, which the commissioners of the court knew. Though it was understood that the person was to employ substitutes to perform the work, it was held that an order entered in the records which fails to mention the fact that the contractor was to employ substitutes, could not be corrected.[1] Contracts made by a receiver of a railroad company for materials and supplies in excess of the needs of the road cannot be enforced against the receiver. It was held, however, that the contractor was entitled to be reimbursed for expenses incurred in good faith under such contracts.[2]

36. Public Agents Not Liable for Blunders.—A contractor cannot be too cautious and careful in taking public work. Commissioners and boards of public works, city engineers, supervisors, and other officers are likely to mistake the extent of their powers, and to contract for, and order things, for which the contractor can never recover. The innocence and honesty with which the officer oversteps the limit of his authority seem to afford no excuse to the contractor's neglect to ascertain the extent of his powers.[3] The corporation is not liable, and if the officer has exercised his honest judgment, and is guilty of no negligence or abuse,[4] he is not liable for innocent blunders or mistakes.[5] *

37. Agent's Authority must Come from His Principal.—Contractors will ask "With whom can I safely contract?" The answer to this must depend upon the circumstances and conditions of each case. If the contractee be an incorporated company it will be well to have access to its charter, in which its powers and purposes will be set forth, and a copy of its by-laws will shed some light upon the powers of the persons exercising authority. If a stock company there will be a board of directors, who, in a strict legal sense, are agents and representatives of the corporation and trustees of the stockholders, but in a practical sense the board of directors become, so far as the company's relations to the public are concerned, the corporation itself.[6] Whatever authority officers, agents, and employees have they must derive from the board of directors or governing power, unless they are conferred by the charter of the corporation or the legislative act creating the body politic. The authority to contract must be given either expressly, impliedly, or by ratification.[7] Contracts which a corporation may legitimately make, the manner of the making of which is not directed otherwise, may be made by its board of directors without the consent or ratification of stockholders;

[1] Gano *v.* Palo Pinto Co. (Tex.), 8 S. W. 634 [1888].
[2] Little *v.* Vanderbilt (N. J.), 26 Atl. Rep. 1025.
[3] 1 Dill. Mun. Corp., § 372.
[4] State *v.* Karn, 81 N J. Law 259.
[5] Hall *v.* Crandall, 29 Cal. 567; Humphrey *v.* Jones, 71 Mo. 62; Dillon's Mun. Corp., vol. 2 (3d ed.), §§ 588, 978 and 979.
[6] Board of Com'rs *v.* L. M. & B. R. Co., 7 Amer. Corp. Cas. 26.
[7] The L. E. & St. L. Ry. Co. *v.* McVay, 98 Ind. Rep. 391 [1884].

* *See also* Secs. 826–859, "Engineers' Personal Liability."

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and in the absence of fraud or collusion on the part of the directors, they are binding on the corporation.[1] If the contractee be a municipal corporation, then the governing body is a board, council, or mayor elected by the people, whose powers and duties are defined in the charter, subject to such restrictions and modifications as the legislature may have made since the city's incorporation. The powers of the general government and its officers must be ascertained in the same manner from the constitution, the laws enacted, and the rules and customs of departments.

38. Authority cannot be Inferred from Business or Family Relations.— From the simple fact that a person is an officer of a corporation one cannot infer authority to contract on its behalf.[2] The president of a company has no power by virtue of his office simply to enter into a contract on behalf of his company as for the construction of its works.[3] Nor can the president and secretary of the company together.[4] The assents of a director, the company's land committee, its civil engineer and a stockholder altogether do not establish the president's authority or make the contract valid.[5] It has been held that an engineer charged with the duty of engrossing the contract and procuring the signature of the contractors, for which no particular time was fixed and no limitation was imposed upon his power, may consent to a delay of a month in the execution of a written contract, and the company cannot repudiate the contract on account of such delay, even if unreasonable.[6]

If it appeared that the president was the officer with whom alone all the negotiations were had which resulted in the execution of both contracts; that he was its managing and controlling man; that he was present as its manager at the time of the arbitration, when the mistake in the latter contract was discovered, and that attention being called to it, he acknowledged it, and consented to the change, so that the truth might be set forth, it was held that such officer had power to bind his company by consenting to a change.[7] If the president and secretary have executed and sealed a contract in the name of a corporation, though not with the express consent of the directors, it is binding on a corporation which has received the benefits of the contract, and has conducted its business in compliance therewith and in such a manner that the directors must have had knowledge of it.[8] If the president or the executive officer of a corporation cannot, by virtue of his position, contract on behalf of the company, it

[1] Beveridge *v.* N. Y. El. R. Co, 112 N. Y. 1 [1889].

[2] Bisley *v.* J. B. & W. Ry. Co., 1 Hun 202 [1874]; Ry. E. & P. Co. *v.* Bank (Sup.), 31 N. Y. Supp. 44.

[3] Templine *v.* Chicago, B. & P. R. Co. (Ia.), 35 N. W. Rep. 634 [1887]; Griffith *v.* C., B. & P. R. Co. (Ia.), 36 N. W. Rep. 901 [1888]; Bi-Spool S. M. Co. *v.* Acme Mfg. Co. (Mass.), 26 N. E. Rep. 991 [1891]; *but see* Loeb Fdy. Co. *v.* Stout, 61 Ill. App. 166, *and* State *v.* Heckart, 62 Mo. App. 427.

[4] Mott *v.* Danville Seminary (Ill.), 21 N. E. Rep. 927 [1889].

[5] Stanley *v.* Sheffield & Co. (Ala.), 4 So. Rep. 34 [1888].

[6] Pratt *v.* Hudson R. R. Co., 21 N. Y. 305.

[7] Nichols *v.* Scranton Steel Co. (N. Y. App.), 33 N. E. Rep 561; *semble* Loeb Fdy. Co. *v.* Stout, 61 Ill. App. 166.

[8] Jourdan *v.* Long Island R. Co., 115 New York 380 [1889].

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would not be expected that any of the subordinate officers would have such powers. Such acts may be ratified by the board of directors, or such powers may be presumed and established by proof of previous adoption of similar acts.

If a contractor enters into a contract with an agent he should have proof of that agent's authority or he does so at his peril.[1] * In general, an agent may do such business only as is ordinarily within the scope of his business, but the making of contracts does not in general belong to anybody but the parties themselves, unless express authority is shown, and then only to the extent of the authority conferred.[2] So it has been held that presidents (see *ante*), general managers, secretaries, attorneys,[3] engineers,[4] and officials in general[5] cannot contract.[6]

The mere proof of family relationship does not establish agency between the parties. A son has no authority to act for his parents merely because of the relation existing between them. To establish agency other evidence is required.[7] The same is true of husband and wife, father and son, or brother and brother.

No power exists, either in the commissioner of public works or in the mayor, or in both acting together, to enter into a contract on behalf of the city for the erection of water-pumping machinery, without previous authority of the city council, or an appropriation therefor.[8] Authority to borrow money for a public work is not authority to undertake the work.[9]

39. Boards, Committees, and Councils in Their Representative Capacity.— A very common and most unfortunate circumstance for contractors is to work under a committee or board whose members attempt to act individually. Members of boards or committees visit the works, give directions, order changes, and authorize new works which only the body or board as a whole have authority to direct. If a contractor obeys such individual instructions he runs the risk of losing the price of the work, for such work ordered by individual members of a committee, board, or council are unauthorized, and generally no recovery can be had against the corporation or its officials.† Good business men would not undertake such methods, but circumstances

[1] *Cases*, 29 Amer. & Eng. Ency. Law, 861 *note* 2.

[2] State *v* Michigan City (Ind.), 37 N. E. Rep. 1041; Chicago Gen'l Ry. Co. *v.* Chicago City Ry. Co., 62 Ill. App 502.

[3] Chicago Gen'l Ry. Co. *v.* Chicago City Ry. Co *supra.*

[4] Jackson *v* The N. W. R. Co., 1 Hall & Tweele Rep. 75 [1848], *Engineer.* Ashuelot Mfg. Co. *v* Marsh, 1 Cush. (Mass.) 507. Lyndon M Co *v.* Lyndon Lit. Inst., 63 Vt. 581.

[5] Dobson *v.* More 62 Ill App. 435

[6] *See* 4 Amer. & Eng. Ency. Law 359; 18 S. W. Rep. 1188; Little *v.* Kerr (N. J.). 44 N. J. 263 [1888]; *but see* Ry. E. & P. Co. *v.* Bank, 31 N. Y. Supp. 44; Locust Mt. W. Co. *v.* Yorgey (Pa.), 13 Atl. Rep. 956 [1888]. *by an engineer;* Dwenger *v.* C. & G. T. Ry. Co., 98 Ind. 153 [1884]; The L., E. & St. L. Ry. *v.* McVay. 98 Ind. 391 [1884], *general manager.*

[7] Walsh *v.* Curley (Com. Pl.), 16 N. Y. Supp. 871; Gibson *v.* Hardware Co. (Ala.), 10 So. Rep. 304.

[8] City of Chicago *v.* Fraser, 60 Ill. App. 404.

[9] Goddard *v.* Harpswell, 88 Me. 228; *but see* Damon *v.* Granby, 2 Pick. (Mass.) 345.

* *See* Sec. 35, *supra.*

† *See* Secs 29-39, *supra.*

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arise which make such acts very common. Such orders or instructions may be adopted, ratified, and authorized by the body when they become binding, and recovery for work done under them may be had.[1] A committee appointed by a town to take charge of the erection of a building are agents of the town, and can act by agreement of the members separately obtained, and need not be in session as an organized body.[2] So when a contractor furnished a different stone in the place of stone called for in the contract it was held that testimony of one of the committee appointed to take charge of the building was competent to show that a majority of the committee had agreed to the change, and that the architect, a member of the committee, had so stated to the contractor in presence of the witness.[3]* A board of public works may exceed its power and its acts or contracts be *ultra vires* and void. For that reason a request by such a board that the contractor suspend work on a street pending an injunction suit by an abutting owner will not make the city liable for delay.[4]† The object and authority of a board of improvement or commissioners being limited to construction and the paying for sewers, the commissioners after completion of the sewers cannot bind the district or themselves as a board by a contract for water for flushing.[4]

40. Public Officers are Presumed to Do Their Duty.—In the absence of proof to the contrary there is a presumption that the public officers do their duty.[5] This may be an advantage to the contractor if the legality of his claims be contested on account of any dereliction of duty or excess of power on the part of the officers.[6] Where the record shows the letting of a contract for building a bridge in a city at a price greatly exceeding ten thousand dollars, but does not show whether a tax was imposed or bonds issued in excess of that sum in any one year, it will be presumed that the council did its duty in that respect. The council having acted upon plaintiff's account for the *whole* of the work embraced in said contract, and having ordered it to be paid, except as to a single item of work which the parties agreed to defer, it will be *presumed*, in the absence of anything in the record upon the subject-matter, that said account was verified in the manner required by the charter. In the absence of proof showing that work was not completed according to contract it will be well presumed that the city engineer in reporting a final estimate and the completion of the work, and the city council in approving the report and ordering the payments, did their duty.[7] The one who attempts to show irregularities must prove that the

[1] Albany City Natl. Bk. *v.* Albany, 92 N. Y. 363 [1883].
[2] Shea *v.* Town of Milford (Mass.), 14 N. E. Rep. 764 [1888].
[3] Matthewson *v.* Grand Rapids (Mich.), 50 N. W. Rep. 651.
[4] Pine Bluff Water & Light Co. *v.* Sewer District No. 1 (Ark.), 19 S. W. Rep. 576.
[5] Valley Tp. *v.* King Iron Bdge. Co. (Kan. App.), 45 Pac. Rep. 660.
[6] Howard *v.* Oshkosh, 33 Wis. 309 [1873].
[7] Bohall *v.* Neiwall (Ia.), 39 N. W. Rep. 217 [1888]; *also* Jenkins *v.* Stetler (Ind.), 2 N. E. Rep. 7 [1889]; N. Chicago St. R. Co. *v.* Cheetham, 58 Ill. App. 318.

* *See* Secs. 48 and 555–557, *infra*.

† *See* Secs. 326 and 689, *infra*.

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public officers did not do their duty.[1] Contracts of public corporations, made through their officers without authority of law, are void, and the corporation may successfully interpose the plea of *ultra vires*, setting up as a defense its own want of power, under its charter or constituent statute, to enter into the contract.[2] Where one has contracted with an alleged corporation, and is sued for failure to perform the contract, he cannot be heard to say that the corporation had no existence, and for that reason no contract was made.[3]

41. Means of Obtaining Information.—Cautious contractors will ascertain the powers of individuals, boards, and committees in as quiet a manner as possible. The self-esteem of some officials, and the indignant spirit in which they resent any doubts expressed as to their authority to undertake and carry out projects, are enough to convince a shrewd man of the impropriety of seeking information directly from office-holders. Usually the documents of incorporation are public property, and access may be had to them at the government offices. The commercial standing of a corporation may be had at the commercial agencies, and a well informed local attorney may be employed to give a reasonably safe opinion as to the legality of the act, or the liability of the company, or the extent of the duties and powers of its officers. A successful contractor will not sacrifice any honest means to obtain and keep the favor of officials of large corporations, nor will he stupidly demand information of them which may offend when he can indirectly and discreetly inform himself through other channels, whether outside or inside. To secure such information is the legitimate business of attorneys and counselors at law, and they need not divulge the name of their client nor in whose interest they are at work. An engineer should appreciate that the contractors require such information, and he should provide copies of the act or charter under which the work is undertaken, so that bidders and contractors may make such inquiries as seem pertinent to their interests and acquire information of the work to be done

Complicated questions come up, and many a contractor has performed work only to find when too late that his labor has been for nothing. An instance of the authority of a public officer is given in the following case: Where the legislature or congress directed a public officer, the secretary of the navy, to contract for the construction of public works according to a plan submitted previously and on file, and the officer directed changes in the plan and contract, it was held that the act of congress directing the officer to enter into the contract was not the contract itself, but that the officer who made the contract might vary the details, and that the rule regarding the effect to be given a contract with the United States was the same as in a contract between man and man.[4]

[1] Hollman *v.* Shoulters (Cal.), 44 Pac. Rep. 915.

[2] Miller *v.* Goodwin, 70 Ill. 659 [1873]; *accord* Ryan *v.* Lynch, 68 Ill. 160; Byrne *v.* E. Carroll (La.), 12 So. R p. 521.

[3] Fresno Canal & Irrigation Co. *v.* Warner (Cal.), 14 Pac. Rep. 37.

[4] Gilbert *v.* United States, 1 Ct. of Claims 28 [1863]; Lord *v.* Thomas, 64 N. Y. 107.

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42. An Agent or Fiduciary Can have No Interest in the Contract.—A director, public officer, trustee, executor, receiver, engineer, or other agent or fiduciary can have no personal interest in the contract of the company, city, principal, or *cestui* which he represents. A director cannot become a contractor with his company, nor become a member of a company with whom the board of directors has made a contract for the erection of works, nor share in the profits of such a contract. If such contracts are made they will be held to have been made for the benefit of the company which the director represents, and a court of equity may compel him to account for the profits realized under such an agreement.[1] Such a contract may be ratified by the stockholders and they may insist upon the advantages, or they may disaffirm it entirely. A president of a corporation who takes an assignment of a contract for the construction of its works acts as a trustee and for the benefit of the corporation, and not as an assignee of the contractor.[2] A contract made by a city council in which one of its members is interested may be avoided by the city, and if the contract has not been performed any taxpayer may restrain its enforcement.[3] It does not matter that the members who are interested in the contract voted against awarding the contract to themselves or their company.[4] The mayor should not act as attorney or solicitor for the city of which he is an officer when the city's charter forbids any interest, directly or indirectly, in any contract, office, or appointment.[5] The city cannot accept a conveyance of real estate subject to a mortgage held by the city solicitor when the statutes prohibit any public officer from becoming interested in any contract for the purchase of property by the state, county, or municipal corporation.[6] An allowance to a public officer by a contractor or employee out of the profits of a contract with the city or government, however small it may be, is such evidence of fraud as will invalidate the contract.[7] * A contract by a freight agent to allow a contractor a low freight rate in consideration of a share of the profits of his contract,[8]

[1] Port *v.* Russel, 36 Ind. 60; Covington, etc., R. Co *v.* Bowler, 9 Bush 468; European Ry. Co. *v.* Poor, 59 Me. 377; Paine *v.* L. E. & L. R. Co., 1 Am. Corp. Cas. 386, 31 Ind. 283 [1869]; Guild *v.* Parker, 43 N. J. Law 430; G. C. & S. R. Co. *v.* Kelly, 77 Ill 426 [1875].

[2] Risley *v.* I. B. & W. Ry. Co., 1 Hun 202 [1874]; *and see* 19 Am. & Eng. Ency. Law 873, 874.

[3] McElhinney *v.* City of S. (Neb.), 49 N. W. Rep. 705 [1891]; Gas Co. *v.* West, 28 Neb. 852, *followed*

[4] Kennet Elec. Lt. Co. *v.* Kennet Sq., 4 Pa. Dist. Rep. 707; Foster *v.* Cape May (N. J.), 36 Atl. Rep. 1089 [1897].

[5] West *v.* Berry (Ga.), 25 S. E. Rep. 508; *but see* Spearman *v.* Texarkana (Ark.), 24 S. W. Rep. 888, where a member of a board of health was allowed to recover on a *quantum meruit* for services as a physician.

It seems the father, brother, or wife of a mayor may have an interest in a contract with the city. Devlin *v.* New York (Com. Pl.), 23 N. Y. Supp. 888.

[6] Marsh *v.* Hartwell, 2 Ohio N. P. 389.

[7] Lindsey *v* The City, 2 Phila. 212 [1858]; Robinson *v.* Patterson (Mich.), 39 N. W. Rep. 21 [1888].

[8] Barclay *v.* Williams, 26 Ill. App. 213 [1887].

* For cases where engineer was interested *see* Secs. 512–518, *infra*; as to executors, administrators, etc., *see ante* Secs. 7–16.

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or an agreement by a bookkeeper to disclose the financial condition of his employer's business,[1] * are against public policy and not enforceable.

A principal who furnishes his agent money for investment is entitled to follow not only the property bought, but its proceeds, if sold, so long as they can be traced and identified.[2]

Injunction will lie to restrain a school board from executing a contract with one of its own members to furnish supplies after the board has passed a resolution to purchase from said member; and it is not necessary to wait until the contract is executed.[3] Injunction will lie to restrain a public officer from entering into a contract with himself individually to furnish supplies to a public institution.[4]

ARTIFICIAL PARTIES. CORPORATE BODIES.

43. Charter and Statute Limitations.—Contracts of corporations are limited to the powers given by their charters. The act creating the body politic, the articles of incorporation, and the charter given by the state should therefore be consulted and carefully studied. A corporation is a creature of the law. It has no powers except those expressly granted or that are necessary to the exercise and enjoyment of those expressly granted.[5] The acts and undertakings must not exceed the powers and privileges granted by the charter, for such acts will be *ultra vires* and without effect. It is not vested with all the capacities of a natural person or of an ordinary partnership, but with such only as its charter confers. If it exceeds its charter powers not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers.[6] A corporation is confined in its operations to projects expressly enumerated in its charter or that are strictly necessary to their performance.

A contract *ultra vires* the charter of a corporation is void. It cannot be made valid by any subsequent act of the corporation;[7] that which it cannot make or do it cannot ratify.[8] The state or sovereign power alone can ratify a contract entered into by a public corporation which is *ultra vires*, and make it valid and binding.[9] The value of work done for a municipal corporation not pursuant to the charter cannot be recovered.[10]

[1] Davenport *v.* Hulne, 32 N. Y. Supp. 808

[2] Harding *v.* Field (Sup.), 37 N. Y. Supp. 899.

[3] Alexander *v* Johnson (Ind. Sup.), 41 N. E. Rep. 811.

[4] Board of Tipp Co. *v.* Railroad Co., 7 Amer. Corp. Cas. 26; Davis *v.* Old Colony R. Co., 7 Amer. Corp. Cas. 549.

[5] Davis *v.* Old Colony R Co., 7 Amer. Corp. Cas. 549.

[6] Sault Ste. Marie *v.* Van Deusan, 40 Mich. 429.

[7] Board of Commissioners *v.* The L. M. & B. R. Co., 7 Amer. Corp Cas. 26.

[8] Brown *v.* Mayor, 63 N. Y. 239

[9] Wallace *v.* Mayor of S. J., 29 Cal. 181; *see also* Zottman *v.* San Francisco *and* 20 Cal. 497, 20 Cal. 96, *and* 1 Dill. Mun. Corp., § 372 [1873 ed.].

* *See* Sec. 85, *infra.*

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The contractor, therefore, should not only satisfy himself that the officers or agents acting are the proper persons to enter into the contract on behalf of the corporation, but he must also take notice of the lawful limits of the company's capacity, that the contract is within the scope of the authority conferred by the act of its incorporation, and that the powers granted to it have not been surpassed.[1] He is bound at his peril to take notice of the lawful limits of its capacity,[2] especially where all acts of incorporation are, or are deemed to be, public acts; for every corporation organized under general law is required to file in the office of the secretary of state a certificate showing the purpose for which the corporation is constituted.[3]

Some cases of interest to engineers will illustrate the import of this law. A water company in England had been duly incorporated for the supply of a certain district with water from certain sources within the district, and to do all other acts necessary to supply water to the inhabitants according to the true intent of the act. In consequence of the increase in population, the supply within the district became insufficient both in quantity and quality. The water company employed a consulting engineer to make surveys and plans, and to report on the feasibility of obtaining a sufficient supply from a certain stream of water beyond the company's district, the same plans and report to be used by the company in its application to parliament for powers to enlarge its works and to embrace this stream of water in its district. When the engineer brought suit for the value of his services the water company resisted payment on the ground that the act of employing the engineer for the work done was beyond its powers. It was held by the majority of the court that the contract made for the plans and report essential to its application to parliament were not necessarily illegal nor the contract void, but a strong dissenting opinion was delivered by the minority of the court. The case is given to show how strictly the courts may define the powers of corporations. Probably the disposition of the courts can best be shown by giving the last few lines of the learned justice's dissenting opinion: "And when I consider the mischief that has been done by directors, under the temptations offered by interested parties and other considerations, adding to the schemes in which parties have contributed their capital, I own, hard as it may be in a particular case, I am sorry that a lesson should not be read that those who deal with directors must see that they have authority to bind their companies, or must trust the directors personally, a consideration which will make both parties more cautious in their speculations with other people's property."[4]

Likewise it has been held that a railroad company has no power to employ

[1] Evans on Agency, pp. 26, 211, 312; Davis v. Old Colony R. Co., 7 Amer. Corp. Cas. 549; Littler v. Jayne, 124 Ill. 123.

[2] Keating v. Kansas City, 84 Mo. 415; Turney v. Bridgeport, 55 Conn. 412; Trenton Loco. Wks. v. United States, 12 Ct. of Cl. 147; *and see* Village of Kent v. Cut Glass Co., 10 Ohio Cir. Ct. Rep. 629.

[3] Davis v. Old Colony R. Co., 7 Amer. Corp. Cas 549.

[4] Bateman v. Mayor, etc., 3 H. & N. 323.

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a mining-engineer to examine and make a report on mines of which the road is the outlet, and that the railroad company is not liable to him for his services, even though its business is benefited as a direct result thereof.[1] It would, without doubt, have been otherwise if the railroad company's charter permitted it to operate mines or engage in mining.

Another case arose under a contract by a corporation organized for the the purpose of "purchasing, taking, holding, possessing, selling, improving, and leasing real estate and buildings, manufacture, lease, sale, use of building-stone, lumber, and other building materials," by which the company agreed to pay for services in organizing stock companies to locate and engage in business upon its land. The contract was declared *ultra vires* and void. If the contract had been performed, and the corporation had received the benefit, it would have been estopped from availing itself of such a defense.[2]

A contract by a railroad company to aid in the construction of the road of another corporation in another state is illegal, though it also provides for the construction of a branch to its own road.[3]

A subscription for stock, in a company which employs and uses certain articles, by a corporation chartered to manufacture and deal in the same articles has been held beyond its powers.[4] The construction of a levee has been held without the corporate powers of a village,[5] as has the reconstruction and repair of a building which had been partly removed for the extension of a street.[6]

44. Other Restrictions to Which Corporate Bodies are Subject—Cost Must be Within the Appropriation or Limit of Indebtedness.—The contractor must ascertain if there be a charter or constitutional limit to the city's or company's indebtedness, for when that limit is reached it cannot create a new debt.[7] The contract should not create a debt in excess of the fund appropriated for the purposes of the contract,[8] for the amount that it exceeds the appropriation cannot be recovered.[9] The contract is void as to the amount that the indebtedness incurred by the contract exceeds the limit fixed by law.[10]

[1] Georg *v.* Nevada Cent. R. Co. (Nev.), 38 Pac. Rep. 441; *and see* Lewis *v.* Colgan (Cal.), 44 Pac. Rep. 1081.

[2] Schurr *v.* N Y. & B Sub. Invest. Co. (Com. Pl.), 18 N. Y. Supp. 454; 16 N. Y. Supp. 210. *affirmed.*

[3] Bostwick *v.* Chapman, 60 Conn. 551; *and see* Cunningham *v.* Massena Sp. R. Co. (Sup.), 63 Hun (N. Y.) 439, 18 N. Y. Supp. 600.

[4] Knowles *v.* Sandercock (Cal.), 40 Pac. Rep. 1047.

[5] Newport *v.* Batesville & B Ry. Co. (Ark.), 24 S. W. Rep. 427.

[6] Sceery *v.* Springfield, 112 Mass. 512 [1873]; *see* Prairie Lodge *v.* Smith, 58 Miss. 801.

[7] App. of City of Erie, 91 Pa. St. 398 [1879]; Soule *v.* Seattle (Wash.), 33 Pac. Rep. 384; Perkinson *v.* St. Louis, Mo. 4 App. 322 [1877]; State *v.* Atlantic City (N. J.), 9 Atl. Rep. 759 [1887].

[8] Turmey *v.* Bridgeport (Conn.), 12 Atl. Rep. 520; Dhrew *v.* Altoona (Pa.), 15 Atl. Rep. 636.

[9] Atlantic City W. W Co. *v.* Reed (N. J.), 15 Atl. Rep. 10; Culburtson *v.* Fulton (Ill.), 18 N. E. Rep. 781.

[10] Culburtson *v.* Fulton (Ill.), 18 N. E. Rep. 781; Turmey *v.* Bridgeport (Conn.), 12 Atl. Rep. 520; Kingsley *v.* Brooklyn, 78 N. Y. 200 [1879]; Boston Elec. Lt. Co. *v.* Cambridge (Mass.), 39 N. E. Rep. 787; Lamar Water Company *v.* City of Lamar (Mo.), 26 S. W. Rep. 1025; Georgetown W Co. *v.* Central T. H. Co. (Ky.), 34 S. W. Rep. 435.

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When a city charter provides that all contracts shall be countersigned by the comptroller, mayor, and clerk, and that the comptroller shall have made an indorsement thereon showing sufficient funds are in the city treasury, or that provision has been made to pay the liability that may arise under such contract, it is essential to the validity of the contract that it have such signatures and indorsement.[1] The execution of a contract by a municipal corporation gives rise to no implied warranty that it has power to make assessments with which to pay for work and materials under the contract, and when a statute authorizing the assessment was adjudged unconstitutional the contractor was unable to collect what was due him.[2] The city will not, however, be relieved from liability for negligently delaying to raise funds by assessment when it has contracted to pay the contractor out of such a fund.[3] It seems that a contract for the performance of work or the furnishing of supplies need not be referred to the city treasurer for his certificate that there is sufficient unappropriated money in its treasury to meet its requirements.[4] The contractor is supposed to know the powers of the officers with whom he is dealing, and the courts hold that there is no excuse for his not knowing the limit of indebtedness fixed by the charter or legislative act, and the amount of the appropriation. Such ignorance will not avail in an action for the contract price.[5]

45. Appropriation Must Not be Exceeded.—The same law holds when the amount of an appropriation for a specific job is limited; the cost of the work, *including extras*, must not exceed the amount of the appropriation. If it does, the city or town is not liable for the excess over and above the appropriation.[6]* So when money was appropriated by a town to build and furnish a town hall, and a contract was awarded for the erection of a hall at a cost equal to the full amount of the appropriation, it was held that the committee exceeded its authority, and that the contractor could not recover a part of the appropriation set aside to furnish the hall, nor for the extra work he had done; and this decision was made in the face of the fact that a number of the citizens had agreed to guarantee the furnishing of the hall if the committee would expend for the building the entire sum appropriated.[7] A contract for twenty years, or for an indefinite period, cannot be sustained as a

[1] City of Superior *v.* Morton, 63 Fed. Rep. 357; Holmes *v.* Avondale, 11 Ohio Cir. Ct. R. 430.

[2] Barber Asphalt Paving Co. *v.* Harrisburg, 62 Fed. Rep. 565; *see also* Connelly *v.* San Francisco (Cal.), 33 Pac. Rep. 1109.

[3] Little *v.* Portland (Oreg.), 37 Pac. Rep. 911; *and see* Soule *v.* Seattle (Wash.), 33 Pac. Rep. 384.

[4] Lamar Water Co. *v.* Lamar (Mo.), 26 S. W. Rep. 1025.

[5] Gutta Percha Co. *v.* Ogalalla (Neb.), 59 N. W. Rep. 513; Crampton *v.* Varna R. Co., L. R. 7 Ch. 568; Keating *v.* Kansas City, 84 Mo. 415; Perkinson *v.* St. Louis, 4 Mo. App. 322 [1877]; Turmey *v.* Bridgeport (Conn.), 12 Atl. Rep. 520.

[6] Turmey *v.* Bridgeport (Conn.), 12 Atl. Rep. 520 [1888]; Nelson *v.* Mayor, 63 N. Y. 535 [1876]; *see also* Galveston *v.* Devlin (Tex.), 19 S. W. Rep. 395; Kingsley *v.* Brooklyn, 78 N. Y. 200 [1879].

[7] Town of Westminster *v.* Willard (Vt.), 26 Atl. Rep. 952.

* *See* Sec. 44, *supra*.

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contract for ten years, but is entirely void when the city is authorized to contract for a period not exceeding ten years. [1]

If the public records fully disclose all the facts of the case, and the contractor was in no way misled or deceived by the records of the town board, then the town is not liable on the contract or for the reasonable value of the structure when public officers without the requisite power do contract on behalf of the town, even though the structure is accepted after its completion and used by the public generally.[2] Acceptance of the work will not affect a ratification of the contract,[3] nor will any subsequent act on the part of the town or city prevent it from denying the validity of such contract.[4]

If the contract price is within the amount of the appropriation it is valid, even though it reserves authority to make such changes of detail as may be necessary, and though it authorizes the engineer to determine the price of extra work required.[5] A charter that authorizes a certain *annual* expenditure, over and above certain repairs, for the building of new bridges, in whole or in part, does not prevent the letting of a single contract for a bridge whose total cost shall exceed the annual appropriation.[6] The fact that there is no money on hand with which to pay for the work does not render the contract invalid where a road and bridge tax has been levied for the current year, though not collected.[7] If the law requires that provision shall be made for payments under such contracts the necessary funds must be provided beforehand.[8] The indebtedness of a city cannot be increased beyond the limit fixed, by contracting for an electric-light plant to be leased by it; such an executory contract is forbidden.[9]

46. The Legislature or Congress May Ratify the Contract.—If the power to contract has been derived from the legislature a contract for a sum that exceeds the sum appropriated may be recognized, sanctioned, and made valid by a subsequent act of the legislature, and the contractor may then maintain his action upon the contract against the city.[10] The contract can be ratified only by making an appropriation expressly for its performance.[11] The act of the voters of a town subsequently voting an additional sum for the completion of a structure will not ratify an invalid contract.[12]

A contract invalid for want of legislative authority may be made valid by

[1] Manhattan T. Co. *v.* Dayton (C. C. A.), 59 Fed. Rep. 327.

[2] Salt Creek *v.* Bridge Co. (Kan.), 33 Pac. Rep. 303.

[3] Newport *v.* Batesville & B. Ry. Co. (Ark.), 24 S. W. Rep. 427.

[4] State etc., *v.* Murphy (Mo.), 31 S. W. Rep. 784.

[5] Kingsley *v.* Brooklyn, 78 N. Y. 200 [1879].

[6] Howard *v.* Oshkosh 33 Wis. 309 [1873].

[7] Sullivan *v* Commissioners, 114 Ill. 262; Smilie *v.* Fresno Co. (Cal.), 44 Pac. Rep. 556; *and see* Cincinnati *v.* Cincinnati, 11 Ohio Cir. Ct. Rep. 309.

[8] Kuhls *v.* Laredo (Tex.), 27 S. W. Rep. 791.

[9] Spilman *v.* Parkersburg (W.Va.) 14 S. E. Rep. 279.

[10] Nelson *v.* Mayor, 63 N. Y. 535 [1876]; *see also* New Orleans *v.* New Orleans W. W. Co., 12 Sup. Ct. Rep. 142

[11] Gutta Percha Co. *v.* Ogalalla (Neb.), 59 N. W. Rep. 513; Shipman *v.* State, 43 Wis. 377.

[12] King *v.* Mahaska Co. (Iowa), 39 N. W. Rep. 636 [1888].

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a subsequent act of the legislature,[1] but such unauthorized contract is not ratified by a special act authorizing the contractor to sue for the value of extras.[2] It has been held that the legislature could require county commissioners to provide funds to pay for the erection of public buildings[3] if in good conscience the county or city ought to pay, although there was no legal liability.[4] A city cannot, it seems, be compelled to stand the whole cost of county buildings.[5] Money raised by taxation for the special purpose of erecting a school-building cannot be diverted by an act of the legislature to the purchase of a site for a normal school in said city, without the assent of the city or its inhabitants.[6] For the legislature to require a claim to be paid there must be an obligation either moral or equitable.[7] The constitution of the United States and of the states denies the legislature the power to pass laws impairing the obligation of contracts, and this limitation applies as well to contracts made by the state as to those made by individuals.[8]

An injunction will not lie against a builder to prevent him from proceeding with the work; the owner's remedy is to refuse to ratify or confirm the contract and defend against an action for the contract price.[9]

47. Cases Where Appropriation has been Exceeded. — In determining whether the limit has been exceeded numerous decisions have been made that shed some light on the question. It has been held that certificates issued by a city against lots in payment for the construction of sewers, the same being payable in seven annual installments with interest, do not create an indebtedness within the meaning of an act limiting the indebtedness to 5 per cent of the value of its taxable property.[10] Charges that have been improperly made against the fund should be rejected and deducted to ascertain the maximum balance available.[11] If a special tax for paying rent for waterworks, together with the general tax, exceeds the constitutional limit, the contract is void.[12] Indebtedness beyond the constitutional limit at the time of the injury is no defense to an action against a city for damages on account of an injury caused by negligence in the construction and maintenance of its streets.[13] The issue of bonds is an indebtedness.[14]

The disbursement of the fund should be watched by the contractor, that

[1] Ball *v.* Presidio Co. (Tex.), 27 S. W. Rep. 702.

[2] Nichols *v.* State (Tex.), 32 S. W. Rep. 453.

[3] Commissioners *v.* People, 5 Neb. 127; Guilford *v.* Supervisors Chenango Co., 13 N. Y. 143.

[4] Thomas *v.* Leland, 24 Wend. (N. Y.) 65, *and cases cited in* 15 Amer. & Eng. Ency. Law 992.

[5] Callam *v.* Saginaw, 50 Mich. 7.

[6] State *v.* Treasurer, 22 Wis. 660 [1868].

[7] 15 Amer. & Eng. Ency. Law 993.

[8] Donalds *v.* New York State, 89 N. Y. 36 [1882].

[9] Joint School Dist. *v.* Reid (Wis.), 51 N. W. Rep. 1089.

[10] Davis *v.* Des Moines (Ia.), 32 N. W. Rep. 470 [1887]; Grant *v.* Davenport, 36 Iowa 395; Clinton *v.* Walliker (Iowa), 68 N. W. Rep. 431; *but see* Soule *v.* Seattle (Wash.), 33 Pac. Rep. 384.

[11] Kingsley *v.* Brooklyn, 78 N. Y. 200 [1879].

[12] Lamar Water Co. *v.* Lamar (Mo.), 26 S. W. Rep. 1025.

[13] Bartle *v.* Des Moines, 38 Iowa 414 [1874].

[14] Scott *v.* Davenport (Ia.), 34 Ia. 208.

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the fund be not exhausted and his labor be without remuneration ;[1] and when the contract price is the full amount of the appropriation he should ascertain by what fund any extra work ordered is to be paid before performing it.[2] Changes and alterations imposing a greater liability are void, and pay therefor cannot be collected.[3]

48. Unincorporated Organizations as Parties. — Such are associations, societies, clubs, and congregations who get together and agree to undertake or promote certain plans and schemes for their own or the public benefit. Usually the powers and resources of such organized bodies are indeterminate, and even when the necessary funds are subscribed it is a question as to how many of the subscriptions can be collected. Contractors and engineers who undertake work for such associations, and who are not well protected by liens, bonds, or paid-up subscriptions, or are not well acquainted with the subscribers, will in making their estimates allow for losses and the possible failure to carry out the project. When an unincorporated association enters into a contract, the individual members are liable either upon the ground that they held themselves out as agents of a principal or because they are themselves principals. Persons who engage in an enterprise are liable for the debts they contract, and all who assent to the undertaking or who subsequently ratify it are included in such liability.[4] If a committee has been appointed to make arrangements they become individually liable for work done and which was procured by a subcommittee of their number, although in making the contract the subcommittee assumed to act as officers of the association.[5] If a joint signer of a contract who represents the other signers in superintending the work makes changes in the terms of a contract he is personally liable, even though the contractor had full knowledge that the change was unauthorized and unknown to the other signers.[6] If the contractor, architect, or engineer be one of the promoters and is himself a member of the association and has to bring suit for his services it may puzzle him as to whom he shall sue. If the relations of the subscribers partake of the nature of a partnership, then they are liable both joint and severally.[7] In dealing with incorporated religious associations special caution should be exercised, for in several states they cannot be sued.[8] *

49. Subscribers to a Project.—It has been held that an association of subscribers to a project to obtain a bill through the legislature to build a railroad was a partnership, and that the engineer, who was one of the sub-

[1] Turmey *v.* Town of Bridgeport (Co n.), 12 Atl. Rep. 520.

[2] Turmey *v.* Town of Bridgeport (Conn.), 12 Atl. Rep. 520 ; Richardson *v.* Grant Co., 27 Fed. Rep. 495.

[3] King *v.* Mahaska Co. (Iowa), 39 N. W. Rep. 636 [1888] ; *but see* Shea *v.* Town of Milford (Mass.), 14 N. E. Rep. 764 [1888].

[4] Lewis *v.* Tilton, 64 Iowa 220 [1884].

[5] Fredenhall *v.* Taylor, 23 Wis. 538 ; Landiskowski *v.* Lark (Mich.), 66 N. W. Rep. 371.

[6] Gutherless *v.* Ripley (Iowa), 67 N. W. Rep. 109.

[7] Davis *v.* Shafer, 50 Fed. Rep. 764.

[8] 29 Amer. & Eng. Ency. Law 864.

* *See* Secs 555-7, *infra.*

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scribers, could not sue one of his associates in the scheme, a copartner, for the value of his services. He should have sued the firm.[1] It might make some difference whether the subscriptions were for stock or merely a donation. The mere act of subscribing to a project does not ordinarily create a partnership unless it is the manifest intention of the parties.[2] The signers of a subscription paper in the ordinary form are liable severally, and not jointly.[3] Each subscriber is liable for the amount of his subscription, and in no way responsible for the payment of the sums subscribed by others.[4]

Under a contract between several farmers and a construction company to build a factory, which contained the provision that "we, the subscribers, agree to pay" the agreed amount for the factory, and a provision that the subscribers should form a corporation, with stock in proportion to their paid-up interest, each subscriber to be liable only for the amount subscribed by him, it was held that the contract was several, and not joint, and that each was liable only for his proportion.[5] When subscribers have signed at different times and places, and without knowing what subscriptions will be subsequently made, or by whom, the contract does not bind each subscriber to pay the entire sum.[6] If the amount of subscription is set opposite each subscriber's name, the liability of each is as effectually limited as if such amounts had been (in words) limited in the body of the contract.[7] A subscriber cannot escape payment of his subscription by an averment that he notified plaintiffs that he had canceled his subscription before they had expended money or performed labor under the contract, there being no averment that the cancellation was made before plaintiffs accepted the contract.[8] If a contractor would recover a balance due and unpaid for the erection of a structure he cannot sue all the subscribers jointly, but should proceed against those subscribers who are in default, or at least his declaration should allege certain subscribers in default.[9] The question might be asked, How is he to know who are in default? If the association of subscribers has been incorporated, it seems the contractor may not have a mechanic's lien on the joint property for the balance of the price for work done under contract with the subscribers[10] unless it can be shown that the corporation adopted the contract of its promoters.[10]

The payee named in the subscription may maintain an action, as can any-

[1] Holmes *v.* Higgins, 1 B. & Caldwell 74 [1822].

[2] Parsons Partnership, 46–7; Shibley *v.* Angel, 37 N. Y. 626 [1868]; Fuller *v.* Rome, 57 N. Y. 23 [1874].

[3] Davis *v.* McMillan (Ind. App.), 41 N. E. Rep. 851.

[4] 24 Amer. & Eng. Ency. Law 335; Davis *v.* Ravenna C. Co. (Neb.), 67 N. W. Rep. 436.

[5] Davis, etc., Manufg. Co *v.* Jones (C. C. A.), 66 Fed. Rep. 124; Davis Co. *v.* McKinney (Ind. App.), 38 N. E. Rep. 1093.

[6] Davis *v.* Hendrix, 1 Mo. App. Rep. 41.

[7] Davis *v.* Campbell (Ia.), 61 N. W. Rep. 1053.

[8] Davis *v.* McMillan (Ind. App.), 41 N. E. Rep. 851.

[9] Davis *v.* Ravenna C. Co. (Neb.), 67 N. W. Rep. 436; *semble* Clayton *v.* Newton Academy, 95 N. Car. 298

[10] Pittsburg & T. C. Co. *v.* Quintrell (Tenn.) 20 S. W. Rep. 248; Weatherford, etc., R. Co. *v.* Granger (Tex.) 22 S. W. Rep. 70.

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body selected to receive the money in the manner required by the terms of the paper.[1] If no person, committee, or board is designated in the paper the payment many be enforced in the name of the remaining subscribers, or by the association as a body, or by a building committee appointed by the association.[2] If the subscription paper stipulate that the sums subscribed would be paid to any person who would erect a structure it is like a note payable to bearer, and the subscriptions may be collected by any one who builds in accordance with the specifications of the paper.[3] If the association has been legally incorporated the action should be in the name of the corporation.[4] If one of the subscribers has been authorized to act for the others and has incurred expense or advanced money on the faith of the subscriptions he may sue other subscribers refusing to pay and in his own name. Such is the case where one has acted as superintendent or a contractor and carried out the plan contemplated. A good illustration is afforded in a case where a college class at a class meeting voted to publish a class-book, the members voting or assenting to the vote were held personally liable for the expense, at the suit of one who printed it, under a contract with a member of the class elected business manager of the publication.[5] Agreements by subscribers to pay a person their respective subscriptions upon the erection by him of a certain structure may be enforced when the structure has been completed, even though the subscribers among themselves have not performed their mutual agreements.[6]

Subscribers are bound by stipulations and conditions contained in the subscription paper, and none other can be shown in contradiction to them. The subscriber cannot go outside the written contract to show different terms,* such as misrepresentations, not incorporated in the subscription paper.[6] In the absence of fraud, parol evidence is not admissible to show that the subscriptions were not to be payable except on certain other conditions not mentioned in the subscription paper. Thus it cannot be shown that certain materials were to be used in a building to be built out of the fund subscribed,[7] or that the contract was to be let to the lowest bidder,[8] or that the structure was to be completed by a certain date.[9]

50. Second Party Not Named, but Determined by His Own Act. —In many cases the contractor or second party to the contract who is to perform or who has performed the consideration is not named in the offer, but anybody who may accept the offer or perform the consideration may become the contractor. Such contracts are those created by the performance of the

[1] 24 Amer. & Eng. Ency. Law 339.
[2] 24 Amer. & Eng. Ency. Law, 339, 340.
[3] Cooper v. McCrimmin, 33 Tex. 383.
[4] Wilcox v. Arnold (Mass.), 39 N. E. Rep. 414.
[5] Davis v. Johnson, 49 Mo. App. 240.
[6] 24 Amer. & Eng. Ency. Law 341.
[7] Gerner v. Church (Neb.), 62 N. W. Rep. 51.
[8] Cooper v. McCrimmin, 33 Tex. 387.
[9] Miller v. Preston, 4 N. Mex. 314; *and see* McCormack v. Reece, 3 Green (Ia.) 591.

* *See* Secs. 122–131, *infra.*

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consideration stipulated, as by the apprehension and arrest of a criminal under a public offer of a reward, or by being the highest bidder at an auction sale, or the lowest bidder for the performance of public works. To become a party to such a contract the person must bring himself strictly within the terms and conditions of the offer, or the rules and regulations prescribed at the sale or in the advertisement for bids or proposals. In accepting an offer of reward a person must know of the offer, and perform the consideration with such knowledge, to become a party to the contract. In auction sales, as in bidding for contract work, the contractor becomes the offerer; and if the sale is "without reserve" or the letting absolutely to the lowest bidder, then his becoming a party to the contract depends upon whether he is the highest bidder in the former case and the lowest bidder in the latter case. The fact that his offer is the highest in the one case or the lowest in the other case does not make him a party to the contract, but it gives him a right to a contract. To become a party to a contract the offer of the bidder must be accepted either by the auctioneer knocking down the goods, or by the formal acceptance of the proposal, as by awarding the contract to the lowest bidder.

The subject of proposals and lowest bidder is of special interest to readers engaged in construction work. Considerable space has been given to the subject in Chapter VI. The custom of letting contracts to the lowest bidder, which is so universal in public work, has been prolific of law-suits. The large amount of money involved and the desire on the part of men in office to reward their constituents have promoted sharp practice of every color and design. Therefore such contracts receive the closest surveillance of the court when they come before it, and in consequence thereof the law regarding contracts to lowest bidders is pretty well determined.

51. Charter and Statute Requirements Must be Strictly Carried Out.— Where directions and proceedings are prescribed by which the corporation is to let the contract or conduct the work, these directions and instructions are imperative, and any neglect or deviation from them will be fatal to the validity of the contract.[1] In an act which declared that a board of public works "may" advertise for proposals and the contract be given to the lowest bidder the court declared that the word "may" must be construed to mean "shall."[2] The illegality of the contract may be asserted by any party or interest.[3]

When it was left discretionary with commissioners to employ their own labor and purchase their own materials and construct waterworks, or they

[1] Sedgewick on Const. and Stat. Law 368–378; Henderson *v.* United States Ct. of Claims, Dec. Term, 1868, *per* Casey, C.J., pp. 75–83.

[2] McBrian *v.* Grand Rapids, 56 Mich. 95; *and see* Santa Cruz Co. *v.* Heaton (Cal.), 38 Pac. Rep. 693.

[3] Knapp *v.* Swany, 56 Mich. 345; Dillon's Munic. Corps, § 382; Green's Brice's Ultra Vires 43; Elmira Gas Co. *v.* Elmira, 2 Alb. L. J. 392; Randolph Co. *v.* Jones, 1 Breese (Ill.) 103.

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could let the work or portions of the work by contract, it was held that, having elected to do the work by contract, they must let the contract strictly as provided by law, and material deviations from the methods imposed rendered the contract void and the contractor without remedy.[1] Such legislative acts are not directory but imperative in their requirements, and when a statute or charter declares that work is to be advertised, plans and specifications prepared and published, bids invited, and the contract awarded to the lowest bidder it is a formality that cannot be dispensed with.[2] *

52. No Recovery can be Had for Work and Materials Furnished for Public Work Contrary to Law.—Any irregularity, gross mistake, fraud and collusion, or any circumstance that tends to foster favoritism or to prevent fair and honest competition, may suffice to render the contract void and to deprive the contractor of any returns for his labor or materials. This must necessarily work great hardships to a contractor, it is imposing upon him great burdens to ascertain and watch the deliberations of a board or city council; it is impossible to ascertain the mistakes and collusions of their officers and agents;—but the courts maintain that, though the law may work hardships, it is better that an individual should occasionally suffer from the mistakes of public officers or agents than to adopt a rule which, through improper combinations and collusions, might be turned to the detriment or injury of the public.[3] This rule may seem unjust to a contractor who, without having considered whether the law has been complied with or not, has performed labor and furnished materials for a public corporation, and expects compensation therefor, the same as if they had been done or furnished for a private individual. But, nevertheless, the authorities hold that a contractor when dealing in a manner expressly provided by law must see to it that the law is complied with. Where work is done for a city without authority the fact that the city is benefited thereby does not establish its liability to pay for it.[4]

53. The Law will Not Imply a Contract which the Law Forbids.—The *general* doctrine unquestionably is that when one receives the benefit of another's work or property he is bound to pay for the same, and this doctrine applies as well to corporations as to individuals in cases where there is no restriction imposed by law upon the corporation against making in direct terms a contract like the one sought to be implied;[5] † but where there exist legal restrictions which disable a corporation from agreeing in

[1] Dickinson *v.* City of Poughkeepsie, 75 N. Y. 65.

[2] Davison *v.* Gill, 1 East 64–71; People *v.* Allen, 6 Wend. 486; Briggs *v.* Georgia, 15 Vern 72.

[3] Whiteside *v.* United States, 93 U. S. 247–257 [1876]; Hawkins *v.* United States, 96 U. S. 691 [1877]; Nash *v.* St. Paul, 11 Minn. 174 [1866]; Burrell *v.* Boston (Mass), 2 Clifford 590 [1867].

[4] Springfield M. Co. *v.* Lane Co., 5 Oreg. 265.

[5] *Cases collected*, 29 Amer. & Eng. Ency. Law 864.

* *See* Chap. VI, Sec. 138, *infra*.

† *See* Secs. 692–703, *infra*.

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express terms to pay money the law will not imply any such agreement against the corporation.[1] The law is based upon motives of economy, and orginated perhaps in some degree from distrust of officers to whom the duty of making contracts for public work was committed. If contractors were allowed to recover the reasonable value of their work, or were allowed compensation to the extent that the corporation is benefited, it would afford a means of evading the law. Contractors could combine, conspire to not bid against one another, bribe public officers to accept their proposals, and if detected recover the reasonable value of their work and materials, and thus defeat the very object of the statute.[2]* No implied contract can be inferred from the fact that the structure is subsequently used by the public.[3]

Attempts have been made to give detailed estimates of the kinds and quantities of materials and work required, and to omit from the specifications and plans such materials and work as may be encountered that would greatly increase the cost and which are difficult to determine in advance, it being the intention to have such work done by outside parties or by the contractor at a reasonable price. Such materials are hard-pan, rock, and quicksand. If under the statute contracts can only be let to the lowest responsible bidder, then no other manner of contracting can be legal, and any bid or contract which leaves the payment for a substantial part of the improvement contemplated, either in work or material, to private agreement, is contrary to express provisions of law, and void.[4] It seems that if the extent of such extra work and matorial cannot possibly be ascertained in advance, even approximately, it may be proper to mention such contingencies in the specifications and contract and to provide for payment for such extraordinary contingencies at what the extra work is reasonably worth; by measure or weight, as per cubic yard or per ton; but such a course can never be necessary where, by the exercise of reasonable diligence and suitable investigation by the city surveyor or other proper official, the condition of things affecting the cost of construction can be ascertained beforehand. It can be justified only when the true condition of things cannot be ascertained.[5] If a partial compliance were sanctioned, then there would be no safeguard to the public interests in the requirements of the statute. If a part of a contract be exempted from the force of the law, a small and comparatively unimportant portion of the work might be advertised and com-

[1] Brady *v.* The Mayor, 2 Bosworth 173; Zottman *v.* San Francisco, 20 Cal. 102–105; Springfield Milling Co. *v.* Lane Co., 5 Oregon 265 [1874]; Berlin Iron Bridge Co. *v.* San Antonio, 62 Fed. Rep. 882.

[2] Bare *v.* Village of G., 72 N.Y. 463–472; McBrian *v.* Grand Rapids, 56 Mich. 95.

[3] Taft *v.* Montague, 14 Mass. 281, *a streets*; McDonald *v.* Mayor, 68 N. Y. 23; Davis *v.* School District, 24 Me. 349; Pratt *v.* Swanton, 15 Vt. 147; Murphy *v.* Albina (Oreg.), 29 Pac. Rep 855 [1892]. Welson *v* School District, 32 N. H. 118; 1 Dill Mun. Corp., § 464; *many cases in* 15 Amer. & Eng. Ency. Law 1084–5.

[4] McBrian *v.* Grand Rapids, 56 Mich. 95.

[5] Parr *v.* Village of Greenbush, 112 N. Y. 246 [1889]; Brady *v.* Mayor of New York, 20 N.Y. 317–318; McBrian *v.* Grand Rapids, 56 Mich. 95.

* *See* Sec. 43 and Secs. 136–140, *infra*.

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petition invited, and the great bulk be left to private agreement between public officers and the contractor.[1] *

It is thought advisable to mention some cases of interest to engineers and contractors in which contracts have been held void and inoperative. The books are full of cases where, contrary to law, contracts have been awarded to parties who were not the lowest bidders, and it is fully established that the contract in such a case is void, and that the contractor cannot recover for work done or materials furnished. †

54. Irregularities Need Not be Caused by Contractor.—Irregularities in awarding the contract, though not encouraged or solicited by the contractor, may destroy the validity of the contract when subsequently discovered. Thus where one of the competitors in bidding for a public work was permitted by the engineer, to whom the proposals were referred for calculation and comparison, to alter his bid so as to make it appear lower than that of the others, and then after the acceptance of his bid, a contract was made at different prices, and with material clauses inserted, not contemplated or offered the other bidders; it was held that the contract was unauthorized and void, and, further, that no recovery could be had for the work performed.[2] The misfortunes of the contractor are thus augmented when it lies in the power of a dishonest or careless engineer to render his contract invalid. It has been so held when an engineer has been negligent, dishonest, or collusive in his estimates, and it turned out that the successful bidder was not the lowest bidder, that the law was not complied with, and that there was no basis for a valid contract.[3]

The facts of the case cited, briefly stated, are that the estimate of the engineer proved no better than a random guess, and, like such cases, was far from being correct. The engineer reported the quantities as 10,000 cubic yards of earth and 20,000 cubic yards of rock, and the successful contractor bid $1.62½ for earth and 2 cents for rock excavation, and in comparison with others he was the lowest bidder. As it turned out, there were about 20,000 cubic yards of earth and 10,000 cubic yards of rock, which made him one of the highest instead of the lowest bidder. The contractor cleared about $12,000, or 20 to 30 per cent. above the fair value of the work. The court said that such an estimate, in connection with a bid of five times the actual cost of earthworks and less than 1½ per cent. of actual cost of rock excavation, was enough to show on its face that the contract was the result of fraud and collusion.[3]

To engineers and contractors this estimate and bid may not seem so extraordinary nor such clear evidence of fraud. When it is considered that no appropriation or other provision had been made for engineering investi-

[1] McBrian *v.* Grand Rapids, 56 Mich. 95.
[2] Dickinson *v.* City of P., 75 N. Y. 65.
[3] *In re* Anderson, 109 N. Y. 554.

* *See* Chap. VI, Secs. 136–150, *infra*.

† *See* Secs. 182–200, *infra*.

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gation, and that no tests whatever were made before letting the work to ascertain the quantities of rock and earth respectively, the estimate is not so extraordinary. And men of experience engaged in construction know that facilities for undertaking and handling work, the co-operation of contractors, the joint performance of two dependent jobs, in which the work done upon one counts upon the other, would all tend to make a wide difference in the prices bid. For earth that must be hauled to the limits of a city or to distant dumping-grounds they would require a good price, while other contractors who have contracts for filling an adjoining lot at a good figure would be glad to secure the earth for the digging; and likewise with rock, contractors who had immediate use for stone in the vicinity could excavate or quarry it at a mere nominal price. Whether such conditions existed is not known, but to an engineer the facts related would alone hardly be conclusive evidence of fraud. If, however, there had been a *bona fide* effort to comply with the ordinance, and there had been an honest mistake or error as to the quantities, the case would have been decided differently.[1]

In a more recent case in the same state, with almost precisely the same facts and circumstances, it was held,—that the contract was binding; that, though the contractor in making his bid knew that the estimate misstated certain items, and, in bad faith and with intent to profit by the ignorance of the engineer, made an unbalanced bid, yet, there being no fraudulent collusion between him and the engineer or other officer of the corporation, he was entitled to recover, and had a right to the benefit of his own knowledge, honestly acquired, so long as he did nothing to mislead or deceive the city. It was held that the validity of such a contract did not depend upon the accuracy of the officer charged with the duty of making the estimates, but upon an honest effort on his part to be accurate; that the lowest bidder under the esti ates is the lowest bidder under the law; that the city could not hold the contractor to a performance and then annul the contract because the accurate result so varied from the estimates as to make the accepted bidder higher than the others.[2]

The decision in this case, it is thought, will better meet the views of engineers and contractors, but it does not overrule the preceding case; and if the officers of a corporation have acted dishonestly, collusively, or even negligently, in express violation of the statute or ordinance, the contract may be declared void.[3]

In another case, in which the prices for curbing and guttering were about four times those of other bidders, and the bid offered to do flagging for nothing, which was the largest portion of the expense, the case was

[1] *In re* Anderson, 109 N. Y. 554.
[2] Reilly v. Mayor, etc., of N. Y., 111 N. Y. 473.
[3] *Accord* McMullen v. Hoffman (C. C.), 75 Fed. Rep. 547.

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regarded as free from fraud, and it was held that the prices alone were not sufficient reason for declaring the contract invalid.[1]

55. Precautions to be Taken by Contractors with Regard to Parties and Their Powers.—In conclusion it is submitted that when a contract is made and entered into "by and through commissioners or boards of public works, government or city officers or engineers, or agents of a public corporation" it is imperative that the parties study the act or statute to which the corporation or board owes its existence; that the constitutionality of the act be considered; that the charter granted be consulted to see that the powers and privileges of the corporation comprehend the proposed improvement; that the deliberations and actions of the city council or board have been legal and constitutional and within the strict interpretation of the act; that the indebtedness limited by the act has not been exceeded, nor the appropriation been exhausted; that the power to make and enter into contracts has not been specifically given by the act to some particular officer, and that it is a power that can be delegated; that the officer or agent who assumes to act has been duly appointed, elected, and authorized to act on behalf of the corporation or board; that his acts are within the authority so delegated or bestowed; that such officer or engineer has in honesty and in good faith performed his duties according to law; that the work itself is not forbidden by statute, ordinance, or public policy; and finally that the property upon which the work is to be performed has been acquired, accepted, or condemned pursuant to the powers given and the laws governing the corporation. Then, and only then, can a contractor feel secure in the prosecution of his work and that he will be rewarded for his labors.

56. Source of Power.—"*By virtue of the power vested in him* [*them*]," etc.* The importance of this clause must be evident from what has preceded. Every opportunity should be given the contractor to investigate the conditions under which he enters into the contract, and to inquire into the legality of his undertakings.

57. Residence of Parties—Place Where Contract is Executed.—"*By and between*.....*of the City of*..... *County of*.....*State of*....." Here should be inserted the full name of the person, partnership, or corporation that assumes to act and be responsible for the performance or execution of the works undertaken. The contract should give the full and correct name under which the parties do business if a partnership, and if a corporation the precise title under which it was incorporated.

58. Laws Governing Contract May be Determined by the Place Where Contract was Made or by the Residence of the Parties.—It is important that the residence of the parties be given. Corporations should be described

[1] Matter of N. Y. P. E. P. S., 75 N. Y. 324 [1878].

* *See* Secs. 29, *supra*, and 200–202, *infra*.

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very carefully, as the question of jurisdiction to which they belong is an important one in serving notices, bringing suits, and in all legal proceedings. The personal ability or disability of a party to make a contract is often decided by the law of the party's domicile,[1] and the validity of an assignment for the benefit of creditors is tested by the law of the assignor's domicile.[2] The law of the owner's domicile determines whether his property is real or personal, as well as the right to its possession and the validity of its transfer.[3] The residence of the parties, the place in which the contract is executed and delivered, and the location of the subject-matter of the contract or the place of performance may one and all have much to do in determining the validity, interpretation, enforcement, etc., of the contract, and the customs and usages under which the work shall be executed and paid for. The law that *should* govern is the law by which the parties *intended* to be governed, and if that be expressed it *will* govern. If it be not expressed, then there are certain presumptions which are conclusive of the parties' intention. These are: 1. "That an agreement to perform an act in a certain place is made in reference to the law of that place. 2. That an agreement to perform an act without designating a place for performance is presumed to be made with reference to the law of the place at which the agreement was made" If it appear from the face of a contract made in one place that it is to be performed in another place its validity, nature, obligation, and interpretation will be determined by the law of the place of performance, but not its legality, it seems.[4] If no place of performance is designated in the contract, or it may be performed anywhere, it will be governed by the law of the place where it was made.[5] A contract made in one state to be performed partly in that state and partly in other states will be governed by the law of the place where made;[6] but when a contract was made in one state for a building to be erected in another state the law of the state where the contract was performed—*i. e.*, the house built—held with regard to mechanics' liens.[7] In building and construction contracts the place of performance is usually named in the description of the subject-matter, the site or locality; but whether the rule will hold hard and fast may be doubted, for many exceptions and contrary decisions have arisen under the conflict of laws of different places. If the full intention of the parties cannot be ascertained from the contract, the custom or usage of the place where the contract was made may be shown to assist in its interpretation. If free from obscurity the intention as expressed will hold unless it be proved that the

[1] **Matthews v. Murcheson**, 17 Fed. Rep. 760 [1883]; Spearman v Ward, 8 Atl. Rep. 430; 3 Amer. & Eng. Ency. Law 573.

[2] 3 Amer. & Eng. Ency. Law 573.

[3] 3 Amer. & Eng. Ency. Law 574

[4] **Brown v. Amer. Financ Co**, 31 Fed. Rep 516; West. Un. Tel. Co. v Eubank (Ky.), 88 S. W. Rep. 1068.

[5] 3 Amer. & Eng. Ency. Law 544, 561–2; Bank v. Hall (Pa.). 24 Atl. Rep. 665; *accord* Lenke's Digest of the Law of Contracts 207; Cartwright v. Railroad Co. (Vt.). 9 Atl. Rep. 870 [1887].

[6] 3 Amer. & Eng Ency. Law 560.

[7] Border v. Carnie, 44 N. J. Law 208; Thurman v Kyle, 71 Ga. 628.

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interpretation would be different according to the law of the place where the contract was executed.[1] When it is not clear that the contract is to be performed in a place designated, it is a general rule that the rate of interest, the penalties of usury, the ceremonies to be performed, such as those required by the registry laws, the statute of frauds, and special statutes pertaining to the subject-matter, all depend upon the laws of the place where the contract is drawn, signed, and delivered, or where it is purported to have been entered into. It is often said that if a contract is valid and binding where made, it is valid and binding everywhere, and if void or illegal where made, it is generally held void and illegal everywhere else.[2] This is generally so unless the contract is contrary to good morals or repugnant to the policy of the state where it is to be enforced.[3] A contract that is valid when made is not affected by a change in the public policy of the state;[4] and it has been held that where a contract is valid at the time when it is sought to be enforced the fact that it was against public policy when made, is immaterial.[5] The operation of a contract and the rights of the parties under it, so far as such rights depend upon the construction and validity of the agreement or on questions of sufficiency of performance, are governed by the laws of the place where the suit is brought,[6] as are also questions of the remedy to be allowed and the manner of enforcing the contract. A discharge of a contract by the law of the place where it was made is generally held a discharge everywhere; but a discharge by the law of a place where it was not made or to be performed will not be a discharge of it in other countries.[7] All suits must be brought within the time prescribed by the statute of limitations which prevails in the place where the action is brought, yet the law of the place where the contract was made may limit the time in which a a suit may be brought, for no action can be brought in another place where a greater length of time is allowed or where there is no limitation at all.[8] The place of contract is not the place where a note or bill is made, drawn, or dated, but the place where it is delivered from drawer to drawee, from promisor to payee, from indorser to indorsee.[9] A contract is made and determined by the place in which it was completed. Therefore a contract made by a traveling agent which required ratification by his employer was deemed to have been made at the place where the ratification was given.[10]

The author has dwelt upon this subject to show the necessity of describing the parties, their residence, and the place where the contract is entered into and to be performed, more than for the purpose of explaining the laws by

[1] 3 Amer. & Eng. Ency. Law 561.
[2] Winter *v.* Baker, 50 Barb. 432 [1867]; 3 Amer. & Eng. Ency. Law 552–3.
[3] 3 Amer. & Eng. Ency. Law 554; Union Locomo. Exp. Co. *v.* Erie Ry. Co., 37 N. J. Law 23 [1873].
[4] Stephens *v.* Southern Pac. Co. (Cal.), 41 Pac. Rep. 783.
[5] Hartford Fire Ins. Co. *v.* Chicago, M. & St. P. Ry. Co. (C. C.), 62 Fed. Rep. 904.
[6] 3 Amer. & Eng. Ency. Law 575.
[7] 3 Amer. & Eng. Ency. Law 581–2.
[8] 3 Amer. & Eng. Ency. Law 583–4. *See other cases cited.*
[9] Overton *v.* Bolton, 9 Heiskell 762 [1872].
[10] Schuenfeldt *v.* Junkerman, 20 Fed. Rep. 357 [1884].

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which the contract will be governed. To do the latter in a few pages or even chapters would be out of the question, for it embraces the whole subject of conflict of laws, one of the most confused and perplexing subjects in the study of law.

59. Time When Contract was Made or Entered Into—Day or Date.—Of equal importance is the date of a contract, which is usually inserted in the following phrase: *"This.....day of.....in the year....."* Every engineering, as well as legal, document or memorandum should be correctly dated, so much often depends upon the day on which it was made. The validity, enforcement, and time of completion of a contract are sometimes determined by the day or hour when it was delivered. If a longer period than that fixed by law has elapsed since its breach or execution both parties' rights may have been forfeited, and the contract be dead and worthless. This suggests the question as to what completes the contract, or at what time does it become binding. A written contract or specialty is not binding until delivered.[1] It has therefore frequently been held that a deed or bond or note signed on Sunday,[2] but delivered on some other day of the week, is valid and binding, since such instruments take effect from the time of delivery; and the deed may have been acknowledged on Sunday.[3] The same has been held of other contracts in writing, as an order for goods[4] written and signed on Sunday, but dated, delivered, and filed on a secular day; a contract to finish a court-house signed by one party on Sunday.[5] To render a contract void because made on Sunday it must have been closed or perfected on that day.[6] The fact that negotiations leading up to the contract took place, or that terms were agreed upon, on Sunday does not render the contract invalid if it were completed on a week-day.[7] On the other hand a proposition of purchase and sale made on a week-day, but completed and delivered on Sunday, is void.[8]

If a contract *must* be made upon a Sunday or legal holiday the terms may be agreed upon, the instrument drafted, signed, sealed, and acknowledged on Sunday, and then delivered upon some succeeding day not a holiday, postdating the contract to agree with the date of delivery. It seems that the contract cannot be delivered on Sunday to another as an agent to deliver upon a week-day, for when a note was signed by two makers on Sunday and delivered by one only on a week-day it was held not to bind the other signer, as he could not authorize a delivery on Sunday.[9] Under such a law it would seem legally proper for the party who could not

[1] McFarland *v.* Sikes (Conn.), 3 N. E. Rep. 252.
[2] 24 Amer. & Eng. Ency. Law 555, 566, *and cases cited.*
[3] 24 Amer. & Eng. Ency. Law 555, *note.*
[4] Cameron *v.* Peck 37 Conn. 556.
[5] Behan *v.* Ohio, 75 Tex. 87.
[6] Foster *v.* Worten, 67 Miss. 540; Moseley *v.* Van Hoser, 6 Lea (Tenn.) 286.
[7] *Cases in* 24 Amer. & Eng. Ency. Law 566.
[8] Smith *v* Foster, 41 N. H. 220.
[9] Bishop on Contracts (Enlg. ed.) § 544; Davis *v.* Barger, 57 Ind. 54; *and other cases cited in* 24 Amer & Eng. Ency. Law 566.

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be present on a day following, to take his copy of the contract with him, and to make a delivery to the other party by messenger, express, or through the post-office.

In some jurisdictions contracts made on Sunday, and therefore invalid, may be ratified on some succeeding week-day;[1] but there are many cases that hold that the ratification must amount to the making of a new contract. The diversity of opinions is due to the different statutes of the states, and to the view that the courts have taken of Sunday contracts.

It is suggested that courts will have little sympathy with contracts made and executed on Sunday, inasmuch that in nearly all Christian countries and states all labor and business are required to be laid aside on the Sabbath except such work as is *necessary* or is an act of charity, and parties who deliberately transgress the law will have little consideration when they seek the law's protection. The courts therefore frequently refuse to have anything to do with cases where Sunday contracts have been made, holding that the party complaining is as bad as the one complained of, denying either party any rights under the contract, and leaving the parties where their illegal transaction has put them.

As to what is necessary construction-work, there are few cases reported in the books. If property be exposed to imminent danger or peril it is work of necessity to preserve it.[2] It has therefore been held proper to gather and handle grain, hay, sap, etc., on Sunday that were liable to spoil or be damaged, and to save logs scattered by storm. A flow of two barrels of salt water a day into an oil-well was held not so injurious that it would make the pumping of it out on Sunday necessary work, and relieve the operator from the penalty imposed by the Sunday law.[3] Repairs to a mill,[4] as the cleaning out of a wheel-pit, on Sunday, so as to prevent stopping on week-days, and thereby shutting down a mill employing many hands, was held not a work of necessity.[5] It has been held that a contractor was not chargeable with negligence for refusing to work on Sunday when by so doing and constructing a sewer he could have avoided injury to a brick wall.[6]

One is not safe in undertaking any work on Sunday that can as well be done on a week-day.[7] The fact that a creditor wished to go away immediately does not make it necessary to sign, deliver, or accept on Sunday an order to pay the debt.[8] If one contract to serve another in Alaska, and to give his whole time, attention, capacity, and energy to the business, and to work as directed, at all times, at any place, Sundays and holidays not ex-

[1] 24 Amer. & Eng. Ency. Law 561, 570, 571.
[2] Parmalee v. Wilks, 22 Barb. (N. Y.) 540.
[3] Com v. Funk, 9 Pa. Co. Ct. Rep. 277.
[4] Hamilton v. Austin, 62 N. H. 575.
[5] McGrath v. Merwin, 112 Mass. 467.
[6] Oleson v. City of Plattsmouth (Neb.), 52 N. W. Rep. 848.
[7] Bucher v. Fitchburg R. Co., 131 Mass. 156, 125 U. S. 555; Holcomb v. Danby, 51 Vt. 428.
[8] Mace v. Putnam, 71 Me. 238; *and see* Meader v. Whit, 66 Me. 90.

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cepted, he may be required to work on Sundays, and may be discharged for refusing to do so.[1]

If a contract be not dated, the day on which it was made and entered into and delivered may be proved by evidence. The omission of the date is not fatal to the validity of a simple contract, nor of a deed, though it may affect the negotiability of a bill or note.[2] If an instrument be dated the date inserted will be regarded as the true date unless otherwise proven.[3]

[1] Nelson v. Pyramid H. P. Co. (Wash.), 30 Pac. Rep. 1096; *other cases accord and contra in* 24 Amer. & Eng. Ency. Law 559.

[2] 5 Amer. & Eng. Ency. Law 77.

[3] *See* 5 Amer. & Eng. Ency. Law 80, 81-92.

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CHAPTER II.

LAW OF CONTRACTS. ESSENTIAL ELEMENTS OF A CONTRACT. THE CONSIDERATION.

THE THING FOR WHICH THE ACT IS DONE. CONTRACTOR CONSENTS TO DO SOME LAWFUL ACT: FOR WHAT?

60. The Consideration.—An undertaking or agreement is not a contract that can be enforced in our courts of law unless it has been made or assumed for a consideration. There must be a clear understanding between the parties, and there must be some consideration for the obligations assumed by both parties, something given in exchange for the obligation, that, in the theory of the law at least, is commensurate with the obligation undertaken.[1] The law will not permit a person to assume contract obligations for nothing. There must be something given in exchange, and that something, so far as it is the policy of the law to judge, must be legally equivalent to the obligation assumed.

The consideration of a contract may be described as that which either party suffers, surrenders, gives, does, or refrains from doing, or promises or pledges, for the obligation which he receives in return from the other party. It may be that which is given or promised by one party for that which is received or undertaken or relinquished by the other party. The consideration may consist of some right, profit, interest, or benefit accruing to one party, or it may be some forbearance, detriment, loss, or responsibility endured, suffered, or undertaken by the other party. The thing given or surrendered may be any material thing of value, as money, an act, a right, or a privilege, or it may be simply a promise or an undertaking for a consideration of value. There must be some undertaking or obligation assumed or there is no contract; a mere exchange of two articles of value is not a contract.

61. As Regards Consideration.—The act undertaken or the promise given may be in consideration of something given, or of a promise to give, to pay, or to do something, or to refrain from doing something. The consideration may be a benefit to the one to whom it moves or is promised, or a detriment to the one who furnishes it. Detriment may be simply the doing of a thing which the party is not bound to do, and does not necessarily

[1] Langdell's Summary of Contracts 1017.

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mean injury. There may be a clear benefit to a promisor, and yet no consideration—for example where the benefit does not come from the promisee. Detriment to the promisee is a universal test of the sufficiency of consideration, and every consideration must possess this quality. If there is detriment to the promisee it does not matter whether there is benefit to the promisor or not. The consideration may inure to the benefit of the promisor or of some third person, or to the benefit of nobody. Consideration therefore means rather that the promisee suffers detriment more than that the promisor is benefited.[1] The detriment must be a detriment from entering into the contract, not from the breach of it.[2] In legal contemplation the promise is always given and received in exchange for the consideration, and for no other purpose. A promise can never constitute a gift from the promisor to the promisee.

62. Consideration in Case of Subscriptions.—From what has been said a natural conclusion would be that gratuitous subscriptions to promote a common object were not binding. Many engineering and architectural schemes are promoted by the concerted action of public-spirited citizens, whose ardor is less warm when it comes to paying their subscriptions than when they made them. To the contractors and engineers who have undertaken to carry out their plans it is a matter of much moment whether they can collect anything for their time, labor, and materials.*

Where several persons sign a subscription paper, each agreeing to pay a certain amount towards an enterprise in which all are interested, the promise of each may be held a good consideration for the promise of the others. This may be a consideration for a binding contract between the subscribers, but it is not a consideration as between the subscribers and one who is not a subscriber, but who has furnished the means to carry out the enterprise for which the subscriptions were made.

If the subscription is for a designated purpose, and a contractor is invited to carry out the conditions stipulated in the subscription paper, which he has done, or if on the faith of the subscriptions he has expended money or assumed liability, an acceptance of the offer of the subscribers will be implied, and the contractor may collect from the subscribers. In the absence of the above circumstances the subscription is a mere offer and cannot be enforced. If an offer merely it may be revoked at any time before the consideration and conditions have been performed. A gratuitous subscription with only one signature is but an offer which, until accepted by the promisee in express terms or by a performance of the conditions stipulated therein, is without a consideration, and cannot be enforced against the will of the subscriber. Doubtless, however, *the law* would imply a contract to reimburse the contractor for the amount he had expended. Cer-

[1] Currie *v.* Misa, L. R. 10 Ex. 162; Langdell's Summary of Contracts 1022.

[2] Ridgway *v.* Grace (Com. Pl.), 21 N. Y. Supp. 934.

* *See Parties*, Secs. 42, 49, *supra*

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tainly it is well settled that when a contractor to whom the subscriptions run has performed his part or has incurred obligations on the faith of such subscriptions, and has complied with the conditions on which they were made, the contract of each and all can be enforced.[1]

63. Adequacy of Consideration.—The consideration must have some value, and the considerations moving from either party to the other party must be legally equivalent. In the absence of fraud the parties themselves are left to judge of the relative value of the considerations which they furnish or pledge, but if the agreement be such that the consideration cannot possibly be equivalent to the promise the contract will not hold.

The value of most considerations, as well as of most promises, is something which the law cannot measure; it is not merely a matter of fact, but a matter of opinion. If the parties think that the consideration is equal to the promise, or *vice versa*, and if they are willing to exchange one for the other, the consideration will be equal to the promise if the law can see that it has any value at all. Fifty cents cannot be a consideration to pay $1 unconditionally and on request, *i. e.*, immediately. But $1 is a sufficient consideration for a promise to pay $1000 at some future day or upon the happening of some uncertain event, though the $1 is only a sufficient consideration for a general or unqualified promise to pay $1.[2] The smallest sum of money may be a sufficient consideration for a promise to acknowledge satisfaction of a judgment for the largest sum.[3] So $1 may be a consideration for a farm whose market value is $5000, or $1000 may be a consideration for so trivial a thing as a canary-bird.

The reasons for these discriminations are that the law has never abandoned the principle that the consideration must be commensurate with the obligation which is given in exchange for it, that though the smallest consideration will in most cases support the largest promise, this is only because the law shuts its eyes to the inequality. Any inequality to which the law cannot shut its eyes is fatal to the validity of the promise.[4] Yet, though the most trivial thing may answer for a consideration, there must be *something*, for the court cannot disregard the fact that something and nothing are not equivalent. The inadequacy of the consideration must not be so gross as of itself to prove fraud or imposition.[5] A promise to accept a part of a debt already due in payment of the whole if paid by a certain day is without consideration and void, for surely "a part cannot be equal to the whole."[6]

64. The Consideration of a Contract Must be Something More Than a Moral Obligation.—A mere moral obligation or duty is not regarded in law

[1] Homan *v.* Steele, 18 Neb. 652 [1886]; Orman *v.* Buel (Neb.), 59 N. W. Rep 515; Higert *v.* University, 53 Ind. 326 [1876]; Brownlee *v.* Lowe (Ind.), 20 N. E Rep. 301 [1889]; Stearns *v.* Corbett, 33 Mich. 458 [1876]; *but see* 24 Amer. & Eng. Ency. Law 328, *et seq.*

[2] Langdell's Summary of Cont acts 1017.

[3] Langdell's Summary 1017; Emmet Co. *v.* Allen (Ia.), 41 N. W. Rep 201 [1889].

[4] Judy *v.* Louderman (Ohio), 29 N. E. Rep. 181.

[5] W tts *v.* Frenche *et al.*, 19 N. J. Eq. 407 [1869].

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of sufficient value to support a promise. A debt owing by a woman's dead husband which is barred by limitations is not such a consideration as will support an agreement by her to pay the amount of the debt.[1]

There are what seem to be exceptions to the statement that a moral obligation will not support a promise. The cases of obligations which are not enforceable because of the infancy or bankruptcy of the promisor or because the right to an action is barred by the statute of limitations are often cited as such exceptions. In these cases the obligation is not regarded as having ceased to exist, but the law has given the party a defense which he may exercise or waive, and a new promise is held to operate as such a waiver. The action in such a case is not brought upon the new promise, but either upon the original obligation or upon one implied by law.[2] A promise to pay a debt which the creditor has by his own act effectually released is without consideration. A promise by a widow to perform a promise made by her while married is not binding without a new consideration in states where married women are under coverture.[3] An obligation enforceable in equity will support an express promise to pay and make it suable at law.[4] The moral duty of a father to provide for his child has been held a sufficient consideration for a promise to pay money.[5]

65. The Consideration Must Not be Wanting.[6]—If the thing to which the consideration relates has, contrary to the belief of the parties, no existence, the contract obligation will not hold. Thus materials sold that turn out to have been destroyed before the bargain was made is in fact no contract of sale.[7] So if parties contract for a thing which they suppose to exist, but which in point of fact does not exist, the contract is void.[8]

66. The Doing of a Thing by One Party Which He is Already Bound to the Other Party to Do is Not a Consideration for a New Promise or a Contract.—A promise to pay a public officer an extra fee or a sum beyond that fixed by law is not binding, even though he renders services and exercises a degree of diligence greater than could have been required of him;[9] but a contract by persons whose property was threatened by a mob to reimburse the sheriff for money expended by him for the wages and subsistence of special deputies is not void as against public policy so long as he exacts nothing for his own services or the services of his regular deputies.[10]

[1] Sullivan *v.* Sullivan (Cal.), 33 Pac. Rep. 862.

[2] Langdell's Summary of Contracts 1026.

[3] 3 Amer. & Eng. Ency. Law 841.

[4] Condon *v.* Barr (N. J.). 6 Atl. Rep. 614 [1886]; Cameron *v.* Fowler, 5 Hill (N. Y.) 306.

[5] 3 Amer. & Eng. Ency. Law 840

[6] Tife *v.* Blake (Minn.), 38 N W. Rep. 202.

[7] Pollock on Contracts 441; Bishop on Contracts, § 70; Rogers *v.* Walsh, 12 Neb. 28; Gibson *v.* Pelkie, 37 Mich 380; Hopkins *v* Hinkley, 61 Md. 584; Price *v.* Peper, 13 Bush 42, *horse dead.* And the same is true of a house that has been burned Taylor *v.* Caldwell, 3 B & S. 826 Walker; *v.* Tacker, 70 Ill. 527.

[8] Marion *v.* Bennett, 8 Paige 312; Mays *v* Dwight, 1 Norris (Pa) 462; Indianapolis *v* McAvoy 86 Ind. 587.

[9] Decatur *v.* Virmillion, 77 Ill. 315 [1875].

[10] McCandless *v.* Alleghany Bessemer Steel Co. (Pa Sup.), 25 Atl. Rep. 579.

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A promise by the owner to pay additional compensation for the performance of a contract which the contractor is already under obligation to the promisor to perform is without consideration.[1] A promise by the contractor's surety, to whom the money to become due under the contract had been assigned, to pay the claim of a subcontractor if he would do certain work which he was required to do by his contract was held without consideration.[2] A promise by a building-contractor to put another coat of oil on the inside of a house, made after he had fully complied with his contract and without any additional consideration, is a mere gratuity, and his failure to put on the additional coat will not prevent him from recovering the full amount due under his contract.[3] If the promise had been made before he had performed his contract it might have been different. When a construction company had completed work according to contract an agreement to accept less than the contract price was held without consideration and not to release the owner from liability for payment at the original contract rate.[4] The same was held of an agreement of a subcontractor to sign a release of the contractor from personal liability in consideration that the owner would pay the former a past-due note.[5] A promise to pay at a future time a debt already due, and which draws interest, is not a consideration for the extension of the time of payment when the rate of interest thereon is not changed.[6]

A promise by an owner to an architect to pay him a commission of 5 per cent. additional as an inducement to resume work upon a job for which he had agreed to furnish plans and to superintend is void, there being no consideration for the promise. The architect in this case had contracted to prepare the plans and to superintend the erection of a large brewery, but upon learning that a certain contract, which he had hoped himself to secure, had been given to another he became angry, took his plans, called off his superintendent, and refused to have anything more to do with the brewery. The facts of the case were that the architect took advantage of the owner's necessities and extorted a promise to pay him 5 per cent. as a balm for his feelings and as a condition for his complying with his contract already entered into. To permit one to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts that they might profit by their own wrongs.[7]

The principle seems to apply even when the promisee is under obligation to a third person to do the thing in question, for there is a conclusive presumption of law that the act is done in discharge of the previous obligation,

[1] Jones *v.* Risley (Tex. Sup.), 32 S. W. Rep. 1027.

[2] Alley *v.* Turck (Sup.), 40 N. Y. Supp. 433.

[3] Widiman *v.* Brown (Mich.), 47 N. W. Rep. 231 [1890].

[4] Fitzgerald *v.* Fitzgerald & Mallory Const. Co. (Neb.), 59 N. W. Rep. 838.

[5] McNutt *v.* Loney (Pa. Sup.), 25 Atl. Rep. 1088; *and see* McCarty *v.* Hampton Bldg. Assn., 61 Iowa 287, *where an additional guaranty was exacted.*

[6] Stickler *v.* Giles (Wash.), 37 Pac. Rep. 293.

[7] Lingenfelder *v.* W. Brewery Co. (Mo.), 15 S. W. Rep. 844 [1891].

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and not as a consideration of a new and later promise.[1] So if a builder is under a contract to complete a house by a certain day and an outsider promises him a bonus if he will fulfill his contract the promise would be without a consideration. It would be otherwise, however, if the contract had been mutually rescinded or the contractor had good and sufficient reason for abandoning the work. A promise in consideration that he should complete it a day earlier than that required by his contract would be binding, and an extension of time by one party is a good consideration for the promise of another.[2]

A request by the owner of a building, that subcontractors stop work for the reason that the contractor had overdrawn his account and that he could get it done more cheaply, and a refusal on the part of the subcontractors, whereupon the owner told them to go ahead and to send the bill to him, but to make a reduction in the price if possible, was held to create a contract between the owner and subcontractors on sufficient consideration.[3] An agreement of a construction company to commute its contract rate of compensation for finished work to a lower rate, because the work had not been completed as agreed, in consideration of which the other party consented to accept the work in its unfinished condition, affords a sufficient consideration to sustain the stipulated reduction.[4]

A contract to make an excavation at an agreed price, the contractor having examined the work before taking the contract, and having furnished proof that it was found more difficult than was supposed, which was disputed by disinterested witnesses, is insufficient to show consideration to uphold a promise to pay an additional price.[5]* An agreement to permit the contractor to retain twenty-five dollars already paid him above his expenses and to pay for the material furnished in consideration of the cancellation of the contract is not void for want of a consideration.[6] A promise to pay for extra materials ordered by the architect, made before the work is completed, is founded on sufficient consideration as to materials already used, as well as those not used.[7]

67. The Consideration Must be Present.—The consideration must be present, *i. e.*, in legal contemplation the promise or undertaking must be assumed the moment the consideration is completely performed. This would seem to be necessary if the consideration is given in exchange for the promise. A past act performed without regard to any promise cannot be said to have been given in exchange for the promise, and a promise made for a

[1] Langdell's Summary of Contracts 1018.
[2] Risley *v.* Smith, 64 N. Y. 576 [1876], *and cases cited.*
[3] Yoeman *v.* Mueller, 33 Mo. App. 343 [1889].
[4] Fitzgerald *v.* Fitzgerald & Mallory Const. Co. (Neb.), 59 N. W. Rep. 838.
[5] Casterton *v.* McIntire, 23 N. Y. Supp. 301.
[6] Blagborne *v.* Hunger (Mich.), 59 N.W. Rep. 657.
[7] Irwin *v.* Locke (Colo.), 86 Pac. Rep. 898.

* *See* Sec. 563, *infra.*

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consideration already performed is simply a promise, without a consideration, and therefore cannot form an element of a binding contract. A promise made for a consideration to be thereafter performed, though invalid as a promise, may take effect as an offer and become binding if the consideration is performed before it is revoked or has ceased to exist.

A promise made in consideration of some future act must be distinguished from a promise given in exchange for *a promise to do* some future act.[1] In the former case the promise is in exchange for a future act, which is only an offer, while in the latter case the promise is in exchange for a present promise, and the promises themselves are the consideration, one for the other. When the consideration consists of performance the promise becomes binding when the act is performed. If an owner promise to pay a contractor a sum of money if he will do a particular act, and the contractor does the act, the promise thereupon becomes binding, though the contractor at the time did not engage to do the act.[2] A promise in consideration of some past or future act must be distinguished from a promise for or in consideration *of a promise* to perform some deed or work some time in the future, or of a promise made on account of some past act by which the party derived some benefit or the other party suffered detriment. In the former case the past or future act itself would not be a sufficient consideration, but in the latter case the present promise is a good consideration. Thus if an owner says to a builder: "I will pay you ten thousand dollars to build me a house," and the builder says: "All right," and the builder thereupon makes arrangements to build, it is not strictly an enforceable contract until the builder has built the house. The owner may revoke the offer any time before the builder has completed the house, *i. e.*, furnished the stipulated consideration; and the builder can have no action for the revocation, there being no express contract, though the law will imply a contract by the owner to pay the builder the reasonable value of what he has received or been benefited. But if the owner says: "I promise to pay you ten thousand dollars if you *promise* [agree] to build me a house, payment when house is completed," to which the builder agrees, then the contract is supported by a present consideration, viz, the *promise* to build. So a promise to pay in consideration of some service rendered in the past, and not at the express or implied request of the promisor, is not binding.[3]

In all these cases if the owner is free to refuse or can return what he has benefited or been enriched by the labors of the contractor, and he does not return it, the law will imply a contract to pay for it what it is reasonably worth to him; but the contractor does not recover upon an express contract made by him with the owner, but upon the contract imposed by the law to promote justice and to prevent unjust enrichment. If the

[1] Langdell's Summary of Contracts. 1024
[2] Train *v.* Gold, 5 Pick (Mass.) 380-285.
[3] 3 Amer. & Eng. Ency. Law 838; Stuht *v.* Sweesy (Neb.), 67 N. W. Rep. 748; Myers *v* Dean (Com. Pl.), 32 N. Y. Supp. 237.

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owner cannot restore what he has received he need not pay for it, as when a contractor has built a house upon the land of another without his knowledge or consent, or has built the house materially different from the one he contracted to build; there is no contract implied by law to pay for it, and the fact that the owner uses it and enjoys it does not add to his liability to pay for it.[1] *

If a part of the consideration is present and a part past it will support the promise or agreement.[2] Therefore when certain sums were subscribed to induce a contractor to complete the grading of a street begun under a contract with the city and in consideration of that agreement the contractor made a settlement with the city for the work then done and entered into engagements for its completion, which arrangements and expenditures he was not obliged to perform under his contract with the city, and which were necessarily productive of loss and injury in case of nonpayment, it was held that the consideration was amply sufficient to support an action for the amount pledged.[3] A receipt in full by a subcontractor who claimed extra remuneration for extra work has been held a good consideration for a promise to pay for the same extra work if the promisor succeeded in getting an allowance for the same.[4]

68. From Whom Consideration Must Come.—The consideration of a contract must move from the person who receives the promise, *i. e.*, the promisee. If it does not, then the promise cannot be said to have been given in exchange for it, but as a gift, which is not binding on the promisor. Certain courts may and do allow persons for whose benefit the promise is made, *i. e.*, the beneficiaries, to sue on a contract; but, as Professor Langdell has said in his Summary, the consequence is that the promisor is then liable to two actions—one by the promisee and one by the beneficiary. In truth a promise to A to pay one hundred dollars to B confers no right upon B in law or equity, but *there are* similar cases in which B has been allowed to recover against the promisor.[5]

Therefore a third party was held not liable for the work of a contractor, because he told him, while the work was in progress, to go on and do the work ordered by the owner and he would pay for it; nor for the reason that the owner introduced the third party to the contractor as his partner and coadjutor in the work, and that he was shown what was being done in connection with the owner, and that he expressed great satisfaction and told the contractor to go on and do all that the owner ordered and he would pay for it. The promise was held voluntary and without consideration.[6]

[1] 8 Amer. & Eng. Ency. Law 889.
[2] *Cases in* 8 Amer. & Eng. Ency. Law 888.
[3] Corrigan *v.* Detsch, 61 Mo. 290 [1875].
[4] Read *v.* Hitchins, 71 Me. 590 [1880]. [However, it was not a very brilliant thing on the part of the subcontractor to do unless required to do so to obtain the contract price.—Ed.]
[5] 8 Amer. & Eng. Ency. Law 863.
[6] Stidham *v.* Sanford, 36 N. Y. Sup. Ct. 341 [1873].

* *See also* Secs. 681, 697–703, *infra.*

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The principle is well illustrated in a case where the third party was a member of a committee to solicit aid towards the erection of a foundry-building, donated as an inducement for a foundry business to remove to a village where the third party resided. The third party had called upon an architect to solicit aid, at the same time telling him the purpose contemplated, and that whatever was done was to be a voluntary contribution. Under these circumstances, and without any express promise by the third party to pay him therefor, the architect prepared plans and specifications for the proposed building. It was held that to charge appellant for such plans an express promise to pay must be established, and such promise must have been made before the service was rendered; for if the work was not done on the credit of the third party, but for some other person, any subsequent express parol promise to pay for the same would be void as being a promise to pay the debt of a third person and being without consideration.[1]

69. Changes or New Terms in a Contract.—If a contract cannot be created without a valid consideration it would naturally follow that some consideration would be required to modify its terms or add new terms to an existing contract.[2] Therefore when certain work was being done according to the contract and specifications, and the employer, under threats of stopping the work, and without any further consideration, exacted and secured from the contractor a guaranty concerning the work not embraced in the original contract, it was held that such guaranty was not binding upon the contractor, and that in an action brought by him for the contract price of the work a failure of said guaranty could not be set up as a defense by the owner.[3]

There is no doubt that at any time after a writen contract has been entered into the parties may orally either vary it or abrogate it, if there is a new consideration.[4]

Some tribunals have conceded that an executory parol contract may be varied, or even dissolved, before breach by an agreement to that effect without any new consideration, which involves the idea that if a person who has entered into a contract declare that he will not fulfill it as it stands, nor unless his demands are satisfied, and the other party assents, the new agreement will supersede the old one.[5]* Thus it has been held that if a contractor threatens to abandon his contract on account of pretended mis-

[1] Dunton *v.* Chamberlain, 1 Bradwell 361 [1878].

[2] Titus *v.* Cairo & T. R. Co., 37 N. J. Law 98.

[3] McCarty *v.* The Hampton Bldg. Ass'n, 61 Ia. 287 [1883].

[4] Juilliard *v.* Chaffee, 92 N. Y. 529; Flanders *v.* Fay, 40 Vt. 316; Burkham *v.* Martin, 54 Ala. 122; Maxfield *v.* Terry, 4 Del. Ch. 618; Roberts *v.* Wilkinson, 34 Mich. 129.

[5] Holmes *v.* Doane, 9 Cush. 135; Wilgus *v.* Whitehead, 6 W. N. of C. 537.

* *There are numerous decisions to the contrary, which are set forth in* Secs. 181 and 559–564, *infra.*

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representations of the company, or because unexpected difficulties have been encountered, or because the work is too expensive, and the owner agrees to pay an extra price, the promise is binding, though apparently without consideration.[1] So it has been held that no new consideration was necessary to sustain an agreement by the owner to extend the time for completion of a building contract.[2]

An agreement without a consideration is repugnant to the law of contracts, and it may well be doubted if these cases as stated are good law.[3] If these cases were looked into it would be found that there were mutual promises or mutual acts to be performed, or that the question of consideration was not raised until the work was done and the contract executed. There are many cases that decide that a consideration is required to sustain a change in a contract, and to be safe, a consideration should always be insisted upon.

If it is agreed between the owner and the contractor that the work shall be performed in a manner different from that originally agreed upon it has been argued that the undertaking of the contractor to do something different, though only in detail, and the relinquishing by the other party of the right to have it done in a particular manner, furnished consideration enough, and that the court would not go into the question whether it gave an actual advantage.[4] A contract that has *not* been executed may be rescinded by mutual agreement, the parties exchanging promises not to enforce their rights;[5] but a contract executed by the contractor, leaving only an obligation to pay on the part of the owner, cannot be rescinded by mutual consent without other consideration.[6] *

70. Consideration Good in Part.—When an offer is made for a consideration named no promise arises until the consideration is fully performed. If the consideration consists of several things they must all be performed. If any part of the specified consideration is illegal the illegality will affect the whole, and there will be no binding promise.[7] If, however, a part only is void or voidable it is otherwise,[8] for it is impossible to apportion the weight of each part of the consideration in inducing the promise. If, among several things named as consideration, a good and sufficient consideration can be found it is the same as if that alone had been specified as a consideration.[9] Where independent promises are in part lawful and in part unlaw-

[1] Hart *v.* Launman, 29 Barb. 410; Osborne *v.* O'Reilly, 42 N. J. Eq. 467 [1887].

[2] Izard *v.* Kimmel (Neb.), 41 N. W. Rep. 1068 [1889]; Hill *v.* Smith, 34 Vt. 535; Rulge *v.* Gates (Wis.), 38 N. W. Rep. 181 [1888].

[3] Webbe *v.* Romona O. S. Co., 58 Ill. App. 222.

[4] Pollock on Contracts 180.

[5] Foster *v.* Daber, 6 Exch. 851; Morawetz on Corp'ns, § 871.

[6] Westmoreland *v.* Porter, 75 Ala. 452 [1883].

[7] Langdell's Summary of Contracts 1030; Pollock on Contracts (4th ed.) 321; Edwards Co. *v.* Jennings (Tex.), 35 S. W. Rep. 1053.

[8] Clements *v.* Marston, 52 N. H. 31 [1873].

[9] Langdell's Summary of Contracts 1030.

* *See* Sec. 66, *supra.*

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ful those which are lawful can be enforced, but if any part of an entire consideration is unlawful all promises founded upon it are void.[1] If the contract is bad in part for being in violation of law, but good in part, and the good part of the contract can be separated from the bad, that which is good can be enforced in law.[2] The possible invalidity of a provision in the contract for referees in case of differences rising was held not to invalidate the contract as a whole.[3] When a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted.[4] In all contracts in writing and under seal signed by the parties bound thereby, a valid consideration is implied.[5] Equity will not relieve a surety from liability on an instrument under seal merely for want of consideration when no consideration was contemplated by the parties.[6]

[1] Pollock on Contracts (4th. ed.) 321; Reed *v.* Brewer (Tex.), 87 S. W. Rep. 418.

[2] Jackson *v.* Shawl, 29 Cal. 267 [1865]; Erie R. Co. *v.* Union Loc. & Express Co., 35 N. J. Law 240 [1871].

[3] Union Pac Ry. Co. *v* Chicago, R. I. & P. Ry. Co., 16 Sup. Ct. Rep. 1173.

[4] Hobbs *v.* McLean, 117 U. S. 567 [1886]; *followed in* United States *v.* Central Pac. R. Co., 118 U. S. 235 [1886].

[5] Warren *v.* Johnson (Kan.), 17 Pac. Rep. 592 [1888]; Erickson *v.* Brandt (Minn.), 55 N. W. Rep. 62; Fuller *v.* Artman, 24 N. Y. Sup. 13.

[6] Meek *v.* Frantz (Pa. Sup.), 88 Atl Rep. 413.

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CHAPTER III.

LAW OF CONTRACTS. ESSENTIAL ELEMENTS OF A CONTRACT.

THE SUBJECT-MATTER. THE ACT TO BE PERFORMED OR THING TO BE ERECTED, FURNISHED, OR SUPPLIED.

71. **Relation of the Subject-matter and the Consideration.**—The act, undertaking, or promise on the part of one party is the consideration for the act, agreement, or obligation of the other party. In fact it cannot be said that the undertaking of the second party is any less the consideration of the contract than is the undertaking of the first party. They are considerations one for the other, and what has been said of the legality or validity of the consideration will be quite as true for the act or promise given in return—*i. e.*, the act or subject-matter must be a lawful undertaking and one not contrary to the policy of the law. Whatever may be said of the acts or undertakings of one party will hold equally true for the acts or undertakings of the other party. The consideration on both sides in construction contracts is usually an act or a promise to perform certain acts. The consideration on one side may be a material object, as a sum of money or a cargo of lumber, or it may be a circumstance or a condition of detriment. It may be an act or the refraining from doing some act. Whether a material object or a condition, the contract obligation existing between two parties is usually, if indeed not always, the result of an act on the part of one or both parties. It is not the mere existence of the money or the lumber that is the consideration of the contract, but the act of paying the money or the delivery of the materials is the real consideration of the contract. The loss of the ship, the burning of the house, or the death of the person may mark the hour from which the company is liable for the insurance, but the right to demand the insurance dates from the proof of certain conditions which requires an act on the part of one of the parties. The consideration may be either the doing of an act or the giving of a promise.[1]

AS REGARDS THE ACT TO BE DONE OR UNDERTAKEN OR THE CONSIDERATION FOR WHICH IT IS UNDERTAKEN.

72. **There Must be a Lawful Subject-matter—The Promise Must be to Perform a Lawful Act.**—A legal contract requires that the obligations as-

[1] 8 Amer. & Eng. Ency. Law 831.

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assumed shall be lawful acts or undertakings not only within the written law of the land, but that they shall be in harmony with the law and in keeping with the policy of the government and good society, and that their execution shall be possible. The consideration on both sides can be neither wicked nor prohibited by law.[1] It therefore follows that the consideration, the act or undertaking, of either party must not be opposed to the constitution of the United States or of the State; it must not be contrary to law, and the effect of the contract must not be to defraud or injure the government.

Among the latter agreements are those that promote smuggling, evade the internal-revenue laws, assist in rebellion or riot, aid enemies of our country, effect fraud in elections, or interfere with legislation or the administration of justice by our courts. Contracts to build ships of war or to manufacture arms or to furnish supplies in violation of the laws and treaties of our country will not be recognized by our courts.

73. Contracts the Effect of Which is to Influence Public Officers.—A contract must not tend to influence legislative bodies or public officers in the discharge of their duties. A contract to pay a certain sum of money annually for ten years in consideration of the owners offering their building to the government for a post-office at a nominal rent and using their personal influence and proper persuasion to have the post-office located in that building was held illegal and against public policy, and, the consideration being indivisible and partly illegal, the whole contract was declared void.[2] If the owners were not to have used their influence and persuasion with the public officers it seems the contract would have been legal.[3]

If there be no evidence that a politician had influenced any legislators or public officers in his behalf, then the contract might be held valid and not necessarily against public policy.[4] The government may enter into a lease of a building for a nominal sum, the rent being made small to induce it to locate the office in such building. Such a lease is not contrary to public policy in the absence of anything to show that the building is not a convenient and desirable one for the purpose.[5]

An agreement by a public officer to accept a greater or less fee than is prescribed by statute, or not to avail himself of a statutory mode of enforcing the collection of his fees, is against public policy, as is also a contract to delegate his official duty, or to pay a rival candidate half of the profits of an office, or for a deputy to divide all his fees with his principal, such fees being payable directly to such deputy,[6] or for the principal to appoint a certain person as deputy in case he is elected.[6]

[1] Pollock on Contracts 322.

[2] 9 Amer. & Eng. Ency. Law 916; Elkart Co. Lodge *v.* Crary, 98 Ind. 238 [1884].

[3] Fearnley *v.* De Manville (Colo. App.), 39 Pac. Rep. 73.

[4] Beal *v.* Polhemus, 34 N. W. Rep. 532, *many cases cited.*

[5] Deyoe *v.* Woodworth (N. Y. App.), 39 N. E. Rep. 375; 24 N. Y. S. 373 *affirmed*, 9 Amer & Eng. Ency. Law 915.

[6] Conner *v.* Canter (Ind. App.), 44 N. E Rep. 656.

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Contracts for public favor or personal influence with the government or with public officials are against public policy. Such are contracts to pay officers for their influence in procuring contracts for work, as to have a certain person's bid accepted;[1] or to procure sales, or to induce any one to do acts inconsistent with his duty.

Any agreement which contemplates the use of private influence to secure legislation is void,[2] but a contract to draft bills, explain them to members of the legislature, and request their introduction is not.[3] An agreement to procure the passage of a bill declaring certain railroad lands forfeited to the government, so that one party to the contract might be benefited as a *bona fide* settler under the homestead laws, is void as against public policy.[4] Contracts with legislators to secure franchises, enactments, and licenses for public works, by would-be contractors or companies that want charters for special works, are within the same class.

A mortgage given to secure the payment of compensation for procuring the appointment or resignation of a public officer is void as against public policy.[5] Money paid under a contract for the sale of property which is contrary to public policy, because of a promise by one of the parties to resign a public office and use his influence to secure the other's appointment, cannot be recovered on refusal of the seller to perform.[6] An assignment of, or a lien on, the unearned salary or fees of a public officer, given by him, is void as against public policy.[7]

74. Contracts for the Perversion of the Courts.—A legal contract cannot have for its object the perversion of our courts or the obstruction of justice.[8] An agreement to procure evidence in consideration of a part of the sum recovered is against public policy;[9] and one to stifle a prosecution or to withhold testimony therein is absolutely void, and no recovery can be had on a promissory note given in consideration of such an agreement.[10]

Agreements to pay money to a witness to keep out of court,[11] or to induce a public officer to violate his trust or neglect his duty, or to do things inconsistent with his official duties,[12] to gain particular official

[1] Davidson *v.* Seymour, 1 Bosw. (N. Y.) 88; Halcomb *v.* Weaver, 136 Mass. 265; *and see* Bermudez Asph. Pav. Co. *v.* Critchfield, 62 Ill. App. 221.

[2] Burney's Heirs *v.* Ludeling (La.), 16 So. Rep. 507.

[3] Chesebrough *v.* Conover (N. Y. App.), 85 N. E. Rep. 633; 21 N. Y. S. 566 *affirmed.*

[4] Houlton *v.* Dunn (Minn.), 61 N. W. Rep. 898; *but see contra* Houlton *v.* Nichol (Wis.), 67 N. W. Rep. 715.

[5] Basket *v.* Moss (N. C.), 20 S. E. Rep. 733.

[6] Edwards *v.* Randle (Ark.), 38 S. W. Rep. 343.

[7] State Nat. Bank *v.* Fink (Tex. Sup.), 24 S. W. Rep. 256; Williams *v.* Ford (Tex. Civ. App.), 27 S. W. Rep. 723

[8] Bierbauer *v.* Wirth, 5 Fed. Rep. 336 [1880].

[9] Lyon *v* Hussey (Sup.), 31 N. Y. Supp. 281; Kennedy *v.* Hodges (Ga.), 25 S. E. Rep. 493.

[10] Friend *v.* Miller (Kan.), 34 Pac. Rep. 397.

[11] *In re* Brule (D. C.), 71 Fed. Rep. 943.

[12] Robinson *v.* Patterson (Sup. Ct. Mich.), July, 1888; Schlass *v.* Hewlett (Ala.), 1 So. Rep. 263.

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favor,[1] or to influence legislators,[2] and similar undertakings, are illegal contracts, and will not be enforced by our courts.[3]

75. The Undertaking Must Not be Contrary to Federal or State Laws, or in Disregard of Police Regulations or City Ordinances.—It is not necessary that the parties should actually contract to do the acts specially prohibited, but it is sufficient if the tendency is to subvert the laws, or overthrow, defraud, or injure the government or its institutions. If the contract is made for the purpose of using the subject-matter in a manner prohibited by law there can be no recovery on the contract.[4] Mere knowledge of the use to which the things are to be put will prevent recovery for them if the act prohibited amounts to a felony.[5] Knowledge alone, even if the act does not amount to a felony, will preclude recovery in England.[6] In short if the agreement is to do anything to facilitate the doing of an unlawful act it is invalid, and there can be no recovery. A case in trade is reported where a quantity of candy and silverware was sold, to be put up in "prize candy packages"; it was held that the transaction, having been for the purpose of aiding in a lottery, which was prohibited by the New York statutes, it was void and that no recovery could be had upon the contract.[7]

76. The Contract Must Not be to Invade Property Rights, to Commit or to Maintain a Nuisance, to Obstruct a Public Way or Stream, or to Commit a Trespass.—Some cases of interest to engineers and contractors will best demonstrate these points of contract law. Thus it is submitted that a contract to erect a bridge over, or a tunnel under, the Hudson River at New York, entered into before the necessary franchise had been obtained from the state and Federal governments would not be a binding obligation; or a contract to drive piles or build a pier out into the bay beyond the harbor-line; or to do work that would necessarily obstruct a public street or waterway.[8] A contract to build a railroad or canal through a state, territory, or reservation, entered into before the corporation had obtained its franchise or authority from the state to build, would not be a valid contract; certainly the contractor could not be required to fulfill his contract until the necessary license and permission had been obtained. Such cases come up not infrequently; such are contracts to construct waterworks or irrigation ditches, canals or sewers when the appropriation or pollution of the water would be an unlawful act, or to drive a tunnel under a government fortress, as occurred on the West Shore Railroad at West Point. The question has been asked

[1] 3 Fed. Rep. 1; Hager *v.* Callin. 18 Hun 448 [1879]; Staunton *v.* Parker, 19 Hun 55 [1879].

[2] 2 Amer. & Eng. Ency. Law 366.

[3] *See a good collection of cases in* 9 Amer. & Eng. Ency. Law 879–930.

[4] Cranan *v.* Bryce, 3 B. & Ald. 179; McKimmel *v.* Robinson, 3 M. & W. 434.

[5] Hanauer *v.* Doane, 12 Wall. 342; *but see* Fedder *v.* Odorn, 2 Heisk. 68.

[6] 2 Keener's Cases on Quasi-Contracts 35, *note.*

[7] Hull *v.* Ruggles, 56 N. Y. 424; *see also* Arnot *v.* Coal Co., 68 N. Y. 558; *and* Lynch *v.* Rosenthal (Ind.), 42 N. E. Rep. 1103, a contract for sale of lots to subscribers to be determined by lot, held void.

[8] Whitfield *v.* Zellnor, 2 Cushman (Miss.) 663, work enjoined as a nuisance.

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as to whether a contractor after having built a structure upon, or driven a canal through, Federal property, or diverted a stream, or appropriated the waters of a pond, or constructed an outlet for a sewer, or directed a sewer into an unpolluted stream, any of which acts is an unlawful act, and which has been the consideration for his contract, could recover on such a contract for what he has done. It has been held that a party could not avoid a contract on the theory that the doing of extra work was malicious mischief, because the extra work required the contractor to dig or excavate in a street without proper license, which was an unlawful act.[1]

A contract to build houses on a disused unconsecrated burial-ground, necessitating the removal of many corpses, has been held illegal;[2] and it has been held that no recovery could be had under a contract to grade a street for earth filled outside the street-line and included in the slopes, and which had been deposited on private property, as it was an unlawful act without the consent of the owner,[3] but the fact that a part of the improvement was on private property did not prevent the contractor from recovering for work done on the street.[4] Recovery has been allowed a contractor who built a bridge and some track without the railroad company's territory, the contract for which was void, where it appeared that the company had possession and enjoyed the benefit of the structures.[5] The act of the city in preventing the contractor from improving a street in which the city had no right of way does not give the contractor a right to recover as for breach of contract, as the contract was void.[6]

Instances are numerous in the engineering profession where contracts have been taken to build structures or do work by processes that are patented, the execution of which could be stopped by an injunction and the performance of which would be unlawful, but whether the contractor would be excused and the contract declared illegal may well be doubted.[7] * Such might be cases of patent processes or patent apparatus required, such as patent heating apparatus, patent pavements, etc. A contract to publish a copyrighted book without permission of the author, or to act a play, or to copy a picture without permission of the artist would be of the same character.†

Contracts to erect structures the maintenance, ownership, and use of which are contrary to law are not binding. Such are contracts in violation of local ordinances and building regulations, as those fixing the thickness of

[1] Bernstein *v.* Downs (Cal.), 44 Pac. Rep. 557.
[2] Gibbons *v.* Chalmers, 1 C. & E. 577 [1885].
[3] Davies *v.* E. Saginaw (Mich.), 32 N. W. Rep. 919 [1887].
[4] Johnson *v.* Duer (Mo.), 21 S. W. Rep. 800.
[5] Cunningham *v.* Massena Springs R. Co. (Sup.), 18 N. Y. Supp. 600.
[6] Sang *v.* Duluth (Minn.), 59 N. W. Rep. 878; Becker *v.* Phila. (Pa.), 16 Atl. Rep. 625 [1889].
[7] *See* cases in Dillon's Munic. Corp'ns. (4th ed., 1890), § 468, § 467 *note*.

* *See* Contracts Impossible, Secs. 669–680, *infra*. † *See* Secs. 816–825, *infra*.

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walls.[1] It has been held that a carpenter and builder could not recover for work he had performed upon a bowling-alley in the state of Ohio, the building being unlawful property.[2] For labor and materials furnished for the erection of an awning which is forbidden by a city ordinance no recovery was allowed, neither upon the express contract with the owner nor upon an implied contract, as on a *quantum meruit*. The law will not assist those who have transgressed its commands, but leaves the parties where they have placed themselves.[3] *

When a statute prohibits every contribution of money to promote the election of any person or ticket, except for expenses of printing and the circulation of handbills and other papers previous to such election, an an agreement to pay $1000 to one who had built a log cabin for campaign meetings in consideration that he would keep it open for the accommodation of political meetings to further the success of certain candidates nominated for congress was held illegal and not enforceable.[4]

Contracts for the erection of a building in violation of a city's building regulations, such as pertain to safety of the structure and infringement of others' rights and the protection of citizens, may be declared invalid.[5] It has been held that a contract to erect a proper and legal building is avoided by an ordinance passed two days after the contract was made prohibiting the erection of such a building.[6] A contract to erect a building prohibited by the statute will not become valid by reason of the subsequent repeal of the statute.[7] A contract executed in consideration of a previous illegal contract is also void.[8]

77. The act must not be to commit a crime or a misdemeanor, or to injure others in the enjoyment of their rights.

78. The agreement must not be for the sale or supply of adulterated goods, or of intoxicating liquors in violation of excise laws prohibiting traffic in them.

79. The act must not require either party to violate the Sabbath laws or to ignore the laws and regulations of society.†

80. The act must not be to effect something in contravention of the law or public policy or in violation of judicial morals; to do what the law forbids or to neglect what the law requires.[9]

[1] Stevens *v.* Gourley, 7 C. B. N. S. 99.

[2] Spurgeon *v.* McElwain, 6 Ohio 442; *see also* 14 Amer. & Eng. Ency. Law 786.

[3] Brinkman *v.* Eisler, 16 N. Y. Supp. 154, *and many cases cited; and see* another awning case, Simis *v.* Brookfield, 34 N. Y. Supp. 695; *and see* Ellwood *v.* Mani (Com. Pl.), 16 Pa. Co. Ct. Rep. 474; *and* Harper *v.* Jonesboro (Ga.), 22 S. E. Rep. 159

[4] Jackson *v.* Walker, 5 Hill (N. Y.) 127 [1843].

[5] Stevens *v.* Gourley, 7 C. B. N. S. 99; Burger *v.* Roelsch (Sup.), 28 N. Y. Supp. 460.

[6] McMillin *v.* Walker, 21 N. B. R. 31.

[7] Banchor *v.* Mansel, 9 Amer. & Eng. Ency. Law 881, *and cases cited.*

[8] Cate *v.* Blair, 6 Coldw. 639; Pierce *v.* Kibbee, 51 Vt. 559; King *v.* Winanto, 71 N. C. 469, *also* 73 N. C. 504.

[9] 9 Amer. & Eng. Ency. Law 889.

* *See* Sec. 87, *infra.*

† *See* Sec. 59, *supra.*

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81. The Undertaking must Not Have for Its Object the Creation of a Monopoly.—Such acts are attempts by the officers of cities, railroads, and other corporations to grant exclusive rights or franchises to individuals and other companies, as "the exclusive right to sell water to a city,"[1] "the exclusive right to maintain and construct a telegraph-line along a railroad."[2] A contract by a railroad company granting to a hackman the exclusive right to bring his hacks into its depot grounds has been held not against public policy.[3] But a contract by a town to give to one party an exclusive right or franchise for many years to light its streets and its residences is a monopoly, and cannot be enforced.[4] The granting of exclusive privileges to telegraph companies to run wires along the line of a railroad or to lay an oil-line across a large tract of land is void as tending to create monopolies.[5]

A railroad company may not agree to refrain from applying to the legislature for a land grant and to assist another railroad company in getting it. Such a contract is void, even though it stipulates that the means employed in securing the grant shall be reasonable and proper.[6] A contract not to sell water rights to any other person or persons under a penalty called liquidated damages, and not to make any settlement or compromise with other parties, is void as imposing a restraint upon compromises of litigation and disputes.[7]

Certain cases may be recited to show how near the line one can walk and yet keep within public policy. Thus it has been held that two railroad companies whose lines are parallel may agree to extend their lines so as not to interfere with one another, the agreement being made to prevent an unprofitable war of construction.[8] A contract by a railroad company by which it agrees to give all its ferry business at a certain point to one company and to employ none other has been held a good and valid contract.[9] An agreement to refrain from forming a corporation for the construction of waterworks and from carrying on or prosecuting such work so that another may incorporate for that purpose and conduct the business without competition is not void as against public policy.[10] An agreement by a vendor in consideration of the sale of a lot not to build a flat in the immediate neighborhood is not against public policy as being in restraint of trade.[11]

[1] Davenport *v.* Kleinschmidt (Mont.), 13 Pac. Rep. 249 [1887].

[2] Pac. Tele. Cable Co. *v.* W. Union Telegraph Co., 50 Fed. Rep. 493.

[3] Brown *v.* N. Y. Cent., etc., R Co., 27 N. Y. Supp. 69.

[4] Saginaw Gas & Light Co. *v.* Saginaw (U. S. Cir. Ct.) (Mich.), 22 The Reptr 579 *[1886]*; Gale *v.* Kalamazoo, 23 Mich. 344.

[5] 9 Amer. & Eng. Ency. Law 892; Union Trust Co. *v.* Atchison, etc., R. Co. (N. M.), 43 Pac. Rep. 701.

[6] Chippewa, etc., Ry. *v.* Chicago, etc., Ry., 44 N. W. Rep 17.

[7] Ford *v.* Gregson (Mont.), 14 Pac. Rep. 659 [1887].

[8] Ives *v.* Smith, 8 N. Y. Supp. 46.

[9] Wiggins Ferry Co. *v.* C. & A. R. Co., 73 Mo. 389 [1881].

[10] Oakes *v.* Cattaraugus Water Co. (N. Y.), 38 N. E. Rep. 461.

[11] Lewis *v.* Gallner (N. Y.), 29 N. E. Rep. 81, *reversing* 14 N. Y. Supp. 362.

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Contracts in general for total restraint of trade, or contracts for the purpose of creating a monopoly, or compacts having for their object the elevation or depression of the market prices, or to raise or lower the prices of goods and produce, or sales of stocks, grain, and produce on margins, or option contracts whose effect is to corner the markets, are held to be against public policy and void.[1]

82. Contracts Not to Bid or Compete.—If the undertaking is to prevent competition in trade at public sales or in bidding for public work it is against public policy. A compact entered into by members of a trade-union to establish and maintain uniform rates of charges and to prevent competition among its members is illegal, and one party cannot maintain an action against another who has underbid him.[2] A contract, or a note given by reason of an agreement, between contractors who belong to an association of masons and builders, the by-laws of which require the members to pay to the association 6 per cent. on all contracts taken by them, and to submit all bids for work first to the association, and which provide that the lowest bidder shall add 6 per cent. to his bid before it is submitted to the owner or his architect, is contrary to public policy and void.[3]

Contracts by builders or bidders to refrain from bidding against each other for public works or to share the profits with others not bidding at a public sale, or any agreements which tend to destroy competition, which the law requires before the contract is awarded, or to induce a sacrifice of the property sold, are illegal and void.[4] However, an agreement to bid, the object of it being fair, is not void.[5] It is a fraud upon the public for persons to obligate themselves not to bid, or not to bid beyond a certain sum.[6] An agreement to pay certain commissions to a person who shall become a mock subscriber and purchaser of house-lots, which the owner is to take back off his hands if he does not wish to keep them, the object being to induce others to purchase, is against public policy.[7]* Contracts by companies who have been competitors who agree not to compete with each other either as railroads for traffic, but to divide their earnings;[8] or as gas companies, not to compete in certain districts of a city, will not be enforced.[9] A railroad pooling contract, the evident object of which is to stifle competition for the purpose of raising rates, is void as contrary to public policy.[10]

[1] Illegal Contracts, 9 Amer. & Eng. Ency. Law 879.

[2] Moore v. Bennett (Ill.), 29 N. E. Rep. 888.

[3] Milwaukee Masons' & Builders' Ass'n v. Niezerowski (Wis.), 70 N. W. Rep. 166.

[4] 9 Amer. & Eng. Ency. Law 898; People v. Stevens, 71 N. Y. 527; Durfee v. Moran, 57 Mo. 374 [1874].

[5] Wicker v. Hoppock, 6 Wall. 94 [1867]; Flanders v. Wood (Tex.), 18 S. W. Rep. 573, *between competing architects.*

[6] Hunter v. Pfeifer, 108 Ind. 197; *see also* McMullen v. Hoffman (C. C.), 75 Fed. Rep. 547.

[7] McDonnell v. Rigney (Mich.), 66 N. W. Rep. 52; Atlas Nat. Bank v. Holm (C. C. A.), 71 Fed. Rep. 489.

[8] Texas & R. Ry. Co. v. So. Pac. R. Co. (La.), 6 So. Rep. 888.

[9] Chicago G. L. Co. v. People's G. L. Co. (Ill.), 13 N. E. Rep. 169 [1887].

[10] Chicago, M. & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co. (C. C. A.), 61 Fed. Rep. 993.

* *See* Lowest Bidder Chap. VI., Sec. 148, *infra.*

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83. Contracts that Promote Gambling.—It is against the policy of the law to sustain gaming or gambling contracts, whether at games of chance or on the stock-market; or even to enforce agreements to repay money borrowed for the purpose of gambling.[1] Anything which induces a man to risk his money or property without any other hope of return than to get for nothing any given amount from another is gambling and demoralizing to the community. All gambling is immoral, and, wagering or gambling agreements being in violation of the law and in the nature of a public wrong, have no legal effect. Money lent for the express purpose of settling losses on illegal stock-jobbing transactions to which the lender was no party, cannot be recovered back. It being unlawful for one man to pay, it cannot be lawful for another to furnish him with the means of paying. The mere fact that a lender of money knew that it was to be used for gambling in oil is not sufficient to defeat a recovery unless he confederated with the borrower for its unlawful use.[2] *

84. The Act Must Not be Inconsistent with the Duties and Obligations of a Party Who has Undertaken It.—Such duties and obligations may be due to the public, or they may be such as arise from fiduciary relations, as those of an agent to his employer, or of an officer to his company, or of a trustee to his beneficiary. Thus it has been repeatedly held that the officers of a railroad company cannot agree to locate its depot at a particular point,[3] or the route of its road through a certain place.[4] If the contract tends to sacrifice the interests of stockholders or of the public it is against public policy and therefore not valid.[5] The agreement is not of itself void,[6] and will hold if the company's and public interests have not suffered.[7]

An interesting case came before the courts in Oregon, where one H. being director and president of a railroad company and owner of a controlling interest in the stock, agreed for a money consideration to cause the line of railroad to be relocated over a longer and more expensive route; the contract was held to be contrary to public policy. It was held that a railroad company was a sort of public corporation, and that its officers were bound to be disinterested in the consideration of public questions.[8]

85. A Fiduciary Can have No Personal Interest in His Principal's Contract.—Independent of the fact that a railroad company is a *quasi*-public cor-

[1] Stebbins *v.* Leowolf, 3 Cush. 137 [1849].
[2] Waugh *v.* Beck (Pa.), 6 Atl. Rep. 923 [1886].
[3] Florida Cent. & P. R. Co. *v.* State (Fla.), 13 So. Rep. 103; Northern Pac. R. Co. *v* Territory (Wash.), 13 Pac. Rep. 604 [1887].
[4] Linder *v.* Carpenter, 62 Ill. 309 [1872]; *also* 13 Ill. App. 568.
[5] Bestor *v.* Wathen, 60 Ill. 138 [1871].
[6] Railroad Co. *v.* Ralston, 41 Ohio St. 573.
[7] Frey *v.* Ft. Worth & R. G. Ry. (Tex.), 24 S. W. Rep. 950; Bank *v.* Hendrie, 49 Iowa 402 [1878]; Mills County *v.* B. & M. R. Co., 47 Iowa 66 [1877].
[8] Holiday *v.* Petterson, 5 Oregon 177 [1874]; 1 Redfield on Rys. 577, § 140; Fuller *v.* Dame, 18 Pick. 472; Pacific R. Co. *v.* Seeley, 25 Mo. 212; Bestor *v.* Wathen, 60 Ill. 138 [1871].

* *See* Sec. 75, *supra*.

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poration, the fiduciary relation of an agent, engineer, officer, or director of a corporation to his company and its stockholders would prevent him from having any personal interest in a contract.[1] A contract by a freight-agent to share with a contractor in the profits of a contract, the only service of the freight-agent being to allow the contractor a low freight rate on materials of construction, is void as against public policy.[2] An agreement by the bookkeeper of a corporation to disclose its financial condition to another is void, and it is immaterial that such other is a stockholder of the corporation.[3] An agreement between two real-estate agents representing different principals to divide commissions in case they effect a sale between their respective principals is void as against public policy, and the fact that the sale was effected at the valuation that each principal had set on his property with his agent will not give validity to the agreement.[4] A contract made by a person on behalf of two parties and acting in the capacity of agent for both is voidable. It must be ratified or adopted to become binding. Such a contract may be ratified by a municipal corporation.[5] An agreement by the superintendent and general manager of a mill company in consideration of five thousand dollars to use his influence and authority to secure the removal of the mill to another place and the extension of its logging-roads to that place is void as against public policy.[6] So where an architect and defendant agreed to build houses for sale, the latter to advance the money and the former to contribute his skill and time as superintendent, each to have half of the profits after sale, it was held that the defendant could not charge plaintiff with the land used for building purposes at a greater price than its original cost, though it was bought with money furnished by him and the title was taken in his name.[7]

However, a contract founded on a promise to disclose information as to a place where a railroad company intended to locate its depot is not void as against public policy where there is nothing to show that the plaintiff obtained his information by reason of any relation of trust or confidence that he bore to the railroad company, or that it had any interest in the subject-matter of the contract, or that it attempted to keep the location of the depot a secret.[8] *

86. A Man Cannot by Contract Forfeit Certain Rights and Privileges the Protection of Which the Law Guarantees.—"The Declaration of Independence holds the truth self-evident that all men were endowed by their Creator with certain inalienable rights; that among these are life, liberty, and

[1] Bestor *v.* Wathen, 60 Ill. 138.
[2] Barclay *v.* Williams, 26 Ill. App. 213 [1887].
[3] Davenport *v.* Hulme (Super.), 32 N. Y. Supp. 803.
[4] Levy *v.* Spencer (Colo. Sup.), 33 Pac. Rep. 415.
[5] City of Findlay *v.* Pertz (C. C. A.), 66 Fed. Rep. 427.
[6] Lum *v.* Clark (Minn.), 57 N. W. Rep. 662.
[7] Budd *v.* Scudder (N. J. Ch.), 26 Atl. Rep. 904.
[8] Green *v.* Brooks (Cal.), 22 Pac. Rep. 849; *but see* Wills *v.* Abbey, 27 Tex. 202.

* *And see* Secs. 42, *supra*, and 508–518, *infra*.

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the pursuit of happiness"; and, being inalienable, no one can give them away for or as a consideration; and to these might have been added one's character, religion, citizenship, and many other things which cannot be for sale or subjects of exchange.[1]

Such an agreement would be against the policy of the law, and against public policy. If the undertaking tends to injustice or oppression, restraint of liberty, commerce, or natural or legal right; if it tends to obstruct justice, or to violate the law, or is against good morals—it is against public policy and cannot support a contract.[2] It does not matter that the parties are innocent of any design to violate the law; if the effect of their agreements or acts is against the laws or public policy, then the contract must fail.

It is contrary to public policy for a person to make agreements to forego his inalienable natural rights. A contract by which a person agrees not to demand damages or compensation for injuries that may arise from another's acts or negligence is within this class. Such contracts are those of carriers of freight and passengers, as railroad, express, and telegraph companies, that seek to avoid or limit their responsibility for negligence or delay in transporting or delivering goods or messages by notices, clauses, conditions, or even by deeds. Such agreements and contracts have frequently been declared inoperative and void.[3] It may be doubted even if they may so contract with persons carried gratuitously, *i. e.*, with persons traveling on free passes. It has frequently been held that they could not, though there are cases to the effect that they can.[4] A railroad company was held liable for causing the death of a passenger by the negligence of its employees notwithstanding he was at the time riding upon a free pass upon which was a stipulation signed by him releasing the company from all liability for injury to his person or property while using the pass.* A contract on a telegraph-message blank that the company will not be liable for but ten times the cost of sending the message has been held invalid so far as the damage is the result of negligence on the part of the company or its servants.[5]

Parties cannot by private agreement in advance of a controversy oust the courts of their proper jurisdiction. It is true that a matter in controversy or a pending civil suit may be finally submitted to arbitration or to the

[1] 9 Amer. & Eng. Ency. Law 883.
[2] 9 Amer. & Eng. Ency. Law 880.
[3] 9 Amer. & Eng. Ency. Law 913; 26 Amer. Law Rev'w 212 [1892]; 21 Amer. Law Rev'w 506; L. S. & M. S. Ry Co *v.* Spangler (Ohio), 23 The Reptr. 734 [1886], 44 Ohio St. 471; Porter *v.* N. Y. L. E. & W. R. Co., 129 N. Y. 624 [1891].
[4] *See cases just cited, and see* 36 Alb. Law Jour. 404. A recent case carried to the court of appeals in New York held not. Porter *v.* N. Y. L. E. & W. R. Co., 129 N. Y. 624, [Dec. 1891]; *see also* Rose *v.* Des Moines R., 39 Iowa 246, 20 Amer. Ry. Rep. 326; *and many cases cited in note* p. 338.
[5] Marr *v.* Telegraph Co. (Tenn.), 3 S. W. Rep. 496 [1887], 85 Tenn. 529.

* *See* Engineers' and Architects' Employment, Sec. 864, *infra*.

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decision of a single judge, or by omitting to exercise their rights the parties may waive them as they choose, but they cannot by an agreement in advance, when no matter of dispute or controversy has yet arisen, forfeit their rights to a proper adjudication in the appropriate tribunal established by law when a proper case may be presented.[1] It is a constitutional right, and neither a statute by the state nor an agreement of the parties made in advance under it can justify a denial of the right.[2] *

It is true that parties may impose as a condition precedent to an application to the courts that they shall first have settled the amount to be received by an agreed mode of liquidation or adjustment, and this in many cases provides a much more appropriate tribunal for the purpose than a jury.[3] The principle involved in these cases does not close the access of the parties to the courts of law, as the award of the arbiter is only enforceable there. On the same ground it is against public policy to sustain an agreement by an employee that an officer of the company employing him shall be the sole judge of the damages to be assessed for breach of the company's rules, and that the officer's decision shall be final and conclusive of the rights of the employee ;[4] but it has been held that a contract by which a railroad employee agreed, on becoming a member of the relief department of the company, that the acceptance of relief from such department on being injured should bar his right to sue the railroad company for the injury is not one against public policy.[5] It is not invalid in that it restricts the liabilities of railroads for the negligence of their employees.[6] Nor is it void for want of mutuality nor for lack of consideration.[7] It is on this same ground of public policy that agreements by contractors to abide the decisions of civil engineers and architects as final and conclusive, without recourse to courts of law or equity, have been declared not binding, illegal, and void. The courts have held that the government guarantees every man the protection of the courts and their assistance, and that no man can enter into a contract that shall deny him this privilege and right.†

A contract of employment between a company using patented machines and a mechanical engineer which requires that any improvements in the machines made by such engineer shall belong to the company is not unreasonable nor contrary to public policy.[8] ‡

[1] *See* Ins. Co. *v.* Marse, 20 Wall. 445.
[2] *See* Atlanta & R Co. *v.* Monghan, 49 Ga. 260; Nate *v.* Hamilton Ins. Co., 6 Gray 174; Hobbs *v.* Manhattan Ins. Co., 55 Me. 421; Scott *v.* Avery, 5 H. of L. Cas. 811; Story Eq. Jur., § 670.
[3] Monon. Nav. Co. *v.* Fenlon, 4 W. & S. 205; 7 Casey 306; 79 Pa. St. 480, *citing engineering cases to support them.*
[4] White *v.* Middlesex R. Co., 135 Mass. 216 [1883].
[5] Chicago, B. & Q. R. Co. *v.* Bell (Neb.), 62 N. W. Rep. 314; Pittsburgh, etc., R. Co. *v.* Cox (Ohio Sup.), 45 N. E. Rep. 641; Shaver *v.* Penna. Co. (C. C.), 71 Fed. Rep. 931.
[6] Donald *v.* Chicago, B. & Q. Ry. Co. (Iowa), 61 N. W. Rep. 971.
[7] Pittsburgh, etc., R. Co. *v.* Cox, *supra.*
[8] Hulse *v.* Bonsack Mach. Co. (C. C. A.), 65 Fed. Rep. 864.

* *See* Secs. 344–5 and 405–409, *infra.*
† *See* Secs. 339–345 and 406–412, *infra.*
‡ *See* Secs. 816–825, *infra.*

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87. Immoral Contracts.—A contract for immoral or indecent purposes will not be sustained; if it is to effect an immoral object it will not be enforced. An agreement to pay money for the use of a carriage or of a house or of furniture which is to be used for immoral purposes will not be enforced; and the same, it is submitted, might hold true if a contractor had built a house or fitted up quarters knowing they were to be employed for indecent or unlawful purposes, or for any purpose that tends to induce immorality.[1] Such might be the erection of a still for illicit distillation, or the fitting and furnishing of a barroom in a no-license state, or the erection or furnishing of a house of prostitution or for gambling,[2] or possibly of a bucket-shop or even a stock exchange.[3]* An owner who has parted with the possession of his personal property under a contract which is against good morals and void as against public policy, the law will not aid him to recover the possession of such property, but will leave the parties in the situation in which they have placed themselves.[4]

All contracts having for their object the "making of matches" for marriages, or the separation of man and wife, or to restrain the freedom of marriage or the right of selection of a companion, or to prohibit marriage, are against public policy, illegal, and void.[5] Therefore a contract intended to facilitate the procuring of a divorce at the suit of either of the parties thereto is void.[6] A contract to sell letters from persons who are diseased to a person who advertises articles and instruments to cure them is contrary to good morals and void.[7] No recovery can be had for the expense of printing an immoral publication.[8]

Illicit intercourse is not a consideration for a promise to marry, and a promise to marry a woman if she will give herself up to the promisor is tainted with immorality and is not a legal contract. Such a contract must be distinguished from a promise to marry and the promisor afterward taking advantage of the trust and confidence imposed in him.[9]

The defense of public policy proceeds not upon the idea of relief to the defendant, but protection to the public, and it is immaterial that a defendant was ignorant of the illegality.[10] It is not therefore necessary to plead public policy to prevent a recovery on a contract invalid as against public policy.[11]

[1] 9 Amer. & Eng. Ency. Law 921; Pearce *v.* Brooks, L. R. 1 Exch. 213; Reed *v.* Brewer (Tex.), 36 S. W. Rep. 99.

[2] *Contra* Michael *v.* Bacon, 49 Mo. 476, *and cases cited.*

[3] *See cases collected in* 9 Amer. & Eng. Ency. Law 922. Reed *v.* Brewer, *supra*, held that notes given for furniture for a house of prostitution were void.

[4] Hutchins *v.* Weldin, 114 Ind. 80 [1887].

[5] 9 Amer. & Eng. Ency. Law 918-921.

[6] Wilde *v.* Wilde (Neb.), 56 N. W. Rep. 724.

[7] Rice *v.* Williams, 32 Fed. Rep. 437 [1887].

[8] Poplett *v.* Stockdale, 2 C. & P. 198.

[9] Hanks *v.* Waglee, 54 Cal. 51 [1879]; Bourngueres *v.* Boulin, 54 Cal. 146 [1880]; Saxon *v.* Wood (Ind.), 30 N. E. R p. 797.

[10] Church *v.* Proctor (C. C. A.), 66 Fed. Rep. 240.

[11] Sheldon *v.* Pruessner (Kan.) 35 Pac. Rep. 201.

* *See* Sec. 76, *supra.*

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When the immediate object of an agreement is unlawful the agreement is void,[1] and a contract executed in consideration of a previous illegal one is void.[2]

A contract otherwise valid is not void *in toto* merely because in certain independent particulars it is broader than, or goes beyond the scope of, the law.[3]

[1] Pollock on Contracts (4th ed.) 321.
[2] Cate *v.* Blair, 6 Coldw. 639; Pierce *v.* Kibbee, 51 Vt. 559; King *v.* Winanto, 71 N. C. 469, *also* 73 N. C. 563.
[3] Ragsdale *v.* Nagle (Cal.), 39 Pac. Rep. 628; Arnot *v.* Coal Co., 68 N. Y. 558. A case of making the price of coal, the plaintiff had assisted in facilitating the illegal act. *And see* 2 Keener's Cases on *Quasi*-Contracts 35.

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CHAPTER IV.

LAW OF CONTRACTS. ESSENTIAL ELEMENTS OF A CONTRACT. MUTUAL CONSENT OR MUTUAL ASSENT.

88. There Must be Mutual Understanding.—The fourth essential element of a valid and binding contract is a mutual understanding between the parties as to the essential terms of the agreement between the parties; there must be privity, mutual understanding, and no mistake.[1] Mutual consent must always exist at the moment when the contract is made. An express refusal to abide by an award, made at different times by the parties thereto and without any meeting of their minds, is not a contract that will operate as a discharge of the award.[2]

89. Mutual Consent Must be Shown by Some Overt Act.*—It is impossible to enter into a person's thoughts or ascertain how fully he comprehends what he is doing or what he intends to do, and mutual assent is not therefore in general capable of direct proof; but proof of acts performed that indicate a purpose or intention on the part of the contractor is sufficient proof of consent on his part to the terms of his agreement. As Professor Langdell has said in his Summary:[3] "Mental acts are not the materials out of which promises are made; a physical act on the part of the promisor is indispensable, and when the physical act has been done only a physical act can undo it." If one party has made an offer which has been duly accepted by the other, or if one has made a delivery and the other appropriated the thing delivered, proof of these facts is sufficient proof of the mutual consent of the parties. If such acts cannot be proved, then the contract fails, for whatever may have been in the minds of the parties, or however mutual their unexpressed wishes may have been, they will not suffice to create a contract unless manifested by some overt act. The mental state in itself signifies nothing; it requires manifestation.

If, on the other hand, it can be conclusively proven that mutual consent is lacking, the performance of the acts will amount to nothing toward es-

[1] Gill Manfg. Co. *v.* Hurd, 18 Fed. Rep. 673 [1883]; Pullman Palace Car Co. *v.* Tex. & Pac. R. Co., 11 Fed. Rep. 625 [1882]; Greve *v.* Gauger, 36 Wis. 369; Shields *v.* Hickey, 26 Mo. App. 194 [1887].

[2] Hynes *v.* Wright, 62 Conn. 323; *but see* Sheffield Fur. Co. *v.* Hull Coal & Coke Co. (Ala.), 14 So. Rep. 672.

[3] Langdell's Summary of Law of Contracts 1090.

* *See* Sec. 183, *infra.*

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tablishing a contract. An offer must be a physical and mental act combined, the mental act being embodied in, represented by, and inseparable from the physical act. If the mental act becomes impossible, then the offer comes to an end, as in death or insanity, either of which during the pendency of an offer makes the contract impossible for want of mutuality.[1]

As an instance, suppose an engineer draws up two contracts for the approval of his company, both of which are signed and sealed, and the company elects to deliver one of the instruments, but by mistake delivers the other instead, then there is no contract.[2] There must be a definite understanding between the parties as to all the elements of the contract.[3]

90. There Should be No Misunderstanding.—A material error as to the kind, quantity, quality (?), or price of the subject-matter may make the agreement void, either because there was never any real consent of the parties or because the things or state of things to which they consented does not exist or cannot be realized.[4] Therefore it was held no contract when a telegraph-operator by mistake made an order for three rifles to read as an order for fifty rifles.[5]

A mistake as to the person with whom the contract is made has been held to invalidate it where it was shown that the contractee never intended to contract with the person who assumed to be the contractor.[6] A mistake as to which of two things was the subject of the sale will render the obligation not binding. Thus in the description of an estate sold, if the description include a piece of land not intended to be included in the sale, then there is no mutual understanding, and therefore no contract.[7] Another instance is afforded where materials were bought to arrive by a certain ship Peerless, which the contractor supposed to be a vessel that sailed from a distant port in October; but there were two ships named the Peerless, the one meant by the seller sailing in December, and it was held that there was no binding contract, because there was a mistake as to the subject of the proposed sale.[8]

A contract will not be enforced when it appears to have been based on the supposed existence of a certain fact which furnished the motive for

[1] Langdell's Summary of Contracts. 1091.

[2] A contract is completed by delivery. There was no contract as to the one delivered, for there was no consent; not as to the other contract, because there was no delivery to evidence the assent. Langdell's Summary 170. [It might be a very difficult matter of proof, however.—ED.]

A contract signed by both parties and left with the engineer or architect for their joint benefit has been held a good delivery. Coey *v.* Lehman, 79 Ill. 177; Blanchard *v.* Blackstone, 102 Mass. 343.

[3] Hubbard *v.* Thompson, 25 Fed. Rep. 188 [1885]; Sibley *v.* Felton (Mass.), 31 N. E. Rep. 10.

[4] Pollock on Contracts 433; Hopkins *v.* Hinkley, 61 Md. 584; Rogers *v.* Walsh, 12 Neb. 28; Gibson *v.* Pelhie, 37 Mich. 380; Lamar Milling & Elevator Co. *v.* Craddock (Colo. App.), 37 Pac. Rep. 950.

[5] Henkle *v.* Pape, L. R. 6 Ex. 7.

[6] Boulton *v.* Jones, 2 H. & N. 564; Boston Ice Co. *v.* Potter, 123 Mass. 28; *but see* Benjamin on Sales 372.

[7] Calverly *v.* Williams, 1 Vesey Jr 210; Pollock on Contracts 430, 431, *and cases cited.*

[8] Raffles *v.* Wichelhaus, Langdell's Select Cases on Contracts 39.

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entering into the agreement if it subsequently transpires that the assumption on which the contract was based was erroneous.[1]

An agreement by the owner of a patent for certain machines to furnish to another "such a number of machines as he desires for his own use at present or hereafter" was held void for want of mutuality.[2]

An error as to *quality* will not suffice to make a transaction void unless it is such that, according to the ordinary course of dealing and use of language, the difference made by the absence of quality wrongly supposed to exist amounts to a difference of kind, and furthermore the mistake must be common to both parties,[3] or it may be a mistake on one side and fraud on the other. As Mr. Dickson says in his notes to Pollock on Contracts: "The law tolerates a good deal of lying in trade when it is merely in the nature of puffing one's own goods or deprecating those of another, provided the thing bargained for reveals its own qualities and is open to the parties' equal inspection."[4]*

It has been held that executed contracts are obligatory without regard to mutuality.[5] The fact that it is left optional with one party whether he will enforce his rights under the contract is not a ground for a defense of want of mutuality by a party who has received the benefit;[6] but an agreement which is void as against public policy does not give one party the right to sue for damages for failure of the other party to perform his part, though the first party has performed his part.[7]

If a misunderstanding as to the price to be paid be proven no obligation will be created. Thus when a watchman was employed at one dollar and a half per day, and nights the same, and the employer understood him to say and mean one dollar and one-half for every twenty-four hours, while the watchman meant that amount for a day of twelve hours, it was held that there was no contract, because the parties had never assented to the same thing; that the watchman had never consented to work for one dollar and a half per twenty-four hours nor the employer to pay three dollars, but that, the watchman having performed the services, he was entitled to recover what they were reasonably worth.[8]

In another case where shingles were bought at a price agreed upon, but there was a dispute as to whether the shingles were by the "bunch" or by the thousand, it was held that unless both parties had understandingly

[1] United States *v.* Charles (C. C. A.), 74 Fed. Rep. 142.

[2] Columbia Wire Co. *v.* Freeman Wire Co. (C. C.), 71 Fed. Rep. 302.

[3] Pollock on Contracts 436; *American cases cited in the Blackstone edition* [1888].

[4] Poland *v.* Brownell, 131 Mass. 138; Armstrong *v.* Huffstutler, 19 Ala 51; Hill *v.* Bush, 19 Ark. 522; Bell *v.* Henderson, 6 How. (Miss.) 321.

[5] Grove *v.* Hodges, 5 P. F. Smith 504.

[6] Waterman *v.* Waterman, 27 Fed. Rep. 827.

[7] Kountz *v.* Flannagen (Sup.), 19 N. Y. Supp 33.

[8] Turner *v.* Webster, 24 Kan. 38 [1880]; Tucker *v.* Preston (Vt.), 11 Atl. Rep. 726 [1888]; Vogel *v.* Pekoe (Ill. Sup.), 42 N. E. Rep. 386.

* *See* Sec. 277a, *infra*.

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agreed to one of these views as to quantity, then there was no special contract as to price.[1] There is no contract unless the parties thereto assent, and they must assent to the same thing in the same sense.[2] *

An interesting case is reported in Maine, where a contractor proposed to erect a schoolhouse for $4550, as per plans and specifications, and, being the lowest bidder, the committee awarded the contract to him for $4525 and made it a matter of record, and required a bond for that amount for the completion of the work, also forfeiture for delays, etc. During construction trouble arose as to the erection of the building, and the court held that there had been no contract between the parties.[3]

In order to have a contract, the minds of the parties must meet and all the terms of the contract must be agreed to. If any part of the contract is not settled by the parties, or a mode agreed upon to settle it, there can be no contract as to that part.[4]

A memorandum reciting that a company has engaged an employee "for the season 1890–1891 at a salary of $75 per week, subject to the regulations and conditions of a contract to be substituted for the memorandum," is not a contract. There is no meeting of the minds of the parties as to the conditions, restrictions, and regulations mentioned.[5]

91. To Avoid a Contract Mistake or Misunderstanding Must be Shown Conclusively.—It may seem to the reader that such rules of law would enable any man to escape the obligation he has assumed, but it is thought not. The misunderstanding, as to the parties, thing, quantity, or price of the property, material, or goods sold or contracted for, must be of such a nature as a reasonably diligent man might fall into in order to relieve him from the performance of his contract, and that he did misunderstand and that there was no mutual consent he must satisfy twelve jurymen.[6]

If a proposal was misunderstood by an acceptor it is for him to show that the misunderstanding was reasonable. A contractor cannot be allowed to evade the performance of his contract by the simple statement that he has made a mistake or did not understand. If the owner or contractor at the time he executes the contract conducts himself so as to lead a reasonable man to believe that he understands and assents to its terms, and the contractor or owner executes and performs his part under that belief,

[1] Greene *v.* Bateman, 2 Woodb. & M. 239.

[2] 1 Parsons on Contracts 389; *and see* Flaherty *v.* Miner, 123 N. Y. 382, in which case it was claimed that the clause for architect's certificate was inserted by mistake. A strong architectural case. It is submitted that this question of quantity might frequently be determined by the custom or usage of the place.

[3] Howard *v.* School, 78 Me. 230; *and see* Hughes *v.* Clyde, 41 Ohio St. 339; *also* Verzan *v.* McGregor, 23 Cal. 339, where the contractor made a mistake in estimating amount and difficulty of work.

[4] Gill Manfg. Co. *v.* Hurd (Ohio), 18 Fed. Rep. 673 [1883]; *see* Lyndon Mill Co. *v.* Lyndon Lit. Inst., 63 Vt. 581, where the owner supposed the contractor was furnishing the materials as a gratuity.

[5] Walton *v.* Mather (City Ct.), 24 N. Y. Supp. 307.

[6] Pollock on Contracts 432.

* *See* Custom and Usage, Secs 604–628, *infra.*

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neither party can assert that he did not understand or assent to its terms.[1] Where the written draft of a contract is viewed as the consummation of the negotiations there is no contract until it is finally signed.[2] The burden of proof is on one affirming the completion of the contract before the written draft thereof was signed to show that the signing was not necessary to its completion.[3] A statement by plaintiff in his answer accepting the rate, and saying that he would be down the first of the week and make out a contract, does not prove that he did not suppose that his letter perfected the contract.[4] *

A demand for a sleeping-car berth and a promise to furnish it constitute a contract, the mutual obligations and promises being a valid consideration.[5] The same is true of a verbal application for cars of a railroad agent, who replies "*All right*," and makes an order for the cars. Such facts proven are sufficient to show that the minds of the parties met and that a contract was made.[6]

The mistake in executing a contract need not always be mutual in order to invalidate it.[7]

If there is a mutual mistake as to the existence of the subject-matter, as in the sale of a farm and buildings the latter of which were burnt, the vendor cannot recover the contract price.[8]

92. Manner of Coming to an Understanding—Offer and Acceptance Make a Contract.—The manner and method of parties reaching this mutual understanding are essentially various, but probably the most common way of evidencing a mutual consent to the terms of an agreement is by offer and acceptance; by one party making a statement of the terms by which he will abide in the shape of an offer, and then, while he is in that state of mind, *i. e.*, before he has expressed himself to the contrary or made a revocation of his offer, the other party accepting his offer unconditionally, in the same terms as made. Then is there a meeting of the minds, and from the moment of that acceptance there is a binding contract. Such an agreement is usually introduced by some questions as to whether a thing is for sale or to be performed; or the disposition to contract may be evidenced by a notice or advertisement that a certain sale is to take place or a thing is to be disposed of or that certain work is to be performed, inviting offers, pro-

[1] Phillip *v.* Gallant, 62 N. Y. 256.

[2] Steamship Co. *v.* Swift, 29 Atl. Rep. 1063, 86 Me. 248; *but see* Sanders *v.* Pottslitzer Bros. F. Co. (N. Y. App.), 39 N. E. Rep. 75.

[3] Mississippi & Dominion Steamship Co. *v.* Swift, 86 Me. 248.

[4] Lawrence *v.* Milwaukee, L. S. & W. R. Co. (Wis.), 54 N. W. Rep. 797. *See* Sec. 797.

[5] Pullman P. C. Co. *v.* Booth (Tex.), 28 S. W. Rep. 719.

[6] Pittsburgh, etc., Ry. Co. *v.* Racer (Ind.), 38 N. E. Rep. 186.

[7] Foster *v.* Mackinnon, L. R. 4 C. P. 704, 711; Pitcher *v.* Hennessy, 48 N. Y. 415.

[8] Wells *v.* Calman, 107 Mass. 514 [1871], *cases cited*. *But see* Harvard Law Professor's doctrine in Harvard Law Review, and an article on the effect of destruction of buildings on contract for sale of the property, 12 Central Law Journal 77, by E. A. Marshall.

* *See* Sec. 797, *infra*.

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posals, or tenders. This preliminary is then followed by a certain amount of fencing and bantering as to who shall first commit himself to the terms of an agreement. If it is a horse to sell, the seller will want the purchaser to make him an offer. He wants the highest price he can get for his horse, and if he makes an offer it may be accepted, which completes the contract, and he may have named a figure lower than he could have obtained had he been a little more prudent. If the seller gets the buyer to make him an offer, it is then in his hands to close the bargain and make it a sale or to reject it. If the offer be accepted before the buyer revokes his offer, then the contract is completed, and the would-be purchaser is bound by the agreement.

This desire to be noncommittal, or to keep the privilege of closing the contract, has given rise to auction sales and of letting work by advertising for bids, proposals, or tenders, by which means the owner or proprietor retains the right to determine the contract, and contracts are entered into in a manner more dignified and businesslike than those attending every-day bargaining.

The subject of offer and acceptance presents many nice questions as to *what* is an offer, *what* constitutes an acceptance, at *what* moment the acceptance takes effect and the offer becomes irrevocable, and *what* effects a revocation of an offer.

93. What Is an Offer?—An offer is a proposal to make a promise, and in law it is not an offer until it comes to the knowledge of the person to whom it is made. The offer must be made in the form of a proposal to become binding upon acceptance. An offer in the form of a question, as, "Will you or would you take or accept $10 a thousand?" is not an offer at all. The offer must be in such terms that if accepted both parties shall be bound, that the obligations may be mutual. Had the would-be purchaser said, "I will give you $10 a thousand," and the seller signified his assent by accepting the offer or by delivering the materials, that would have made a valid contract.

An offer has been called a conditional promise which may be revoked at any time before it is accepted. It is not a promise, for it is revocable, while a promise is not; but if it is accepted in due course of time, *i. e.*, within a reasonable time, and in the precise terms that it was made, it then becomes a promise, and the offer and acceptance becomes a promise for a promise, which constitutes a contract.

In bilateral contracts where the offer and consideration are mutual promises, the offer becomes a promise only upon the acceptance and performance of the consideration, *i. e.*, the giving of a promise in return for the promise offered. It therefore follows in a bilateral contract that if one party is bound both are bound, and both must have become bound at the same time. In a unilateral contract where the offer is made in consideration of an act or material thing, the offer becomes a promise "in consequence

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of what the contractor does or gives or suffers," while in a bilateral contract the offer becomes a binding promise "in consequence of what the contractor says," promises. Therefore the acceptance in a bilateral contract must amount to a promise or the adoption of the terms imposed in the offer as the consideration for the obligation assumed by the offerer. The adoption of the terms and the promise by the contractor and the continuance of the offer and the counterpromise by the one making the offer are implied by the law. The law implies the making of the counter offer in the terms of the original offer when the acceptance is made, and also imposes upon the offerer the presumption that he has remained in that state of mind so long as his offer continues, and that he will accept the counter offer in the same terms of his own offer.

In treating the subject of offer and acceptance it seems essential to distinguish between these two classes of contracts: those that are one-sided—unilateral, and those in which both sides are bound to perform, or bilateral contracts.

94. What Constitutes an Acceptance?—The acceptance differs from the making of an offer in that it is not always necessary to communicate it to the person making the offer. The acceptance of an offer may be expressed by words or signs, as by the acts of the parties; for example, the delivery of the materials or goods, or by accepting and using them, or by any overt act that indicates in the ordinary course of trade or business an acceptance of the terms offered. For all practical purposes it may be said that the offer is accepted when the person to whom the offer has been made has performed the conditions, *i. e.*, the consideration stipulated in the offer. The entering of an order on the books of a firm may constitute the acceptance and create a contract.[1]

In a public offer of a reward for the apprehension and conviction of the perpetrators of an act, the offer is accepted by the discovery and arrest of the culprit, unless, indeed, the act was done in ignorance of the reward having been offered. If such is the case it is no contract, because the offer had never been communicated to the apprehender. If an offer be made in consideration of the performance of certain acts the offer does not become a promise until the performance of the consideration is completed, and up to that moment the offer may be revoked or destroyed by the death of the one making the offer, and the offeree (contractor) be deprived of any pay for what he had done. Thus an offer in the terms, "If you build me a house according to these plans and specifications, on its completion I will pay you $10,000," would, it seems, allow the owner to back out and revoke his offer at any time before the house was finished, and leave the contractor without any remedy for his work and materials under the terms of their

[1] Camden Iron Wks. v. Fox (N. J. C. C.), 34 Fed. Rep. 200 [1887].

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would-be agreement.[1] This might cause great hardship and gross injustice on the contractor; but if it were held that the offer became a promise when the contractor began the performance of the consideration, it would be contrary to the manifest intention of the parties as shown by the terms of their agreement; and it would impose hardships upon the offerer (owner) when the contractor, as he might at any stage of the work, refuse to proceed further in performing the consideration of the offer. If the contractor should die, the offerer (owner) would then be without remedy. These troubles and hardships may be averted by making a binding contract before the work or performance begins, by giving an offer of a promise to pay, for a promise to perform, *i. e.*, by an exchange of mutual promises. If the parties neglect this precaution, any hardships they may suffer should be charged to themselves.

95. Contracts Made by Mail or Telegraph.—It is the acceptance of an offer that completes a simple contract, and it is the delivery of the instrument that makes a deed. The offer is supposed to continue till the time of its acceptance, for the offer and acceptance must exist at the same time, the moment when the contract is created. Thus when an offer is made by letter or by telegram, the offer is continued during the time that the letter or message is travelling, unless it is recalled or revoked, which revocation must be communicated to the person to whom the offer was made or sent.

It is frequently and popularly stated that the mailing of a letter of acceptance completes the contract, and it is frequently held by courts that an offer is accepted from the time the answer is deposited in the post-office.[2] It has been held too that a telegraph message containing an acceptance of an offer delivered on Saturday to the telegraph company, and required to be delivered on Sunday to the offerer, is wholly completed on Saturday, and not void because of Sunday laws.[3] It is pretty well settled in this country and in England that a contract is completed at the moment the letter of acceptance is mailed, or the message of acceptance delivered to the telegraph company.[4]

[1] In such cases the *law* implies a contract on the part of the owner to pay the reasonable value of the contractor's services and materials. If the owner request a contractor or mechanic to perform certain work or to furnish materials, or if, without any request, the owner stands by and allows the contractor to do work or furnish materials, acting in good faith, and the owner takes possession of the materials and work and enjoys the benefit thereof, the law will imply a contract on his part to pay for such work and materials. Thomas *v.* Walnut Land, etc., Co., 43 Mo. App. 653; Henderson B'dge. Co. *v.* McGrath, 134 U. S. 260; Richard *v.* Stanton, 16 Wend. (N. Y.) 25; *numerous cases cited*, 29 Amer. & Eng. Ency. Law 864–6. The work must have been performed with the owner's knowledge, consent, privity, or by his request. It must not have been done officiously, or no recovery can be had, however meritorious or beneficial it may be to the owner.

[2] Hunt *v.* Highman (Ia.), 30 N. W. Rep. 769 [1886].

[3] Western Union Telegraph Co. *v.* Way (Ala.), 4 So. Rep. 844 [1887].

[4] Trevor *v.* Wood (N. Y.), 16 Am. Law Reg. 215 [1868]; Terrier *v.* Storer, 19 N. W. Rep. 288 [1884]; Adams *v.* Lindsey, 1 B. & A. 681 [1818]; Dunlop *v.* Higgins, 1. H. of L. Cas. 381 [1848]; Thomson *v.* James, Langdell's Cases on Contracts 125; Langdell's Summary of Contracts 993.

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The soundness of this rule has been questioned by good authority, who argue that the acceptance must be communicated to the original offerer to complete the contract, and this seems to be the Massachusetts rule.[1] The latter rule seems to be sustained by the decisions to the effect that if a letter or message of revocation is received by the offerer before or at the same time he receives the letter of acceptance the revocation will render the acceptance inoperative, even though the letter was mailed before the revocation was sent. If the letter of acceptance be followed by another letter, not revoking but modifying the acceptance, and the two are delivered at the same moment, the later letter will take effect, no matter which letter happens to be opened first.[2] The cases cited would seem to hold that a contract is not consummated at the moment the letter or message of acceptance is sent if the contractor can get his revocation to the offerer before or by the time the acceptance is delivered.

Proof that a letter was duly stamped and addressed and mailed is *prima facie* evidence that the person to whom it was sent received it[3] if it appears that he then resided in the town to which the letter was addressed,[4] and the delivery of a letter to a mail-carrier is equivalent to depositing it in the post-office.[5]

96. Acceptance Must be Unconditional and in the Same Terms as the Offer.—The acceptance must be absolute, positive, and unconditional. An offer can be accepted only in the terms in which it is made, and if the acceptance modifies the offer in any particular it is not an acceptance that will create a contract, but is a counter-offer. Therefore where a quantity of tin was offered at a certain price, and the reply was: "We accept your offer if full-weight plates," it was held that the acceptance was conditional and did not constitute a contract.[6] A letter reading, "I am prepared to make the arrangements with you on the terms you name," in answer to a letter of proposal, does not constitute an unconditional acceptance.[7]

If the terms of the offer are not restated in the acceptance, the parties will be bound by the terms of the offer. Thus where a railroad offered to carry logs at a certain rate, the shipper to chain the logs if necessary for safety, which rate was accepted, it was held that by accepting the rate without qualification the shipper accepted all the conditions specified by the railroad company.[8]

An offer must be accepted just as it was made, and without modification or qualification. A qualified acceptance of an offer, *i. e.*, an acceptance in terms that differ from those in which the offer was made, becomes a new

[1] Langdell's Summary of Contracts 993.
[2] Langdell's Summary of Contracts 996.
[3] McFarland *v.* U. S. Mut. Accdt. Assn. (Mo. Sup.), 27 S. W. Rep. 436; Young *v.* Clapp (Ill. Sup.), 35 N. E. Rep. 372.
[4] Goodwin *v.* Provident Sav. Life Assur. Soc. (Iowa), 66 N. W. Rep. 157.
[5] Pearce *v.* Langfitt, 101 Pa. 507 [1883].
[6] Kirwin *v.* Byrne (Com. Pl.), 29 N. Y. Supp. 287; 27 N. Y. Supp. 143, *affirmed.*
[7] Havens *v.* American Fire Ins. Co. (Ind. App.), 39 N. E. Rep. 40.
[8] Lawrence *v.* Milwaukee, etc., R. Co. (Wis.), 54 N. W. Rep. 797.

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offer, which the original offerer may accept and thus complete the contract. The acceptance must conform to the conditions expressed or implied in the offer in respect to time, place, manner, and method in which it is given or made.

The acceptance must be made or mailed within the time named in the offer, and if no time be named, within a reasonable time, which latter will depend upon the circumstances and is a question of fact for the jury.[1] If the offer requires the acceptance to be sent to a particular place, a letter of acceptance sent to another place will not create a contract.[2] An offer containing a request to answer by telegraph "yes" or "no," and stating that unless the answer is received by a certain day "shall conclude no," the acceptance must be received by telegram on or before the date named.[3]

If the offer is neither accepted nor rejected, but a new offer made in turn, it amounts to a constructive rejection of the original offer.[4] If the first offer is afterwards accepted, it does not create a contract, but is only a new counter-offer which may be accepted or rejected by the original offerer.[5]

97. What Effects a Revocation of an Offer.—An offer must be communicated to the offeree, and it can be revoked only in the same manner. It may be withdrawn at any time before it is accepted, but the withdrawal must be brought to the knowledge of the party to whom it was made.[6]

It is not to be supposed that the offeree can leave town or secrete himself and thus avoid a revocation of an offer, for a letter withdrawing the offer, properly directed, with a return notice thereon, and mailed in time to reach the person to whom the offer was made before his letter of acceptance was mailed, will be held to have been received in the absence of strong proof to the contrary.[7]

In the case of an offer the offerer holds control of it and may call it back or revoke it, but once accepted the promise is made and the offerer has parted with his control of the offer and it is irrevocable. It can then be rescinded only by the mutual consent and agreement of both parties, *i. e.*, by another contract that they will not enforce their rights.[8]

A mere change of mind on the part of the offerer will not destroy an offer. It requires some physical act on his part to undo the making of the offer, and the physical act must be brought to the knowledge of the person to whom the offer was made.* An offer to sell materials is not revoked by sell-

[1] Ferrier *v.* Storer, 19 N. W. Rep. 288 [1884].

[2] Eliason *v.* Henshaw, 4 Curtis 382 [1819].

[3] Lewis *v.* Browning, 130 Mass. 173 [1881]; Horne *v.* Niver (Mass.), 46 N. E. Rep. 393.

[4] Hyde *v.* Wrench, 3 Beavan 334.

[5] Sheffield C. Co. *v.* Sheffield & R. Ry. Co., 3 Ry. & C. Cas. 121; W. & H. M. Goulding *v.* Hammond (C. C. App.), 54 Fed. Rep. 639. When and under what conditions silence or a failure to reply will amount to an acceptance of an offer, *see* 27 Am. Law. Reg. N. S. 260 [1888]; Tyler *v.* Tuatlin Acad. etc., 26 Am. Law. Reg. 339 [1887].

[6] Langdell's Summary 1090; Sherwin *v.* Nat. C. R. Co. (Colo. App.), 38 Pac. Rep. 392.

[7] Sherwin *v.* Nat. C. R. Co., *supra*.

[8] Foster *v.* Dabber, 6 Ex. Ch. 851; Morawetz on Corporations, § 871.

* *See* Mutuality, Secs. 89, *supra*.

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ing them to some one else.[1] The offer continues and may be accepted at any time before it is revoked and its revocation is brought to the knowledge of the offeree. The offeree and the purchaser of the materials cannot both acquire title to the materials, but as against the seller they can both acquire the right to the goods, together with the alternative right to damages, which is all that a contract secures to the contractor in any case.[2] In the case of a specific chattel where the title passes immediately upon the acceptance of the offer doubtless the person who first completes his contract with the seller will get title to the goods, and may retain possession of them; but when the offer is to sell real property or unspecified personal property it may be doubted whether a subsequent sale of the property, whether executed or executory, would have any effect upon the contract created by accepting the offer.[3]

It is often held that a definite proposal to do work according to plans and specifications plus an unqualified acceptance by a city together constitute a contract, and the plans and specifications become a part of it.[3] But there are other decisions to the effect that the acceptance of a legally made bid for a proposed building does not in itself constitute a contract, but that the bidder is entitled to a contract in accordance with the terms of his proposal.[4] *

The distinction is a nice one, to say the least, and it is doubtful if it is worth making, as the contractor's rights and claims are substantially the same in either case. If no new terms are contemplated and the acceptance is unqualified, there is no doubt a binding contract. If from the circumstances there is an evident intention to enter into an agreement, and the preparation of the written contract was postponed as a matter of convenience and for the purpose of expressing in more formal language the agreement already arrived at, the contract will be considered as completed when accepted, and must be performed according to the terms of the proposal.[5] An intimation in the written acceptance of a proposal that a contract will be afterwards prepared, does not prevent the contract from taking effect.†

Care should be taken not to accept bids absolutely, but only on condition that the builder sign the contract and specifications in their prescribed forms, finding securities and executing the required bonds, etc. If the acceptance be made "subject to the execution of a contract to be prepared," or "subject to the preparation and approval of a formal contract," [6] or "subject to the conditions and regulations of a contract to be substituted for this memorandum," the contract will not take effect until it has been

[1] Query: if the offeree had been apprised of the sale by the purchaser would it revoke the offer.

[2] Langdell's Summary of Contracts 1091.

[3] Denton *v.* City of A., 34 Kan. 438 [1885]; Wiles *v.* Hoss (Ind.), 16 N. E. Rep. 800 [1888].

[4] Hughes *v.* Clyde, 41 Ohio St. 339.

[5] Lewis *v.* Brass, L. R. 3 Q. B. D. 667; Lawrence *v.* M. L. S. & W. R. Co., 54 N. W. Rep. 797.

[6] Winn *v.* Bull, L. R. 7 Ch. Div. 29.

* *See* Lowest Bidder, Secs. 182-8, *infra.*

† *See* Sec. 797, *infra.*

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formally executed.[1] In each case the evident intention of the parties will hold in determining whether the contract was completed, or whether it was intended to complete it on some later occasion.

An offer which is to continue or remain open for a time named is only an expression of the intention of the parties, and fixes the length of time it shall continue, provided it be not revoked in the meantime. To make such a stipulation binding it must be supported by a consideration or be expressed in a sealed instrument. Even then the offer may be revoked, which act on the part of the offerer would give to the other party a right to damages for the breach of his contract to keep the offer open. A court would not enforce the execution or completion of the contract.[2]

If a dealer agrees with a contractor in consideration of $1 that the contractor shall have the refusal of certain materials for one month for $5000, the law supposes the dealer to offer the materials to the contractor for $5000 and to stipulate that the offer shall continue for one month. If the contractor revoke the offer, then he becomes liable for the damages the contractor suffers in consequence, which would probably be the difference between the price agreed upon and the price at which the contractor could have bought.[3] *

[1] Walter *v.* Walther (City Ct.), 24 N. Y. Supp. 307; *but see* Emdem's Law of Building 58.

[2] Langdell's Summary of Contracts, 1089.

[3] Langdell s Summary of Contracts, 1090.

* *See* Lowest Bidder, Secs. 182–200, especially Sec. 184, *infra.*

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CHAPTER V.

LAW OF CONTRACTS. GENERAL STATUTES LIMITING THE LAW OF CONTRACTS.

STATUTE OF FRAUDS.

98. Proof of Terms of Contracts.—From what has preceded the reader has no doubt often wondered how certain things were to be proved. The existance of certain facts and the proof of them are two quite different things. The facts attending every contract must be viewed in the light shed by the evidence offered as seen by the jury. The facts ascertained, it is the province of the court to determine what laws are applicable and what rights belong to the parties. The most inexperienced will appreciate how difficult it must be to prove the terms of contracts by the parol evidence of the parties or by that of witnesses. The fallibility of men's memories and the frequent change of residence increase the difficulties as the time increases.

To prevent frauds and perjuries statute laws have been passed which require that important contracts be attended by certain ceremonies and overt acts by which they may be proved in courts, and on account of the loss of evidence after the lapse of time statutes have been passed limiting the liability of parties to certain periods or lengths of time. That the public may have notice of certain contracts and obligations, especially those pertaining to transfers of land and to important construction work some states require that they shall be made the subject of public record. In some states it is required that all contracts and specifications for construction of buildings and works shall be recorded with the registry clerk of the district.

99. Statute of Frauds.—In nearly all the states, in Canada, and England there are statutes requiring certain contracts to be in writing which are known as the Statute of Frauds. The statute arose from the necessity of having contracts in writing to prevent frauds and perjuries in proving the the contract; hence its name. These statutes usually provide that contracts in which the consideration is more than £10 (or $40 or $50) cannot be enforced in courts of law if they are not in writing, or there has not been a part payment or a part delivery; and contracts for an interest in lands, or that cannot be performed within one year, or to pay the debt of another, are voidable if not in writing. The reasons and circumstances requiring the passage of such a statute law exist in construction contracts, and every prudent man will require a written contract for construction work.

When the statute provides that certain contracts should be in writing, it

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is imperative that they should be so made. If such a contract is not in writing it can furnish no ground of action or basis of defense to either party, but they must stand as though no express contract had been made. The person rendering services may usually recover upon a *quantum meruit*,[1] but not upon the express contract.[2] If a contract is required to be in writing, all material variations of such contract must be in writing.[3]

The general requirements of the different statutes are the same for the different states, but there are slight differences which it is impossible to treat here. The advice of a local attorney should be sought for the interpretation and application of the statute of the different states, however, some general statements may be made and cases be given which will illustrate the working of the statutes.

100. Statute of Frauds.—Contracts for the Sale of Goods, Materials, and Merchandise.—The statute as enacted in nearly all the states of the Union has a section very similar to the following: "No contract for the sale of goods, wares, and merchandise for the price of [$30 in New Jersey to $300 in Utah] or more, shall be good or valid unless the purchaser accepts and receives part of the goods so sold or gives something in earnest to bind the bargain or in part payment; or unless some note or memorandum in writing of the bargain is made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

This section of the statute has been held to govern all forms of selling goods, as at auction, and to extend to every manner of private sale.[4] It applies to contracts for exchange, barter, and to executory as well as executed sales;[5] but a contract to give a chattel mortgage or a contract to become a partner in the sale has been held not within the statute.[6]

101. Contract for Goods to be Manufactured.—If the subject-matter of goods contracted for or sold has no existence and is to be manufactured, then the law varies in different states. Some hold that such a contract is within the statute, and other states hold it is merely a contract for work and labor. The latter doctrine is often called the New York rule; but there is a tendency to get away from it, even in the State of New York. If a contract be for the sale of an article which requires the personal skill or attention of the seller, it is a contract for work and labor; the test frequently applied being whether the seller is himself to manufacture them or to procure some particular person, or whether a delivery of goods by any one will satisfy the contract. If the latter, then it is a contract for the sale of goods. Other cases make the test one of design and purpose, holding that if the article manufactured is to be of special or peculiar design and not

[1] Salb *v.* Campbell (Wis.), 27 N. W. Rep. 45; Cohen *v.* Stene (Wis.), 21 N. W. Rep. 514.

[2] Lanham *v.* Osborne (Nev.), 18 Pac. Rep. 861 [1888].

[3] Malone *v.* Philadelphia 147 Pa. St. 416.

[4] Davis *v.* Robertson, 1 Mill. 71; Davis *v.* Rowell, 2 Pick. 64.

[5] 8 Amer. & Eng. Ency. Law 704.

[6] 8 Amer. & Eng. Ency. Law 705.

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suitable for general trade, then it is *not* within the statute.[1] Therefore a contract to furnish a monument for a certain amount, to be erected by a state on a battlefield, was held not a contract for sale of goods, within the statute of frauds, though the contractors were not bound to bestow their personal skill and labor thereon.[2] An agreement to take down a building and recrect it on another lot was held not a sale of goods, but an agreement for labor and to improve real estate.[3] A verbal contract to furnish material, and, after performing labor thereon, to attach it to the realty, as a part of a building in the course of construction, is not a sale of goods or chattels, and is not within the statute.[4] *

There is a safe road to travel in all such cases, and that is the surest though it be the longest. Adopt a steadfast rule of committing the terms of every contract to paper, and avoid the question and litigation consequent to a failure to adhere to the rule. The object of this book is not to get its readers out of trouble, but if possible to teach them to avoid trouble and litigation.

In the United States the statute is held to apply not only to personal chattels and ordinary goods, wares, merchandise, and materials, but also to stocks of corporations, bank and promissory notes, book accounts, and bond-scrip, but not, it seems, to an interest in a patent right.[5]

The burden of proving that the price exceeds the sum named in the statute rests upon the party setting up the statute in his defense, and where many articles or different materials are bought at the same transaction the aggregate price of the whole is the price to be considered.[6]

102. What is a Sufficient Memorandum of a Sale.—The note or memorandum need not be an agreement or contract, but it must contain the essential terms of the contract. It must show who are the parties, what was the subject-matter of the contract, the quantity, price, and any special terms agreed upon. The memoranda may be contained in several papers, as in the ordinary exchange of letters in correspondence. A written offer or proposal is sufficient if accepted. A bill of parcels, a receipt for money, a vote of a private or municipal corporation duly entered on its books,[7] or a series of letters or of telegrams put together, may make the necessary memorandum. Where connection is to be established between separate papers they must contain references to one another or be physically joined together. Parol evidence should not be necessary to establish their connec-

[1] Brown & H. Co. *v.* Wunder (Minn.), 67 N. W. Rep. 357.
[2] Forsyth *v.* Mann (Vt.) 34 Atl. Rep. 481.
[3] Scales *v.* Wil y (Vt.), 33 Atl. Rep 771.
[4] Brown & H. *v.* Wunder (Minn.), 67 N. W. Rep. 357; *and cases in* 29 Amer. & Eng. Ency. Law 860; Lee *v.* Griffin, 1 B. & S. 272; Clay *v.* Yates, 1 H & N. 73.
[5] Grigsby *v.* Fombs (Ky.), 21 S. W. Rep. 37; 8 Amer. & Eng. Ency. Law 710.
[6] 8 Amer. & Eng. Ency. Law 710.
[7] 8 Amer. & Eng. Ency. Law 712; Camden I. Wks. *v.* Fox, 34 Fed. Rep. 200 [1887].

* *See* Sec. 106, *infra.*

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tion with the contract. If all the papers be signed they need not refer to one another, but all must refer to the contract. Parol evidence may be introduced to identify the papers, but not to connect them.

The memorandum may be printed, made in pencil or stamped; it need not be delivered to the opposite party, nor need it be published. It is sufficient that a written memorandum was made and signed by the party to be charged. If lost its contents may be proved like those of any writing.[1]

103. Contracts to be Performed within One Year.—The statute usually provides that no action shall be brought upon any agreement made, which by its terms is not to be or *cannot be* performed within one year from the date of the making thereof unless the agreement, or some sufficient memorandum of it, be in writing and duly signed.

In construing this act the courts have held that if the contract can by any possibility be performed or completed within a year according to the intent of the parties, then it is not within the statute and is not required to be in writing. The mere expectation or supposition of the parties as to when the contract will be completed does not determine the intent. However unlikely or impossible it may appear that the contract will not be performed, if it be *possible* to perform it (not terminate it), it is not within the statute. When the performance within a year is impossible it must be in writing or there must be a written memorandum.[2] Agreements to do an act more than a year hence; to continue to do an act or service or to refrain from doing it for a greater period than one year; to take a lease for more than one year or for a year, the same to begin at some future day; to serve or employ for more than a year or for a year, the service to begin at some later day; and all contracts in which it is evident that they cannot be performed according to the express intent of the parties within a year, are within the statute. An oral agreement to make annual payments in a contract which by its terms is to continue sixteen years is within the statute, and cannot be enforced;[3] but it might be otherwise if the contract were completely performed by the debtor.[4]

The following instances will serve to show what agreements are not within the statute, and, if not subject to the restriction of other sections of the statute, need not be in writing: A verbal contract to construct a road or house within a year and twenty days from the date thereof was held valid, as it *might be* completed within the year.[5] The same has been held of an agreement dated June 5, 1883, for the erection of a structure to be put up

[1] 8 Amer. & Eng. Ency. Law 710–728.

[2] Warren Co. *v.* Halbrook, 118 N. Y. 586. 16 Amer. Repts. 788; Lockwood *v.* Barnes, 3 Hill 128; Jilson *v.* Gilbert, 26 Wis. 637; Doyle *v.* Dixon, 97 Mass. 208, 93 Amer. Dec. 80, *and note;* 8 Amer. & Eng. Ency. Law 686; Sarles *v.* Sharlow (Dak.), 37 N. W. Rep. 749 [1888], *and note.*

[3] Jackson Iron Co. *v.* Negaunee C. Co. (C. C. A.), 65 Fed. Rep. 298.

[4] Weatherford, etc., R. Co. *v.* Wood (Tex.), 29 S. W. Rep. 411.

[5] Jones *v.* Pouch, 41 Ohio St. 146 [1884];

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part during the season of 1883 and part during the season of 1884;[1] and of an agreement to work a quarry and to divide the profits, no time being specified.[2]

If the promise depend upon the happening of an event which *may* not happen within a long time, but which *has* happened within a year, the agreement is good and will sustain an action.[3] A verbal contract to deliver ties, timber, etc., on the line of a railroad, to be inspected once a month, and, if received, to be paid for at current prices, the contract to continue until the contractor is notified to stop, is not within the statute;[4] and so also of an agreement to continue to supply materials as long as wanted.[5] An oral agreement between a father and a son by which the son is to support his parents during their lives is not within the statute, as it may be performed within a year;[6] but a verbal agreement whereby a railroad company undertakes to lay a switch for the use of a sawmill-owner, and to maintain it as long as he should need it, was held within the statute when it was expected and understood that he would need it for many years.[7]

When it is expressly agreed that a contract is to be performed within one year, extension from the date of completion from time to time by parol for periods less than one year will not be effected by the statute of frauds.[8]

104. Contracts Executed or Completed by Contractor.—If the contract is executed by one party it does not come within the statute of frauds. Therefore a contract to build a house for $2400;—$500 when the house is begun, $500 when the house is finished, and the residue in five yearly payments, with interest payable semi-annually, was held not within the statute, the contract having being wholly performed by the contractor within a year. The contract had been reduced to writing, but never signed.[9] While this case may represent the general law, there are many cases to the contrary in Massachusetts,[10] New York, Vermont, and other states. If, however, the contract has been fully performed and accepted by one party to the enrichment of the other party, such cases may be supported on the ground that a contract is implied by law to pay for the same, and the contract is good evidence of the value of the performance or work done.

105. Contracts for Employment Not to be Completed within a Year.—Instances within the statute which are most likely to occur in the experi-

Plimpton *v.* Curtis, 15 Wend. (N. Y.) 336; Fain *v.* Turner's Adm'r (Ky.), 29 S. W. Rep. 628.

[1] Sarles *v.* Sharlow (Dak), 37 N. W. Rep. 749 [1888].

[2] Treat *v.* Hiles (Wis.), 32 N. W. Rep. 517

[3] 8 Amer. & Eng. Ency. Law 690.

[4] Walker *v.* Railroad Co. (S. C.), 1 S. E. Rep. 366 [1887].

[5] Walker *v.* Johnson, 96 U. S. 424

[6] Carr *v.* McCarthy (Mich.), 38 N. W. Rep. 241 [1888]; 8 Amer. & Eng. Ency. Law 691.

[7] Warner *v.* Texas & P. Ry. Co., 17 Sup. Ct. Rep. 147.

[8] Donovan *v.* Richmond (Mich.), 28 N. W. Rep. 516; 8 Amer. & Eng. Ency. Law 688.

[9] Durfee *v.* O'Brien, 14 Atl. Rep. 857 [1888]; Haines *v.* Thompson, 19 N. Y. Sup. 184.

[10] *See* 8 Amer & Eng. Ency. Law 692.

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ence of every engineer or architect are verbal contracts for employment by the year, which are usually made some time before the service begins. Such a contract, unless in writing, will not hold, and the employee may get his discharge any day and find himself without redress.[1] If the contract of employment as set forth in his written memorandum is incomplete, then the contract may fail. If, however, the service be by the year and has continued for one year, and as to the next year nothing has been said, a new implied contract may arise at the end of the first year's service, which the law will enforce though not in writing. The new contract implied by the law is a hiring from year to year, performed within a year, and therefore good.[2] A verbal agreement for a future term to begin at once and not exceeding one year is not within the statute.[3]

A contract for one year, to commence when the employee secures release from present employment, was held not within the statute, when it was possible to secure the release on the date of contract, though in fact the release was not secured till later.[4] A verbal contract for steady and permanent employment is not void or within the statute, as it may be at an end any time upon the death of the employee.[5] If the contract by its terms contains an option allowing either party to terminate it within a year, it is not within the statute and need not be in writing.[6]* If no definite time be agreed upon as to when the service shall terminate or how long it shall continue, it need not be in writing, but it were better to be in writing always.[7]

Contracts not to be performed within a year must be signed by both parties. If not signed,[8] part performance will not take it out of the operation of the statute in an action at law,[9] although it has been held a ground for relief in equity.[10]

[1] Milan *v.* Rio Grande, etc., R. (Tex.), 37 S. W. Rep. 165; Moody *v.* Jones (Tex.), 37 S. W. Rep. 379.

[2] Smes *v.* Supt. (Mich.), 25 N. W. Rep. 485; Cullis *v.* Bothhamley, 7 W. R. 87; Lelande *v.* Aldrich (La.), 6 So. Rep. 28, 8 Amer. & Eng. Ency. Law 687, 14 Amer. & Eng. Ency. Law 765; Ball *v.* Stover, 31 N. Y. Supp. 781; Herman *v.* Littlefield (Cal.), 42 Pac. Rep. 443.

[3] 8 Amer. & Eng. Ency Law 687; Whiting *v.* Ohlert (Mich.), 18 N. W. Rep. 219; Raynor *v.* Drew (Cal.), 13 Pac. Rep. 866 *and note;* Ward *v.* Mathews (Cal.), 14 Pac. Rep. 604; Sharkey *v.* McDermoth (Mo.), 4 S. W. Rep. 107; Franklin Sugar Co. *v.* Taylor (Kans.), 15 Pac. Rep 586 [1888].

[4] Baltimore B. Co. *v.* Callahan (Md.), 33 Atl. Rep. 460.

[5] Penn. Co. *v.* Dolan (Ind. App.), 32 N E. Rep. 802; Harrington *v.* Kansas C. C. Ry. Co., 1 Mo. App. 135, "at a monthly salary, so long as he shall do the work assigned him" Carter W. Ld. Co. *v.* Kinlin (Neb.), 66 N. W. Rep. 536, "so long as the works are kept running"

[6] Blake *v.* Voight (N. Y. App.), 31 N. E. Rep. 256 [1892]; *but see contra* Doyle *v.* Dixon, 97 Mass. 208; *and see* Dobson *v.* Collis, 1 H. & N. 81; *and* 8 Amer. & Eng. Ency. Law 692.

[7] Jagau *v.* Goetz (Com. Pl.), 32 N. Y. Supp. 144; Smalley *v.* Mitchell (Mich.), 68 N. W. Rep. 978.

[8] Wilkinson *v.* Heavenrich (Mich.), 26 N. W. Rep. 139.

[9] Wolke *v.* Fleming (Ind.), 2 N. E. Rep. 325; Henry *v.* Wells (Ark.), 3 S. W. Rep. 637.

[10] Warner *v.* Texas & P. Ry. (C. C. A.), 54 Fed. Rep. 922.

* *See also* Sec. 801, *infra.*

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106. Contracts for an Interest in Lands.—The statutes usually require that any contract for the sale or transfer of lands, tenements, or hereditaments, or any interest in or concerning them, shall be in writing, or that a sufficient memorandum shall be made in writing.

This section has been held to apply to private sales, auction sales by administrators, executors, trustees, commissioners, and public officers, except judicial sales, and to exchanges of land. The statute applies to every agreement in regard to the title of lands, for the sale of equitable title as well as the legal title, and in short to every agreement by which an interest in land is modified, increased, or diminished, even to agreements for the possession of lands;[1] to agreements in regard to the use of a party wall;[2] for the sale of bricks of a ruined house still standing on the land,[3] or to prepare the plans of a building and to superintend the construction thereof, in consideration of the conveyance of a certain lot.[4]

Whether a sale of growing timber or crops is an interest in lands is held differently in different states. It is usually determined by the evident intention of the parties, if that can be gathered from the evidence, whether the sale is a sale of chattels made by cutting the growing timber or crops or whether the buyer is to derive any benefit from the lands. In some states it must be in writing if it is a natural growth, *i. e.*, not requiring cultivation as timber; while if it is for a crop that has been planted and cultivated like growing grain, potatoes, and root crops, then an oral contract will suffice.[5] A good general rule is that the agreement does not fall within the statute unless some interest in lands in the nature of a title, enforceable either in a court of law or equity, is sought to be obtained, created, or transferred to the party furnishing the consideration.[6] Therefore improvements upon lands, distinct from the title or possession, are not such an interest in the land as to bring agreements therefor within the statute. A parol promise to pay for work or labor upon land, whether already done or to be done, has never been held to be within the statute.[7] An agreement to pay one-half the cost of a party wall located half on the land of two coterminous owners was held not within the statute of frauds.[8]

Agreements relating solely to the use to be made of lands are valid if not in writing. Such is an agreement not to use a building for a certain purpose, to keep up a fence, to remove a fence, or to use lands for the manufacture of bricks from clay found in it, the title of the property in the clay and wood to remain in the owner until paid for. An agreement not to

[1] 8 Amer. & Eng. Ency. Law 694-7.
[2] Rice *v.* Roberts 24 Wis. 461.
[3] Meyers *v.* Schemp, 67 Ill. 469; *but see contra* 8 Amer. & Eng. Ency. Law 698.
[4] Koch *v.* Williams (Wis.), 52 N. W. Rep. 257
[5] 8 Amer. & Eng. Ency. Law 698-700.
[6] 8 Amer. & Eng. Ency. Law 701.
[7] *Many cases cited in* 29 Amer. & Eng. Ency. Law 860; Scales *v.* Wiley (Vt.), 33 Atl. Rep. 771.
[8] Stuht *v.* Sweezy (Neb.), 67 N. W. Rep. 748.

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build within a certain number of feet from the street and an agreement to open a street have both been held to be within the statute;[1] but parol agreements between coterminous owners of lands fixing their boundaries, followed by possession, is valid and binding,[2] and an agreement to remove a fence has been held not within the statute.[3] There are, however, decisions holding such oral agreements void.[4] Usually the cases hold that the parties must occupy to the boundary for the full statutory period, which bars an action at law, though there are cases to the effect that possession for a shorter time will fix the boundary.[5]

The right to possession of land is such an interest in land as to require an agreement to deliver possession to be in writing.[6]

107. Special Agreements Relating to Lands.—Agreements releasing pecuniary claims for damages to lands where they have been flowed by a mill-pond,[7] or have been taken for public purposes, need not be in writing, for they are held not within the statute.[8]

Agreements to refund or discount the price if the quantity of land falls short have been held valid if not in writing, but an agreement to pay an additional sum if coal was found has been held within the statute.[9]

Where land has been conveyed an oral promise to pay therefor at a certain rate is not within the statute of frauds, and the stipulated amount may be recovered in an action at law.[9]

108. Contract Implied by Law to Pay for Benefits Conferred when there has been Enrichment.—Under any of the provisions of the statute, if a contractor has, in reliance upon an oral agreement and in accordance with its terms, made improvements which are a benefit to the other party estate, he may recover their value if the other party refuse to perform his part of the agreement. The recovery is not upon the oral agreement, but upon the contract implied by law and imposed upon the owner by law that he shall not enrich himself at the expense of one whom he has victimized. An attempt to make an oral contract between the parties, or the existence of such an undertaking, does not prevent the law from imposing a contract upon the party who has profited by his own wrong.[10] The owner must have been enriched, for if the contract was entirely for the benefit of the contractor he cannot recover, and the profits he has received may be deducted from the value of the improvements.[11] *

[1] 8 Amer. & Eng. Ency. Law 703.
[2] Archer *v.* Helin (Miss.), 11 So. Rep. 3.
[3] Storms *v.* Snyder, 10 Johns. 109; *and see* 44 Wis. 96, 60 Wis. 310, 500.
[4] White *v.* Hopeman, 43 Mich. 267; Hagey *v.* Detweiler, 35 Pa. St. 409.
[5] *See Adverse Possession*, 1 Amer. & Eng. Ency. Law 249–250.
[6] Boyd *v.* Paul (Mo.), 28 S. W. Rep. 171.
[7] Clement *v.* Durgin, 5 Greel. (Me.) 14; Smith *v.* Goulding, 6 Cush. (Mass.) 154.
[8] 8 Amer. & Eng. Ency. Law 704.
[9] Freed *v.* Richy (Pa.), 8 Atl. Rep. 626; Kickland *v.* Mensha W. W. Co. (Wis.), 31 N. W. Rep. 471; Huff *v.* Hall (Mich.), 23 N. W Rep. 88; Camp *v.* Moreman (Ky.), 2 S. W. Rep. 179; Railroad Co. *v.* English, 16 Pac. Rep. 82 [1887].
[10] 8 Amer. & Eng. Ency. Law 661.
[11] 8 Amer. & Eng. Ency. Law 662.

* *See* Sec. 53, *supra*, and Secs. 690, 697, 703, *infra*.

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109. Contracts for the Creation, Assignment, and Surrender of Estates in Land.—By the statute of frauds all estates created or transferred must be in writing, and usually the law also requires that they shall be sealed and witnessed, and that they shall also be acknowledged and made of public record. Usually estates less than a freehold are not required to be acknowledged nor registered, but it is good practice nevertheless to have both ceremonies carried out, except perhaps in case of short leases. All such instruments should be signed by both parties. Bids at auction sales of house-lots or land, being verbal, are within the statute of frauds and not binding. Being voluntary, they are usually carried out, but cannot be enforced.[1] A parol promise by a grantor to warrant and defend the title to the land sold is void, being within the statute.[2]

The question often arises as to what is a lease, or such an estate in land as to require a written instrument, and upon that question there are decisions both ways. Without doubt all agreements for the permanent occupation of another's lands or any part thereof should be in writing. So it has been held that permission to erect upon the land of another a permanent structure, such as a building or a bridge, or leave to occupy with a railroad, a canal, a dam, or to overflow by a dam, to dig a drain or lay a pipe, to dig and carry away coal, ore, stone or dirt, or to haul logs across, amounts to a lease, since it is a grant of an interest in the land itself, and must be in writing. There are cases which hold to the contrary that where oral permission has been given to build a permanent structure upon lands, as a party-wall, a bridge, an aqueduct, a dam, etc., that although mere licenses are ordinarily revocable at any time, yet having been acted upon they are valid, binding, and irrevocable.[3] The fact that there are such decisions affords no excuse for one to accept such a license and invest his money on the strength of it, if he can get a lease in writing, even by paying for it.

110. Promises to Answer for the Debts of Another.—The statute also requires all contracts or agreements to answer for the debt, default, or misdoing (miscarriage) of another party to be in writing, or some memorandum to be made in writing, and signed by the party to be charged. The provision varies slightly in the different states, but the law is generally that promises to pay other's debts or to be surety for their undertakings must be in writing. The statute includes every kind of liability that may be enforced in a civil action, but the promise must be to the creditor himself, and not to the debtor—i. e., the one who is himself liable, the latter promise is not within the statute of frauds. A promise by the debtor himself to pay is not within the statute, even though another is also liable, and even though one debtor promises to pay if the other debtor does not pay. Therefore the promise of

[1] Boyd *v.* Greene (Mass.), 39 N. E. Rep. 277; *and see* Lobit *v.* McClave (Tex.), 28 S. W. Rep. 726.

[2] Kelly *v.* Palmer (Neb.), 60 N. W. Rep. 924.

[3] 8 Amer. & Eng. Ency. Law 667.

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a partner to pay a firm debt is not within the statute, while a stockholder's promise to pay a corporation debt is within the statute.

The promise must be to pay with his own funds, and not out of the funds of the debtor that are in his possession, and a debt, it seems, is not funds or property in this sense. The promise must be for a good consideration.

111. Application of the Law to Construction Work.—In construction contracts, cases often arise where the contractor has failed to pay his men or is unable to get materials to go on with his work, and the owner or person to be benefited by the performance of the contract has promised to pay for the labor and materials if the workmen and materialmen will continue at work and to supply the necessary materials of construction. When the owner makes such promises it is important to ascertain whether he himself undertakes to assume the obligation or whether he insures the payment of the contractor's debt. If the owner seeks to obtain a direct benefit or advantage to himself, as to relieve his property from a lien, it is generally held an original obligation, and therefore not within the statute.[1] If it be the evident intention to insure the payment of a debt of another, then it is within the statute, and must be in writing. Some courts have based their decisions upon the fact whether there was a new and distinct consideration for the promise, and if it inured directly to the benefit of the promisor, in which case it was not within the statute; while other courts have ignored these facts, as well as the parties' intentions, and called it a collateral obligation if the original party (contractor) remained liable, making the promise within the statute unless the agreement was a substitute for the original liability.

There are many cases on both sides,[2] but there is a safe and sure way for the owner or his engineer, which is to make such agreements in writing, and to make it clear whether the undertaking is to cancel the obligation of the contractor and to substitute the owner, or whether the original obligation is to continue and the owner become a surety for its performance.

Some cases will illustrate the law. Thus when a contractor having an apparent purpose to quit unless payment was made or assured was told by a third party to go on with the work and he would see that he got his pay it was held that as to the work already performed the promise, not being founded on any consideration, was a collateral undertaking to pay the debt of another, which, not being in writing, was void.[3] The same decision was reached when a third party told the contractor to go on and finish his work and he himself would pay for it.[4] In another case an oral agreement by the owner to pay a subcontractor, on the abandonment of the contract by the

[1] Seguine *v.* Spaeth (Com. Pl.), 35 N. Y. Supp. 847.
[2] 8 Amer. & Eng. Ency. Law 683
[3] Gable *v.* Graybill, 1 Pa. Super. Ct. Rep. 29; Warwick *v.* Grasholtz, 3 Grant 234.
[4] Gill *v.* Herreck, 111 Mass. 501 [1873]; Lachman *v.* Irish (Sup.), 25 N. Y. Supp. 193.

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original contractor, an amount already due him from the latter and an additional sum for extras if he would complete the work, is not void as being a promise to answer for the debt of the contractor.[1] An interesting case is reported where an owner had written to a subcontractor as follows: "By direction of the contractor and at the request of C. I hereby hold $2700, which I hereby agree to pay you when the work has been delivered and put in proper and workmanlike manner; $2500 of which is to be charged on my contract with the contractor on account of his contract with C., and $200 on account of his contract with me, for your labor in putting said work in said place." It was held a guaranty to pay the debt of C., and not an original obligation by the owner.[2]

When a contract provided that if the contractors failed to furnish material the owner would supply the material and deduct the cost from the price, and a materialman, after furnishing certain material on the contractor's credit, refused to furnish more, and an arrangement was made whereby, on the contractor's written order to the owner, the architect was to make the estimates and payments directly to the dealer, it was held that the agreement was not within the statute of frauds, as it was not a promise to pay plaintiff's debt, but to benefit defendant by the immediate acquisition of materials for the building.[3]

A subsequent promise by an owner to a materialman to see that materials furnished in the construction of the owner's house upon the credit of the contractor were paid for is not enforceable, and it will not support a personal judgment against the owner. Such a promise was held a mere verbal collateral contract.[4]

If a contractor, not being paid by an owner, has abandoned the contract and afterwards resumed it, and did certain extra work on the verbal promise of a third party to pay him, but the evidence showed that he still looked to the owner for his pay, and not to a third party except as guarantor, the promise of the third party, not being in writing, is void both as to the extra work and that done under the contract.[5]

A verbal agreement on the part of a supply company to furnish a subcontractor materials for his subcontract, the bills when O.K.'d to be paid by the contractor, is an original agreement on the part of the supply-men, and not an agreement to pay the debt of the subcontractor.[6] It has been held, however, that a promise by a contractor to his subcontractor's men if they will continue at work is an original undertaking on a sufficient consideration which need not be in writing.[7] Promises by a husband

[1] McLaughlin *v.* Austin (Mich.), 62 N. W. Rep. 719; Andree *v.* Bowman, 13 Md. 241.

[2] Bierschenk *v.* Stokes, 26 N. Y. Supp. 88; *and see* Emerson *v.* Slater, 22 How. 28.

[3] Bice *v.* Marquette, etc., Co. (Mich.), 55 N. W. Rep. 882; Calkins *v.* Chandler, 36 Mich. 324, *followed*.

[4] Farnham *v.* Davis (Me.), 9 Atl. Rep. 725 [1887].

[5] Brester *v.* Pendell, 12 Mich. 224 [1864].

[6] Barras *v.* Pomeroy Coal Co. (Neb.), 54 N. W. Rep. 890.

[7] Snell *v.* Rogers (Sup.), 24 N. Y. Supp. 379.

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for the wife's individual debt, or by the wife for the husband's debt, have been held to be within the statute, and void if not in writing.[1]

In an action by a materialman against a contractor for lumber furnished for a house it is no defense that the owner assumed the debt unless there was a novation which released defendant.[2]

The statutes usually require all contracts in consideration of marriage to be in writing, or that there be a written memorandum of the terms of the agreement signed by the party or his authorized agent. Such contracts are marriage settlements or any agreement which makes the marriage the consideration. It does not include mutual promises to marry.[3]

STATUTE OF LIMITATIONS.

112. Objects and Reasons for the Statute.—The time within or the period in which the obligation of a contract can be enforced, or within which an action or suit can be brought for a breach of a contract, is limited in the United States, England, and Canada by certain statutes of limitations. The object of these statutes is to require people to enforce their rights within a reasonable time or to abandon them. They are calculated to give security and repose to business, and to relieve the parties from the necessity of preserving indefinitely their receipts and other evidence of settlement. It provides against the evils that arise from loss of evidence and the failing memory of witnesses, and relieves the defendant from the burden of keeping track of witnesses and preserving documentary evidence in the constant apprehension of being called upon to defend himself in an action at law, while the claimant is required to employ reasonable diligence in prosecuting his claims. The statutes may prove an obstacle to just claims, as where a party may not be able to pay during the period, but afterwards becomes affluent, or where it is within the power of the defendant to avoid and evade a suit during the statutory period.[4]

The statute had its inception in the convenient rule made by courts that after twenty years a presumption arose that debts and even bonds had been paid or released unless the delay was explained by the creditor and he showed that they had not been paid. In fact, independently of any statute of limitation, courts of equity have inherent powers to refuse relief after undue and unexplained delay, and when injustice would be done by granting the relief asked, and the doctrine applies to suits relating to land.[5]

113. Statute Does Not Destroy the Contract Obligation, but Affects the Remedy or Means of Enforcing It.—The statute does not and cannot affect

[1] Brennan *v.* Chapin, 19 N. Y. Supp. 237; Perkins *v.* Westcoat (Colo.), 33 Pac. Rep. 139.

[2] Aidritt *v.* Panton (Mont.), 42 Pac. Rep. 767.

[3] 8 Amer. & Eng. Ency. Law 684; Short *v.* Statts, 58 Ind. 29 [1877].

[4] 13 Amer. & Eng. Ency. Law 736.

[5] Abraham *v* Ordway, 15 Sup. Ct. Rep. 894.

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the contract obligation, it is no part of the contract, but it denies the claimant a means of enforcing his right in a court of law after he has delayed a certain number of years to enforce it. It affects the action only, and not a defense. Thus a defendant may show that a contract was procured by fraud, though the statutory period has passed. A counter-claim or cross-complaint is not a defense in this sense. The statute has only to do with the remedy for a breach of the contract, for without a breach there is no action on a contract. When the statutory period has elapsed no action can be brought in a court of law, and courts of equity decline to entertain suits when an action at law is barred unless there are circumstances showing fraud or oppression.

Much difference of opinion has been expressed as to whether the statute affects the *right* of the claimant so that if the statutory period be changed (extended) it restores the claimant's right to sue. Whether or not this be so, it is well settled that the statute does not destroy the obligation, and that it affects only the remedy, and not the merits of the claim.[1]

114. Disabilities that May Prevent the Operation of the Statute—Personal Disabilities.—Since the defense of the statute is given on the presumption that the claimant has been guilty of laches, it follows that if no delay can be imputed to the claimant, then the statute ought not to apply. If the ability to bring an action has been taken away from the claimant, or he has been disabled from bringing an action of law, *i. e.*, if he (she) were in infancy, insane, idiotic, or under coverture, except where women have the right to sue and be sued, or his (her) residence was in a foreign country or state, such disability must have existed when the right of action accrued, for if the statute had commenced to run no subsequent disability would interrupt it. If a contractor dies even a day after his cause of action accrued, that day was sufficient to set the statute in motion, and if an infant heir were left the infant cannot plead his disability, though there was no time during the whole period when he was of age and able to bring an action. This may seem unjust, but the rule seems a necessary rule to insure the security and repose for which the statute was created. For the same reason one disability cannot be tacked or added to a previous disability partly or entirely run out.

Therefore if a woman is an infant when her right of action accrues, and before she becomes of age she marries, becomes insane before her husband dies, and then dies leaving infant children, only the first disability of infancy will prevent the statute from setting in, and it will bar the statute only so long as the woman was an infant. Such a case shows how the very object of the statute might be subverted if such a rule were not maintained. Several generations might live under disabilities in families in which early marriages, insanity, and short lives were hereditary.

[1] 13 Amer. & Eng. Ency. Law 693–704.

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If the action accrue when the party is under more than one coexisting disability, the statute will not be set in motion until they are all removed. Therefore if, when the right to an action accrues, a woman be married, under twenty-one years of age, and insane, and her husband died at thirty and she became sane at forty, the statutory period would not begin to run until she were forty.

So long as there is nobody against whom the claimant can bring an action the statute of limitations does not run. Such cases arise when the administrators of the defendant have not been appointed, though it does not exclude the time between the death of the claimant and his administrator.

115. The Letter of the Law is Applied Strictly, without Regard to Hardship or Misfortune.—The statute does not run against a town until it is incorporated and has capacity to sue. There are exceptions, however, to this rule in California[1] and Georgia. The statutes of many states contain special provision for such cases, which statutes should be consulted. There has been a doctrine, which is no longer accepted, that an inherent equity would create an exception to the rule, but the general law now is that the language of the act must prevail, and no reason, based on apparent inconvenience or hardships, can justify a departure from it.[2] This is illustrated by a remarkable case in which a city eluded the service of summons during the whole period of ten years, the statutory period. Each year, as soon as the officers of the city were elected, they met and transacted what business was necessary, in a secret place, with doors locked and sentries posted, after which they filed their resignations, which by law took effect immediately, leaving no officer of the city upon whom the railroad company, who held the city's bonds, could serve summons. The court held that however dishonest and wrong morally it was for a debtor to evade services of process, it was not fraudulent in a legal sense, and that as it did not come within any express exception of the statute, the court could not make it one, as that would be making a law instead of administering it, the former of which is for the legislature, the latter for the courts.[3]

War is such a disability or condition as will prevent the statute from operating. It must affect the parties or be of such duration and character as to close the courts. War will not only prevent the statute from taking effect, but it will interrupt the running of the statute for the term that the war existed.

116. Statute Does Not Operate against the Government.—The state nor the United States are not barred unless it is so expressly provided in the statute.[4] The business of the government being transmitted entirely through agents, who are so numerous and scattered, the utmost vigilance would not protect

[1] 13 Amer. & Eng. Ency. Law 737.
[2] 13 Amer. & Eng. Ency. Law 735.
[3] Amy. v. Watertown (Wis.), 22 Fed. Rep. 418.
[4] Slantey v. Schwalby (Tex.), 19 S. W. Rep. 264 [1892]; Jefferson City v. Whipple, 71 Mo. 519 [1880].

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the public from losses and combinations to defraud the government. The government is, therefore, exempt from the operation of the statute upon the grounds of public policy, and not upon the notion of extraordinary prerogative. This exemption is accorded to the different branches of the government only when they act in the sovereign capacity. If the government engages in purely business transactions, as in banking, it is held to be divested of its sovereignty, and to no longer be exempted from the statute.[1]

Rights of a public nature cannot be lost from the lapse of time, but when the rights involve a mere claim of dollars and cents and involve no question of governmental right or duty, the courts hold the government to the ordinary rules controlling courts of equity. In general, in ordinary business transactions, cities, towns, counties, and school districts are within the statute of limitations as much as the individuals with whom they do business.[2] Trespass, nuisances, and other encroachments upon public property cannot be supported by possession and enjoyment for any length of time, for public rights cannot be lost by adverse possession, unless the statute has expressly included the government.

Though the government is not required to plead the statute when plaintiff to a suit, it can plead the statute against its subjects when sued by them, and it seems its representative officers have no power to waive the statute.[3] The defense of limitations must be raised in the trial court ;[4] it cannot be raised for the first time on appeal.[5]

117. Agreements to Waive the Protection of the Statute.—Agreements to waive the statute of limitations or to not plead it in certain actions, even though founded upon a good consideration, have been held void as against public policy. Such agreements may amount to a new promise to pay a claim and take the claim out of the statute as to the length of time already transpired, but not as to the future.[6]

The bringing of a suit by the claimant stops the statute running, and the rule is pretty well settled that the day on which the action accrues is excluded in computing the statutory period. In some states the action is begun by the actual service or by the delivering of summons to the sheriff.

118. New Promises May Interrupt the Running of Statute and Forfeit Its Protection.—A contractor or party to a contract, express or implied, may have lost the protection that the statute would have afforded him by making new promises, acknowledging the debt, or part payments upon a long standing account or contract. An express promise to pay a debt, or acts or words from which the law can imply a promise will make a new cause of action

[1] *See* United States *v.* North Amer. C. Co. (C. C.), 74 Fed. Rep. 145.
[2] 13 Amer. & Eng. Ency. Law 715.
[3] 13 Amer. & Eng. Ency. Law 716.
[4] Shaver *v.* Sharp Co. (Ark.), 34 S. W. Rep. 261.
[5] Eiseman *v.* Heine (Sup.), 37 N. Y. Supp. 861; Pickett *v.* Edwards (Tex.), 25 S. W. Rep. 32.
[6] 13 Amer. & Eng. Ency. Law 717.

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which can be sued upon any time within the full statutory period; it starts the statute anew from the date of the express or implied promise. Any acknowledgment of the debt, such as part payment, unless accompanied by declarations or circumstances which clearly indicate that the act is not an acknowledgment of the debt or claim, will be sufficient for the law to imply a new promise to pay.

Part payment of the principal, payment of interest, or an acknowledgment indorsed upon a note is usually sufficient to start the statute afresh, but the payments must be voluntary, so that a promise may be implied. If the promise is "to pay as soon as I can" or on the happening of a certain event, then it must be shown that the promisor has since been able to pay or that the event has transpired. The acknowledgment must specify the amount of the debt and the debt referred to if it cannot be in some manner connected with the debt or account to which it relates. It is sufficient if the amount can be computed. An acknowledgment that one owes another for services has been held sufficient, and the wages may not have been agreed upon. Usually the acknowledgment must be in writing by the debtor or his authorized agent, and must be communicated to the creditor or his agent.[1]

119. Injury Concealed by Fraud, so that Right of Action was Not Known. —Cases frequently arise in construction-work where the cause of action is not discovered at the time it accrues, as where inferior work or poor materials have been used and their use concealed from the owner, and have not been discovered for some years thereafter. It is an established rule in courts of equity that fraudulent concealment of the cause of action on the part of the contractor will deny him the protection of the statute of limitations so long as the owner remains ignorant of his rights or the injury he has suffered. However, this is no special rule, for it is a general practice for courts of equity to give relief to one on whom fraud has been practiced. Courts of law have sometimes followed the rule, though not universally, and it has been generally applied in courts having concurrent jurisdiction of both law and equity cases.[2]

When fraudulent practice has been concealed, the time will not begin to run in favor of the perpetrator of the fraud until the fraud has been discovered, or until it might have been discovered if reasonable diligence had been exercised.[3] The party defrauded must be diligent, and a clue to facts which if followed up diligently would have led to a discovery has been held equivalent to a discovery.[4] The recording of a deed has been held sufficient notice, so that there should have been a discovery.[5]

[1] 13 Amer. & Eng. Ency. Law 748 *et seq.*
[2] Leake's Digest of Law of Contracts 977; Troup *v.* Smith, 20 Johns. (N. Y.) 33; 13 Amer. & Eng. Ency. Law 728.
[3] Kirby *v.* Lake Shore, etc., R., 120 U. S. 130; Amy *v.* Watertown, 130 U. S. 320.
[4] Norris *v.* Haggin, 28 Fed. Rep. 275, *and cases cited.*
[5] Beattie *v* Pool, 13 S. Car. 383; *but see* Herndon *v.* Lewis (Tenn.), 36 S. W. Rep. 953.

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The fact that the contractor has made no special effort to conceal the fraud does not give him the protection of the statute in a court of equity,[1] but at law the fraud must have been committed by affirmative acts. Concealment without fraud, it seems, is not sufficient to toll the statute, nor is fraud without concealment.

In some states the statute is tolled, *i.e.*, inoperative, only in such actions for relief on the ground of fraud as were originally recognized in equity, while in other states and in England the statute is made to run only from the time the fraud was discovered or might have been discovered with reasonable diligence. Each case must be decided by the law of the state by which it is governed. It is sufficient for the purpose of this work to give a general idea of the law, so that engineers, architects, and contractors may avoid difficulty and litigation.

120. Bad Work Concealed When under Inspection and Supervision of Engineer.—How far the inspection and supervision of work by the owner's architect or engineer would excuse the contractor from the charge of fraudulent concealment would be a matter of fact in each case. If there was no express act on the part of the contractor to conceal bad work, no deception practiced upon the inspectors, such as enticing them away, or working secretly at hours when the work was supposed to be idle, or of bribing them to pass imperfect work, it may well be doubted if poor work not in accordance with the contract would be called fraudulent, or that it could be said to be concealed. This would be especially true when the fact of an inspector's being appointed and every clause of the contract shows that it was feared, if not expected, that the contractor would take advantage of every opportunity to slight the work and effect every saving possible to himself.*

Collusion between the contractor and engineer or architect by which the latter was to pass work or materials which it was his duty to reject or report to his employer would without doubt amount to a fraud which would give relief in equity to the owner or proprietor. A failure on the part of one holding fiduciary relations or relations of confidence and trust to report what it was his peculiar duty to disclose has been held a fraudulent concealment.[2]† It has been held that fraudulent concealment by an agent of the amount collected for his employer prevented the running of the statute.[3] A petition based on fraud which was practiced more than the statutory period before the beginning of the suit should allege that the fraud was discovered within the period of limitations.[4]

121. Liability of Engineer for Misconduct after Statutory Period has Elapsed.—It seems that an engineer or architect or attorney cannot be prosecuted for misconduct, negligence, or mistake in designing, examining,

[1] 13 Amer. & Eng. Ency. Law 688.
[2] 13 Amer. & Eng. Ency. Law 729.
[3] Bonner *v.* McCreary (Tex.), 35 S. W. Rep. 197.
[4] McCalla *v.* Daugherty (Kan. App.), 46 Pac. Rep. 30.

* *See* Secs. 282, 446, and 463–469, *infra*.

† *See* Sec. 849*a*, *infra*.

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or inspecting work or drafting papers, etc., after the statutory limit (usually six years) from the time the act or negligence was committed, although it was *not* known to the employer and was *not* discovered by him until the period of limitation had elapsed. It has been held, therefore, that one who has been employed to examine titles or securities and has done so in a negligent manner, whereby money loaned upon it has been lost, the right of action dates from the negligence or misconduct.[1] The cause of action accrues the moment the employee fails to do what he agreed to do.

In some states the time is limited by statute in which a person may bring his action after he has discovered the fraudulent concealment. In Alabama only one year is given, in Michigan and Kansas two years, and in Colorado three years. In Missouri the discovery must be made within ten years, and in Kentucky the action must be brought in ten years or it is barred, whether the fraud be discovered or not.

An action for breach of a contract will lie at once on a positive refusal to perform, though the time specified for performance has not arrived.[2]

When extra work or extra expense is required to carry out changes in the plans of work done under a contract, the period of limitations does not begin to run while the contract is executory.[3]

LAW OF CONTRACTS. PROOF OF TERMS OF COLLATERAL CONTRACT. PAROL OR VERBAL AGREEMENTS.

122. Parol Evidence Not Admissible to Vary or Contradict a Written Contract.*—Parol evidence of what was said or done before or at the time of making a written contract is not admissible to alter, vary, or contradict the express terms of that contract. The proposition is of too long standing and is too well recognized as one of the foundation principles of the law to be questioned.[4]

It is a general rule of law that when parties have deliberately put their engagements in writing in such terms as import a legal obligation, without any uncertainty as to the object or the extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking were reduced to writing.[5] In such case to add to it by implication would be to vary its terms and legal effect.[6]

[1] Leake's Digest of Contracts 977; Short *v.* McCarthy, 3 B. & Ald. 626; Brown *v.* Howard, 2 B. & B. 73; Howell *v.* Young, 5 B. & C. 259; Wilcox *v.* Plummer, 4 Pet. 172; Argall *v.* Bryant, 1 Sandf. 99; Rankin *v.* Shaeffer, 4 Mo. App. 108.

[2] Donovan *v.* Sheridan (Super. N. Y.), 24 N. Y. S. 116.

[3] Gibbons *v.* United States, 15 Ct. of Cl. 174 [1879]; *and see* Wilkinson *v.* Johnston (Tex.), 18 S. W. Rep. 746; O'Brien *v.* Sexton (Ill.), 30 N. E. Rep. 461 [1892]; *and* Knight *v.* Knight (Ind.), 30 N. E. Rep. 421 [1892]. As to responsibility when injury results from an undiscovered defect in the engineering works, *see* Underhill on Torts 17.

[4] Bishop on Contracts 175, 355, 58, *and cases cited;* 17 Amer. & Eng. Ency. Law 420.

[5] McKinley *v.* Williams (C. C. A.), 74 Fed. Rep. 94.

[6] Merchants' Ins. Co. *v.* Morrison, 62 Ill. 242 [1871]; *see also* 69 Ill. 226, 13 Ill. App. 503.

This presumption may be overcome if the parol evidence be admitted without

* *See* Secs. 559–563, *infra.*

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All conversations and agreements had or made and tending to vary or contradict the provisions of the written contract are inadmissible as evidence to show the meaning or intention of the parties. The written contract must be taken to express the final intention and understanding of the parties. Whether the evidence offered be conversations, correspondence,[1] or previous oral understandings with regard to the same subject-matter, it is not admissible if the contract be clear and certain in its terms.[2]

If there is any one thing that should be impressed upon the minds of engineers, architects, contractors, and builders alike, as well as upon the minds of owners, officers, and managers, it is the fact that a written contract should be complete. It should contain every term and provision, stipulation and condition that the parties are agreed upon. It should embody every item of prior and contemporaneous agreements that they intend shall be the basis of the contract. It should not only provide for present and existing conditions, but should anticipate every difficulty and controversy that may arise in the execution of the contract or the prosecution of the work. When the contract is made and entered into is the time to insist that all the terms agreed upon shall be incorporated in the written instrument; and for either party to take the word of the other that "this or that is understood," or to be satisfied with the assurance that "we will make that all right," is to sacrifice so much of the consideration.

Every man is presumed to know the effect of a contract which he signs, and he can have no action against the other party for misrepresentations made to him as to its illegal effect; nor will such misrepresentations invalidate the contract.[3] When there is evidence that the contractor read the contract sued on, he cannot be heard to say that he was misinformed by the other parties as to its legal effect.[4]

If the intention of the parties be clea the court will not look beyond the four corners of the paper for the entire contract, nor will it listen to any testimony as to prior conversations, understandings, correspondence, or promises without there is an independent consideration to support them. It was therefore held that where a contract was silent as to the time of performance of a contract, evidence of a contemporaneous agreement as to when it was to be done could not be received to vary the ordinary legal construction that it was to be performed in a reasonable time.[5] So when a contract has been signed for the insertion of an advertisement in a paper for one

objection. Brady *v.* Nally (N. Y. App.), 45 N. E. Rep. 547.

[1] Eaton *v.* Gladwell (Mich.), 66 N. W. Rep. 598.

[2] Bryan *v.* Idaho Quartz Min. Co. (Cal.), 14 Pac. Rep. 859; Wonderly *v.* Holmes Lumber Co., 56 Mich. 413 [1885]; Curtiss *v.* Waterloo, 38 Iowa 266 [1874].

[3] 8 Am. & Eng. Ency. Law 636. Nor are false representations as to the validity of a patent actionable, 8 Amer. & Eng. Ency. Law 636, if the person to whom they are made has the same means of information.

[4] Kingman & Co. *v.* Shawley, 1 Mo. App. Rep'r 281.

[5] Liljengren Fur., etc., Co. *v.* Mead (Minn.), 44 N. W. Rep. 306; Boehm *v.* Lies, 18 N. Y. Supp. 577.

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year at a price named, payable quarterly, it cannot be shown that there was an understanding at the same time that the advertisement could be stopped at any time if it did not suit,[1] or that it was agreed at the time of signing the contract that the advertisement and cut should be submitted to defendant for his approval.[2] When a contractor has taken work to be completed by a certain time or to be delivered at a certain place, he cannot prove that the completion of the work was to depend on the delivery of certain materials, or on the navigability of certain streams,[3] or that the defendant railroad company was to haul the materials,[4] or that the contract price was one suitable for a rough job only,[5] or that the owner and his engineer had agreed, before the contract was executed, as to the quality of materials and as to a standard for comparison.[6]

The rule against admitting parol evidence to alter or contradict a written contract applies to the signature of the parties as well as to the body of the contract.[7]

123. When Parol Evidence will be Received.—Parol evidence of a contract is admissible under the following circumstances: 1. To show that there is not and never was a legal contract. This will admit evidence to show that the contract lacked any of the essential elements of a lawful contract, the incapacity of the parties, a want or a failure of the consideration, or that the consideration was illegal or immoral, or that its object or purpose was illegal or against the policy of the law, that the mutual understanding of the parties was not correctly expressed, or that it was not executed or acknowledged as required by law, or was not delivered, or was delivered in escrow or subject to a condition, or that it was obtained by duress, menace, fraud, or collusion, which, as is well known, vitiates all acts, however solemn.[8] 2. To show that the contract, though absolute on its face, was and is subject to a condition precedent to its performance. Such evidence must prove the existence of a separate parol agreement that the obligation should not attach until the condition precedent was performed or the event had transpired.[9] 3. To explain the meaning of technical words and expressions, and to prove the existence of certain customs and usages. In construction work such technical words and phrases are those used in the trades, or by engineers and architects in the practice of their profession; and the customs and usages are those which have grown up in the business, and may consist of certain rules by which

[1] Cohen *v.* Jockoboice (Mich.), 59 N. W. Rep. 665.

[2] Coleman *v.* Rung, 31 N. Y. Supp. 456.

[3] McNeeley *v.* McWilliams, 13 Ont. App. 324 [1887].

[4] Scott *v.* Norfolk & W. R. Co (Va.), 17 S E. Rep. 882.

[5] Crow *v.* Becker, 5 Robt. (N. Y.) 262.

[6] Jones *v.* Risley (Tex.), 32 S. W. Rep. 1027; Eaton *v.* Gladwell (Mich.), 66 N. W. Rep. 598 *Oth r cases see* Monroe *v.* Perkins, 9 Pick. 298; Rand *v.* Mather, 11 Cush. 1; 59 Am. Dec. 131.

[7] Bulwrinkle *v.* Cramer, 3 S. E. Rep. 776 [1887].

[8] Byerstet *v.* Winona Mill Co. (Minn.), 51 N. W Rep. 619 [1892]; 17 Amer. & Eng. Ency. Law 438; Best's Chamberlayne's Principles of Evidence 235.

[9] 17 Amer. & Eng. Ency. Law 436.

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measurements are made and work is estimated.[1] It is well established that parol evidence will *not* be received of a usage which is repugnant to the express terms of the contract,[2] though there are cases in which "black" has been shown to mean "white," and in which "one" has been shown to mean "two or more." * 4 It may be shown by parol evidence in what character the parties contracted—that one or both were acting in the capacity of an agent, officer, trustee, or administrator. 5. Parol evidence may be received of a prior agreement based upon a sufficient consideration as a defense to a suit for specific performance.[3]

It is the duty of a court to make an agreement effective if possible, and oral evidence will be received to identify, describe, or explain a contract.[4] If it is incomplete, oral evidence will be admitted to supply matter omitted from the writing where it is apparent from the writing itself that something has been left out. So when a deed conveys "all my real estate" without any other description, evidence will be received to locate the premises,[5] and to show that the parties of a written lease of "four acres out of lot four" had agreed on certain boundaries thereof.[6]

The facts existing at the time the contract was made, and of the circumstances of the parties, and of the building, may be shown when the question is as to whether a building was to be a two or a three story structure, no plans having been drawn or prepared.[7] Oral evidence has been admitted to show quantities, and to show that certain plans and specifications not referred to in the contract were submitted to the contractor for his estimate of cost, and that such plans and specifications were modified by subsequent parol agreement.[8] Oral evidence is admissible to identify a prior contract incorporated into, or specifications referred to, in a contract to erect a structure, and when identified they may be considered in connection with the contract to determine whether or no the contract is void for uncertainty.

If the contract and specifications appear inconsistent, such variance may be explained by oral testimony. If the papers when taken together show clearly that the specifications are incomplete, evidence may be admitted to explain them or to supply the parts omitted.[10]

If a contract to rebuild a wall fails to show how much of the old wall is to be taken down, it may be shown by parol evidence what was contem-

[1] Ford *v.* Beech, L. R. 11 Q. B. 866.

[2] Myers *v.* Sarl, 30 L. J. Q. B. 9; Mallan *v.* May, 13 M. & W 517.

[3] *See* 13 Solicitors' Journal & Rep., pp. 312, 336, 353, and 373.

[4] Coleman *v.* Mut. Imp. Co., 94 N. Y. 229; Howard *v.* Pepper, 126 Mass. 28; Bennett *v.* Pierce, 28 Conn 315; Hildebrand *v.* Fogle, 20 Ohio 147.

[5] 2 Parsons on Contracts 549, 21 Wend. 652, 13 Peters 89; *see also* Primey *v.* Thompson, 8 Ia. 74; McKinzie *v.* Stafford (Tex.), 27 S W Rep. 790.

[6] Schneider *v.* Patterson (Neb.), 57 N. W Rep. 398; Trinley *v.* McDowell, 24 S. W. Rep. 928.

[7] Doane College *v.* Lanham (Neb.), 42 N. W. Rep. 405 [1889].

[8] Isaacs *v.* Smith, 55 N. Y. Super. Ct. 446 [1888].

[9] Bergin *v.* Williams, 138 Mass 544; Comer *v.* Comer (Ill.), 11 N. E. Rep. 848 [1887].

[10] 17 Amer. & Eng. Ency. Law 442-3.

* *See* Secs. 603-629, *infra.*

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plated by the parties;[1] also, that stone from a certain quarry were to be used;[2] as to how payments should be made and the place and time of delivery;[3] as to the meaning of the clause "the entire walls of the building inside and outside are to be painted" when it is claimed and denied that the plastering as well as woodwork is to be painted;[4] to determine how many cubic feet (16 or 25) constitute a perch of stone in a contract. In the the absence of a statute defining a perch, it may be shown that it was verbally agreed at the time of the negotiations that the work was to be performed at 18 cents per cubic foot and that the party who wrote the contract reduced it to $4.50 per perch of 25 feet; such evidence was held not to vary the contract, but to enable the court to interpret it in the sense intended by the parties.[5]

Likewise, oral evidence has been admitted to show what was intended by the words "at the price of two dollars per thousand;"[6] "hewn timber to average 120 ft. and to class B, No. 1 Good";* "at a price per mile of road whether or not the side tracks were to be measured as road";[7] "to make up the track in good running order, well surfaced, ties evenly and firmly bedded, etc."—whether or no this required the contractor to fill in the space between the ties with earth or other proper substance.[8]

In general, parol evidence is admissible to show a different or some other consideration than that named in the written contract if it be consistent with that which is expressed and does not defeat the legal operation of the instrument.[9] When the consideration named in a deed is money, it may be shown that the consideration was in fact land of the value named, or that it was marriage,[10] or a promise to do something.[11] Parol evidence has been held admissible to show in what manner the consideration was to be paid, and to show a distinct and collateral agreement which is not a part of the contract embraced in writing.[12]

In every case it should be held in mind that the parol evidence must not be inconsistent with the written terms of the contract. It cannot alter, vary, add to, nor contradict the written contract. The evidence must not change the intention of the parties as expressed in the written instrument, but it may complete it or explain it.

124. Parol Evidence to Explain Obscure and Ambiguous Contracts.—Contracts obscure or ambiguous may be made clear and the intention of

[1] Donlin *v.* Daeglin, 80 Ill. 608 [1875].
[2] Centenary Church *v.* Cline (Pa.), 9 Atl. Rep. 163 [1887].
[3] 17 Amer. & Eng. Ency. Law 436; Duplanty *v.* Stokes (Mich.), 61 N. W. Rep. 1015.
[4] Beason *v.* Kurz (Wis.), 29 N. W. Rep. 280.
[5] Quarry Co. *v.* Clement, 38 Ohio St. 587.
[6] Smith *v.* Aiken, 75 Ala. 209.
[7] Barker *v.* Troy, etc., R. Co., 27 Vt. 766.
[8] Western Union R. Co. *v.* Smith, 75 Ill. 496 [1874].
[9] Wood *v.* Moriarity (R. I.), 9 Atl. Rep. 427, 17 Amer. & Eng. Ency. Law 433.
[10] Tolman *v.* Ward, 86 Me. 303; Miller *v.* McCay, 50 Mo. 214.
[11] Twomey *v.* Crowley, 137 Mass. 184.
[12] *Note*, Bolles *v.* Sach (Minn.), 33 N.W. Rep. 862 [1887], *cases cited.*

* *See* Secs. 603–629, *infra.*

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the parties brought to light by oral evidence of the surrounding circumstances, the situation of the parties, the subject-matter, the acts, and even the conversation of the parties under it.[1]

Whatever the nature of the writing, the object is to discover the intention of the parties as shown by the words they have used. To this end the court may put itself in the position of the parties and view the surrounding circumstances, to see how the terms of the contract apply to the subject-matter of the contract.[2] Therefore, under a contract for employment of an engineer which is not clear as to the length of the term of service, or the salary to be received, or the kind of work to be undertaken, oral evidence is admissible to show the situation of the parties at the time the contract was entered into, the surrounding circumstances—what position the employee gave up to accept the employment, what duties his predecessor had been required to perform, etc.[3]

Evidence of the acts, conduct, and declarations of the parties may be given to show their understanding and practical interpretation of contract when the language used by them is indefinite and obscure.[4] Evidence of such subsequent statements and conduct are only competent to show the parties' understanding of it, and do not change its express terms.[5] The conduct has no doubt a great, if not controlling, weight in the interpretation of a contract,[6] but the statements and declarations of the parties are often excluded altogether, whether made before, at the time of, or after the execution of the contract.[7] Where a telegram and subsequent letters are a part of the negotiations which led up to a contract for the purchase of goods, they are to be construed together in determining the terms of sale.[8]

125. Parties may be Held to the Construction they have Themselves Adopted.—Evidence may be received of the construction put upon previous contracts of the same general character by the parties by their actions;[9] and a subsequent contract with regard to the same subject-matter is admissible to show how the parties understood the earlier contract.[10] The construction of a contract adopted by parties will prevail.[11] A promise of

[1] Caperton's Adm'rs *v.* Caperton's Heirs (W. Va.), 15 S. E. Rep. 257.

[2] Shrewsbury *v.* Tuffts (W. Va.), 23 S. E. Rep. 692.

[3] Excelsior Needle Co. *v.* Smith, 61 Conn. 56 [1892]; Marion School Tp. *v.* Carpenter (Ind.), 39 N. E. Rep. 878; Rogers *v.* Straub, 26 N. Y Supp. 1066; Rhodes *v.* Cleveland Roll. Mill Co., 17 Fed. Rep. 406.

[4] 11 Amer. & Eng. Ency. Law 578; Davis *v.* Shafer (Cir. Ct.), 50 Fed. Rep 764; Engel *v* Scott & Co. (Minn.), 61 N. W. Rep. 825; Leavers *v.* Clearly, 75 Ill. 349 [1874]; Lyon *v.* Motley, 30 N. Y. Supp. 218.

[5] Potter *v.* Phœnix Ins. Co. (C. C.), 63 Fed Rep. 382. It is admissible only when there is ambiguity. Davis *v.* Shafer, *supra*.

[6] White *v.* Amsden (Vt.), 30 Atl. Rep. 972.

[7] Scraggs *v.* Hill (W. Va.), 17 S. E. Rep 185; Garnsey *v* Rhodes, 18 N. Y. Supp. 484 [1892]; *but see* Cunningham *v.* M. S. & Ft. C. R. Co., *where evidence of conversation of parties supplemental to contract was received; and see* Hart *v* Thompson (Sup.), 41 N. Y. Supp. 909.

[8] Joseph *v.* Richardson, 2 Pa. Super. Ct. Rep 208.

[9] People's Natl. Gas Co. *v.* Braddock Wire Co., 25 Atl. Rep. 749.

[10] Brewster *v.* Bates, 20 N.Y. Supp. 780.

[11] Rose *v.* Eclipse Carb. Co., 60 Mo. App 28.

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marriage may be inferred from the acts and conduct of the parties towards each other.[1] A defective description of a boundary may be interpreted by evidence of the practical construction the parties put upon it themselves.[2] The acts of the parties may be shown to indicate whether side-tracks were to be computed as road under a contract at a price per mile of road.[3]

When there is a dispute as to which of two contracts is binding, the parties may be bound by the one they have adopted. Thus when the contractor insisted that the contract consisted of proposals duly accepted, and the company claimed that the contract was an unsigned written construction contract by whose terms the work had been performed, it was held that the written contract should hold.[4]

The rules that a court in construing a doubtful provision of a contract will follow the interpretation placed upon it by the parties does not apply to contracts made by a municipal corporation in matters affecting the public interests;[5] and when a board of commissioners has entered in their proceedings a contract, it is not error to exclude parol evidence of their version of it.[6]

Testimony that the stipulations of a contract were the same as those on a block of printed forms from which it had been taken, is inadmissible unless it is shown that the witness compared the contract form with those in the block.[7]

126. Witnesses Cannot Testify as to the Meaning of a Contract.—A witness cannot testify touching the construction of a contract; if a question arise as to its meaning, the question must be settled by the court.[8] Evidence of the opinion of the parties to a contract as to its meaning, not carried into effect by any act, will not govern its interpretation.[9] Parol evidence is admissible to prove the existence of a written instrument, no attempt being made to prove the contents thereof.[10]

When there is a dispute between the parties as to whether the contract was verbal or in writing, and the evidence is conflicting as to whether the contract was verbal or in writing, the question is for the jury.[11] The construction of an ambiguous written contract is for the jury, and a charge as to its meaning is error.[12] Where there is no ambiguity in the terms of a

[1] Button *v.* Hibbard (Sup.), 31 N. Y. Supp. 483; *but see* Yale *v.* Curtiss, N. Y. Ct. of App., Feb. 1897.

[2] Kingsland *v.* Mayor, etc., of N. Y., 45 Hun (N. Y.), 198.

[3] Barker *v.* Troy, etc., R. Co., 37 Vt. 766.

[4] Megrath *v.* Gilmore (Wash.), 39 Pac. Rep. 131; *and see* Mobile & B. Ry. Co. *v.* Northington (Ala.), 10 So. Rep. 839 [1892].

[5] National Waterworks Co. *v.* School Dist. No. 7 (Cir. Ct.), 48 Fed. Rep. 523.

[6] Board *v.* O'Conner (Ind.), 35 N. E. Rep. 1006.

[7] International & G. N. R. Co. *v.* Startz (Tex.), 27 S. W. Rep. 759.

[8] The Alton, etc., R. Co. *v.* Northcott, 15 Ill. 49 [1853].

[9] Shaw *v.* Andrews (C. C.), 62 Fed. Rep. 460.

[10] Sims *v.* Jones (S. C.), 20 S. E Rep. 905.

[11] Jones *v.* Sherman (Neb.), 51 N. W. Rep. 1036.

[12] Ginnuth *v.* Blankenship & Blake Co. (Tex. Civ. App.), 28 S W. Rep. 828; Bloom *v.* P Cox Shoe Manfg. Co. (Supp), 31 N. Y. Supp. 517.

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contract, it is the province of the court, and not of the jury, to determine its meaning,[1] and where the terms are ascertained its meaning presents a question of law only, and it is for court.[2]

It is the duty of the court to construe and determine the legal effect of a written instrument offered in evidence and to instruct the jury thereon,[3] and there is no ambiguity or conflict if the intention of the parties to a written contract be intelligible upon the face of the instrument. Outside proof of its meaning is not admissible,—its construction is for the court alone.[4] Whether certain correspondence constitutes a contract, and its proper construction as such, are for the court.[5]

127. The Intention of Parties should Control.—In the construction of instruments or contracts the first rule to be regarded is to follow the intention of the parties as gathered from the entire transaction, and by looking at all the provisions of the instrument, and not one alone.

All other rules are subordinate to this one, and when they contravene it they are to be disregarded. If the language of the contract is plain and unambiguous, parol evidence is not allowable to ascertain the pretext of the parties thereto. If it admits of more senses than one, it is to be interpreted in the sense in which the promisor had reason to suppose it was understood by the promisee.[6] If the terms of the written contract admit of two meanings, one of which nullifies the contract and the other upholds it, the latter will be adopted and the former must be discarded.[7]

128. Rule against Parol Evidence Applies Only in Suits between the Parties to Contract.—The rule that parol evidence cannot be given to contradict or vary written agreements is limited to the parties actually contracting with each other by the agreement. It cannot be evoked by a stranger to a contract.[8] It is not excluded in suits between strangers to the written contract, and a surety has been held such a stranger.[9] Therefore parol evidence is admissible to establish a contract between a broker and his principal though it may contradict or vary the terms of a written contract entered into in pursuance thereof between the principal and the proposed purchaser.[10]

129. Contracts Obtained by Fraud or Duress.—Exceptions to the rule

[1] Levy *v.* Kottman (Com. Pl.), 32 N. Y. Supp. 241.

[2] Finlayson *v.* Wiman (Sup.), 32 N. Y. Supp. 347.

[3] Bell *v.* Keepers (Kans.), 14 Pac. Rep. 542 [1887]; Fidelity Title & Trust Co. *v.* People's Gas Co. (Pa.), 24 Atl. Rep. 339; Barnhill *v.* Howard (Ala.), 16 So. Rep. 1; Woodburg G. Co. *v.* Mullikin (Vt.), 30 Atl. Rep. 28.

[4] Campbell *v.* Jimenes (Com. Pl.), 23 N. Y. Supp. 333.

[5] Scanlan *v.* Hodges (C. C. A.), 52 Fed. Rep. 354.

[6] Potter *v.* Berthelet, 20 Fed. Rep. 240 [1884]; Root *et al. v.* Johnson, 26 Vt. 64.

[7] Saunders *v.* Clark, 29 Cal. 299.

[8] Coleman *v* Bank of Elmira, 53 N. Y. 388 [1873]; First Nat. Bank *v.* Dunn (N. J.), 27 Atl. Rep. 908.

[9] 17 Amer. & Eng. Ency. Law 454; Coleman *v.* Bank of Elmira, 53 N. Y. 388 [1873].

[10] Barber *v.* Hildebrand (Neb.), 60 N. W. Rep. 594.

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forbidding parol evidence are those cases where the validity of the written instrument is impeached as having been obtained by duress, menace, fraud, or collusion, which, as is well known, vitiate all acts however solemn or even judicial. To reject parol evidence in such cases would afford protection to practices which it is the object of the law to suppress. A party cannot avoid it by setting up his own fraud, nor can other persons claiming under him.[1]

If a contract is attacked on the ground of fraud, parol evidence is admissible to show the fraud.[2] There must be an allegation of duress, collusion, fraud, misrepresentation, or mistake, or the evidence must be offered to prove the same.[3] In the absence of such allegation, parol evidence will not be admitted even in a court of equity.[4] Therefore a contract for the sale of land cannot be varied by prior or concurrent verbal agreement as to what the settler would do in consideration of the purchase;[5] nor when subscriptions have been made to a common project, and the parties soliciting the subscriptions have made parol representations to the effect "that men of great wealth will be connected with the enterprise, that great benefit, collateral improvements, and enhancement of the value of real estate will result,[6] or "that certain materials will be used in the building;"[7] or "that the railroad to be built should connect with other railroads," though the route and termini might be shown.[8] So in a lease it cannot be shown that the landlord made an agreement at the time it was executed to make improvements,[9] or that, under a lease that was to be null and void and not binding on either party if the lessee failed to pay his rent, it was intended to give the lessee an option to terminate the lease at his pleasure.[10]

If the purchaser had alleged fraud, misrepresentation, or deceit, a court of equity would doubtless have admitted the evidence, as was done in a case where a tenant signed a lease of a farm upon the faith of the owner's parol promise to destroy the rabbits infesting it;[11] and in another case where an inventor as an expert made false representations to a purchaser as to the value, merits, and utility of an invention.[12] There are cases to the contrary where misrepresentations as to the validity, value and utility are held mere matters of opinion[13] and therefore *not* fraudulent. Representations as to

[1] Best's Principles of Evidence. (Chamberlayne's ed.) 235. *See* Epigraph, Title page.

[2] Grand Tower, etc., R. Co. *v.* Walton (Ill.), 37 N. E. Rep. 920.

[3] Delouche *v* Smith (Ga.), 10 S. E. Rep. 436; Strong *v.* Waters, 30 N. Y. Supp. 64.

[4] Brunson *v.* Henry (Ind.), 39 N. E. Rep 256; Groome *v.* Ogden City (Utah), 37 Pac. Rep 90; Custean *v* St. Louis Land Co. (Wis.), 60 N. W. Rep. 425.

[5] Cus'ean *v* St. Louis Land Co. (Wis.), 60 N. W. Rep. 425.

[6] Poddock *v.* Bartlett, 68 Iowa 16 [1885].

[7] Gerner *v.* Church (Neb.), 62 N. W. Rep. 51.

[8] Low *v.* Studebaker (Ind.), 10 N. E. Rep 301 [1887].

[9] Lerch *v.* Sioux City Time Co. (Ia.), 60 N. W. Rep 611.

[10] Hall *v.* Phillips (Pa.), 30 Atl Rep.353.

[11] Morgan *v.* Griffith, L. R. 6 Exch. 70 [1871]

[12] Hicks *v.* Stevens (Ill.), 11 N. E. Rep. 241 [1887]. *And see note.* Best's Chamberlayne's Prin. of Evidence 230; Iowa Economic Heater Co. *v.* American, etc., Co., 32 Fed. Rep. 735.

[13] 8 Amer. & Eng. Ency. Law 636.

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facts on which the valuation, merits, etc., are based are fraudulent if false.[1]

Misrepresentations by a nonexpert as to the legality of an instrument or the legal effect of it are not in general regarded as fraudulent so as to relieve one from the obligation assumed on the strength of such allegation.[1]

If one is induced to sign a lease by false statements by the owner that the building leased is fit for certain purposes, evidence of the misrepresentation may be received.[2] So when it is alleged that certain stipulations and provisions were inserted in a contract by fraud, evidence of prior conversations between the parties is admissible.[3] In general, when it can be shown clearly and undoubtedly that certain oral representations, undertakings, and promises, material to the subject-matter of a written contract, induced one of the parties to put his name to it, they may be shown by parol evidence, and the written agreement may be modified, explained, reformed, or altogether set aside by such parol evidence.[4] Such a case is a subscription contract in which it was falsely represented that another person named had made a similar subscription under the same conditions.[5]

130. Independent Oral Agreements.—It must not be taken that the rule against showing a prior or contemporaneous parol agreement forbids parties making separate written and parol contracts at the same time and as to the same subject-matter. Any number of independent contracts each having its own proper consideration may be made, some parol and others written, and the parol contracts may modify, explain, vary, contradict, or multiply the written ones. The parol agreement may form part of the consideration of the written contract, or the written contract may form the consideration for the contemporaneous parol agreement, if the oral agreement is not inconsistent with the written agreement, and if there is evidence that the parties did not intend the written contract to be a complete transaction.

When oral agreements are made at the time written contracts are entered into, then they should rest upon a separate and distinct consideration; and when they have been arrived at they should be regarded as distinct and collateral agreements, and not a part of the written contract. Parol evidence will be admitted of an oral agreement entered into subsequent to the written contract if the oral contract is supported by a new consideration, and the new parol agreement may become a substitute for the old one, or be an addition to it. If the new oral agreement has taken the place of an earlier written contract which has been lost, oral evidence may also be received to prove the terms of the written contract.

A parol modification of the terms of a written contract, which was

[1] 8 Amer. & Eng. Ency. Law 636.
[2] Myers v. Rosenbach, 25 N. Y. Supp. 521.
[3] Van Alstyne v. Smith, 31 N. Y. Supp. 277.
[4] Thudium v. Yost (Pa.), 11 Atl. Rep. 436.
[5] Gerner v. Church (Neb.), 62 N. W. Rep. 51.

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required to be in writing by the statute of frauds, cannot be shown in connection with the written contract.

An interesting case, illustrating this rule, was a written contract for the sale of real estate. One of the provisions was, that a certain person should survey the land. The services of this particular surveyor not being obtainable, a verbal agreement was made to procure another, who surveyed the land, after which the grantor refused to convey the premises. In an action for the breach of the written contract it was held that the verbal alteration could not be shown, because such alteration reduced the whole written contract to a mere verbal agreement for the sale of lands, upon which the statute of frauds provides that no action can be maintained.[1] However, this does not hold that certain terms of a written contract cannot be waived by parol agreement.[2]*

Oral evidence is admissible to show that the time of performance or completion was extended or the date changed by a subsequent agreement, whether the contract be sealed or unsealed, or even within or without the statute of frauds,[3] and it may be shown that the terms of a written contract, even one within the statute of frauds, have been waived or discharged.[4]

131. Subsequent Promises must be Founded upon a Consideration.—A consideration without doubt is necessary to support such contracts to modify or rescind a written contract,[5] but it is not to be understood that by consideration is meant a money consideration. The court will, if possible, find a consideration to support promises for extra work, extension of time, changes in the plans, specifications, etc. If there have been changes by the owner, these may afford sufficient consideration for an extension of time, or for extra remuneration, even though the expense has not been increased. If the contractor has found the work more difficult than he anticipated, it is an easy matter for him to allege misrepresentation on the part of the owner or his engineer or architect, and "trump up" a claim which, however trivial, may afford a consideration for a new agreement on the part of the owner, it being impossible for the court to ascertain how sincere he may have been in his claims or what value it may have had at the time.[6] So when a building fell before it was completed, it being disputed as to whether it was the contractor's or owner's fault, it was held that the question of doubtful liability was a sufficient consideration to support a new promise by the owner.[7]†

[1] Dana *v.* Henry, 30 Vt. 616 [1858].
[2] Hill *v.* Blake, 97 N. Y. 216; 17 Amer. & Eng. Ency. Law 448.
[3] 17 Amer. & Eng. Ency. Law 449; Luckart *v.* Ogden, etc., 30 Cal. 547; Morrill *v.* Colehour, 82 Ill. 618.
[4] 17 Amer. & Eng. Ency. Law 449.
[5] Bruce *v.* Brown (Tex.), 25 S. W. Rep. 444.
[6] Hart *v.* Lauuman, 29 Barb. (N. Y.) 410; Osborne *v.* O'Reilly, *supra;* Holmes *v.* Doane, 9 Cush. 135; Wilgus *v.* Whitehead, 6 W. N. of C. 537; Cooke *v.* Murphy, 70 Ill. 96 [1873].
[7] Brodeck *v.* Farnum (Wash.), 40 Pac. Rep. 183.

* *See* Secs. 559-564, *infra.*

† *See* Sec 563, *infra.*

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Where a contractor was under a penalty (liquidated damages), to complete work, it was held that under a release of the contractor from the contract, a promise to pay for day labor, by the owner, was supported by the fact that the contractors could have abandoned the contract by paying the penalty, and they had incurred a detriment by keeping at work, which they were not obliged to do.

The consideration may be found in the mutual promise to annul certain terms or to rescind the whole agreement and to then enter into a new parol agreement, the agreements on the one side to rescind being the consideration for the agreement to rescind and the new undertakings on the other side. That no new and extraneous consideration is necessary in ordinary construction contracts has been frequently held,* though there are cases to the contrary.

* *See* Secs. 69, *supra*, and 560–563, *infra*.

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PART II.

BIDS AND BIDDERS.

CHAPTER VI.

THE RIGHTS AND LIABILITIES OF BIDDERS FOR PUBLIC WORK.

THE ADVERTISEMENT, INSTRUCTION TO BIDDERS, AND FORMS FOR PROPOSALS. FORMALITIES, REQUIREMENTS, AND RESTRICTIONS IMPOSED ON BIDDERS.

132. Mode of Entering into Construction Contracts.—In treating the subjects of construction and construction contracts it will not be necessary to go into the preliminaries of organization of companies, or of securing charters, or floating the stock. These are affairs that usually have been attended to before the engineer, architect, builder, and contractor are called upon to lend their assistance. When the company has been created and the privileges, permits, grants, or franchises have been obtained, it is then that the services of the industrial element are sought.*

When an owner or company contemplates the erection of works large enough to require the services of an experienced and skilled mechanic, it is a general practice in this country to invite contractors to make offers or proposals to do the work required at a price named. The invitations are something private, and sent to such persons only as the owner or company may desire to do business with; or they may take the character of public solicitations, or advertisements for proposals.

The instructions, explanations, and statements of the terms and specifications attending such negotiations are frequently of considerable importance and compass, which parties to the contract and their agents should understand. The acts and ceremonies attending these negotiations arise from the desire of the owner or proprietor to retain the privilege of creating and completing the contract.

The letting of a large construction contract does not differ greatly in

* The engaging and retaining of the professional services of the engineer or architect, and the relations and duties created by their contract of employment, will be discussed in a later chapter. *See* Part IV., Secs. 800–900 *infra.*

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principle from the bartering and selling of every-day life. Before two parties can enter into a contract they must come to terms, that is, they must have a common understanding of the terms of their agreement.* This is essential to a binding contract. The usual way of entering into a contract is by one party stating certain terms and the other party assenting, both parties agreeing to be bound by those terms. The formal declaration of an agreement to abide by the terms proposed is not necessary. When the statement of terms takes the form of an offer, and the assent that of an acceptance of those terms as made, within a reasonable time or before the offer is recalled, such offer and acceptance constitute a binding contract. This fact, that a contract can be created by the simple act of accepting an offer, has been a prime factor in establishing the ceremonies that precede the execution of a construction contract. Neither the proprietor nor the contractor, the seller nor the buyer, desires to make the initial offer. Each wants to make an agreement or bargain which is to his best interest, and whoever makes the offer sacrifices his chance of getting anything better than he himself has offered. If his offer is accepted, the contract is completed; while the party to whom the offer was made may decline and solicit other offers. In every-day business affairs this gives rise to fencing and sounding to determine who shall commit himself to the terms of an offer. If it be a horse to sell, the seller will want the purchaser to make him an offer, and the buyer will want the seller to name a price. The buyer wants to buy at the lowest price, and he knows that if he make an offer it may be accepted, which closes the bargain, and he may have paid more than he need to have paid had he known the mind of the seller. The same principle prevails in larger transactions, but there are several bidders usually for each contract. Proprietors having work to be performed insist upon receiving offers instead of making them. This is eminently just, for it requires the party to prepare and make the offer who is best qualified to undertake it. A skilled mechanic with a large experience in contracting and building can certainly better determine the proper cost of an undertaking, and should therefore be the one to offer terms by which he will undertake the execution of a contract for such work. Under these conditions the present system of inviting proposals has become universal. Proprietors and corporations having work to be done have found it to their advantage to insist that it is their just privilege to invite offers or proposals, not from one contractor but from several.

By announcing that several proposals will be received, and that the proposal will be accepted which is most advantageous to the proprietor, contractors desirous of securing the work are induced to make close estimates and thus give to the party inviting the offers the benefit of competition. The contracts for all private works of importance, and for nearly all public

* *See* Secs. 88–98, *supra*.

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works are entered into only after these preliminary negotiations. The invitations to make offers is called the *advertisement* for proposals; the offer itself is called the *proposal, tender,* or *bid;* the acceptance of the offer is the *awarding* of the contract, and the completion of the *ceremony.*

The fact that a proposal or bid is but an offer should not be lost sight of however much it is enshrouded with instructions, restrictions, and conditions, and that the advertisement is not in general an offer, but an invitation to contractors or builders to make offers.[1]

The act or charter of many public organizations requires that the work be advertised and proposals solicited from the public.

The advantages of this system of letting work are twofold. (1) If honestly carried out by both parties, it gives to the owner the benefit of close competition, and (2) the privilege of accepting the proposal if the offer is a good one, or of declining it if it is unreasonable. By inviting proposals the owner retains the privilege of assuming the contract obligation to himself, while the contractor in making the proposal may have the obligation of a contract imposed upon him by the mere acceptance by the owner of his offer in the same terms in which it was made. An offer plus an acceptance makes a contract, the obligation of which cannot be escaped. An offer may be recalled or revoked at any time before it is accepted, but not afterwards. To prevent bidders from recalling their offer, bidders are usually required to accompany their proposals with a certified check, which is forfeited if the offer is revoked.

The advantage of competitive bids for work cannot be overestimated if they are honestly made and the contract conscientiously awarded to the lowest responsible bidder.

To get such proposals as can be compared they should one and all be made from precisely the same data, and with the same means afforded to all for observation and study. A word or a wink that tends to give one contractor the advantage over another is an evil practice that undermines the whole system, and is an injustice to the owner and to all the other bidders. If discovered, it affords a ground for attacking the contract awarded upon such a bid, and may result in the contractor losing all that he has earned.

133. The Advertisement or Notice to Bidders—Invitation to Contractors and Builders to Make Proposals.

.....IMPROVEMENT.
PROPOSALS FOR BUILDING .....
..... *Engineer's Office,*
....*Broadway, New York City,*
....., 189..

"SEALED BIDS [OR PROPOSALS] for the construction or erection or for furnishing all the labor, tools, appliances, etc., and materials necessary to build, to erect, and to do all the....., and to com-

[1] Lloyd's Law of Buildings (2d ed.), § 56; Forster v. Ulman, 64 Md. 523.

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plete a certain....[name of structure or work]....at or on....[name of way or stream]....in the town or city of....., county of....., state of ....., are invited, and will be received at the office of....., engineer or architect, or at the office of the Board of Commissioners of the Public Works, City Hall, city of ....., state of....., until .....o'clock....M. of.....day of the week.....the.....day of....., 189.., at which place and hour the bids will be publicly opened and read

"The bids will be compared on the basis of the engineer's estimate of the materials and work to be done, which is as follows:

Items, [*a*].....[*b*].....[*c*]....., etc.

"The work is to be commenced within....days after the execution of the contract, and to be continued with regularity until completed, which must be before the....day of....., 189..

"The amount of the bond required for the fulfillment of the contract will be the sum of...thousand dollars"; or, "The security required for the fulfillment of the contract will be....per cent. of the contract price."

"The contract will be awarded to the lowest responsible bidder without reserve"; or, "The right to reject [any and] all bids is reserved if the engineer, architect, commissioners, or board shall deem it for the best interests of the company, city, or state.

"General instructions for bidders, blank forms for proposals, plans and specifications and contract forms, and all other necessary information may be had [or obtained] at the office of the engineer or architect, ...Street, ...

"Signed.....

"Dated....."

134. The Form of Advertisement to be Adopted.—In adopting the forms here presented for the letting of construction contracts the author has adopted what seems to be a rational subdivision, and one that does not depart materially from established forms in use on public works. Advertising is expensive, and neither individuals, companies, nor the government can afford to publish full and explicit instructions to bidders in the general or technical periodicals. The advertisement need, therefore, contain only general information such as shall enable a contractor to determine if he would like to undertake the work. It should describe the character of the structure, work and materials required, its location, the magnitude of the undertaking, when it must be commenced and when completed, the amount of security required, whether or not the lowest bid will be accepted without reserve, the last day on which the bid will be received, where further information may be secured, and who are the parties that invite proposals; and if it be public work, the attention of the bidders should be invited to the act of congress or of the legislature, or to the ordinance, under which, or by virtue of which, the work is undertaken or authorized or by which it is controlled.

This information is ample to advise a contractor whether the job is in his line, whether it is within his capacity as to the execution of the work in the time named, whether he can furnish bonds and has time to make a careful estimate, and finally, whether he will compete for and undertake

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the work offered by the parties, and under the supervision of the engineer or architect named. These facts determined, the contractor will apply for and receive full instructions for bidders.

When the law provides that the terms of all contracts shall, before they are entered into, be approved by the board of estimate and apportionment, and another section provides that the commissioner shall have power to make contracts on certain conditions, and provides that he shall advertise for proposals to perform the work "in such manner and on such terms and conditions as he may prescribe," the "terms and conditions" referred to in the latter section are merely those which the commissioner deems it necessary to put in the proposals, and not the terms and conditions of the contract, but that the terms and conditions of the contract to be made must be approved by the board of estimate and apportionment.[1]

135. As Regards the Advertisement or General Notice to Bidders.—In the absence of special requirements, boards of commissioners have authority to designate the official newspaper in which advertisements and notices shall be published, but such designation cannot continue for a longer period than their term of office, so as to bind their successors in office.[2]

The requirements of a statute prescribing the mode and time of advertising for bids are mandatory, the compliance with which is a condition precedent to the power of a municipality to enter into a valid agreement in respect thereof.[3] If it be required by statute, ordinance, or resolution that the advertisement be published in designated newspapers, the contract will be invalid if it is not published in all such papers and strictly as required by law or ordinance.[4] It has been held, however, that when the statute requires work to be advertised in *a* newspaper for three weeks, but the ordinance of the city ordering the improvement provides for publication in two papers, that the proceedings are not rendered invalid because it was advertised in only one newspaper ;[5] and a certificate of publication stating a thing has been published "five times" does not show that the statute requiring it to be published for five successive days was complied with.[6] When the paper designated suspended after three publications of the four required, a publication in another paper for the remaining week was held insufficient ;[7] and where the designated official paper had ceased to be the official paper before the last insertion of the notice, the notice in it was held insufficient.[8] If it is provided that notice may be given by posting in lieu of publication in a newspaper, an insertion in a newspaper for a time until the newspaper is suspended, and a posting for the balance of the time, is insufficient;[9] but where

[1] People *v.* Waring (Sup.), 39 N. Y. Supp. 193; Lynch *v.* Mayor, etc., 37 N. Y. Supp. 798, *distinguished*.

[2] Shelden *v.* Fox (Kan.), 29 Pac. Rep. 759 [1892].

[3] McCloud *v.* City of Columbus (Ohio Sup.), 44 N. E. Rep. 95.

Taylor *v.* Lambertville, 43 N. J. Eq. 107; 16 Amer. & Eng. Ency. Law 821.

[4] Connersville *v.* Merrill (Ind. App.), 43 N. E. Rep. 1112.

[5] Chandler *v.* People (Ill.), 43 N. E. Rep. 590.

[6] Townsend *v.* Tallant, 33 Cal. 45.

[7] Basey *v.* Lavitt, 12 Me. 378.

[8] Falkner *v.* Guild, 10 Wis. 563.

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the designated paper was merged into another, taking the name of the latter, it was held sufficient.[1] If certain public officers are required to designate the papers in which notice shall be published, and they fail to do so, a publication in all the papers from which they could have selected is good.[2]

When an officer has discretion he may designate a paper not published in the state.[3] If the notice is to be published in a newspaper, it should be a secular paper of general circulation, printed in the English language and on a week-day. If printed in a supplement to a newspaper, it should have the same circulation as the newspaper itself.[4] A mere advertising-sheet has been held not a newspaper.[5]

The place of publication is not where a newspaper is printed, nor where it is sent for distribution, but where it is first given to the public for circulation.[6] A requirement that the notice be inserted in a paper "printed" in the county is not complied with by inserting it in one "published" in the county, but "printed" elsewhere.[7] A "city paper" must be published and circulated in the city.[8]

If it is required that printed notices be posted up, a publication in a paper is not sufficient.[9] A court-house and a schoolhouse have been held public places, but it seems not necessarily "conspicuous" places.[10] If the charter or act require that a notice be published for a certain length of time, and the period of publication is one day short of that required, it will be fatal to all subsequent proceedings.[11]

If the statute require that the work be advertised for a certain period prior to the letting of the contract or to the opening of the bids, the failure to so advertise will invalidate the award.[12]

A mistake in an advertisement that is unimportant does not vitiate the proceedings so as to require a readvertisement for proposals, in the absence of any allegation that any one would have bid more than was bid if the error were not made. It was so held when three of four newspapers printed correctly the date on which the proposals were to be received, while the fourth paper named a day and date that was impossible.[13] Authority by a city council to a clerk to issue a notice for bids is not lost because the clerk made a mistake in his attempt to publish it, if there is no evidence that any one was misled or harmed thereby.[14] When the charter

[1] Sage *v.* Central R. Co., 99 U. S. 334.
[2] State *v.* Gloucester Co., 50 N. J. Law 585; *and see* People *v.* Chill (Sup.), 39 N. Y. Supp. 372.
[3] Mopley *v.* Leophart, 51 Ala. 587.
[4] 16 Amer. & Eng. Ency Law 822.
[5] Tyler *v.* Bowen, 1 Pittsb. 225.
[6] Le Roy *v.* Jamison, 3 Sawy. (U. S.) 269.
[7] Bragdon *v.* Hatch, 77 Me. 433.
[8] Haskell *v.* Bartlett, 34 Cal. 281.
[9] Kretsch *v.* Helin, 45 Ind. 438.
[10] 16 Amer. & Eng. Ency. Law 820.
[11] State *v.* City of Bayonne (N. J.), 8 Atl. Rep. 295 [1887].
[12] *Re* Pennie, 108 N. Y. 364; Burke *v.* Turney, 54 Cal. 486; *and see* Baltimore *v.* Keyser (Md.), 19 Atl. Rep. 706, in which case a bid was accepted which was received six minutes past the time, and one properly deposited was rejected because the officer to whom it was delivered was late. *See also* People *v.* Yonkers, 39 Barb (N. Y.) 266.
[13] Appeal of Gilfillan (Pa.), 22 Atl. Rep 593.
[14] Gilmore *v.* Utica (N. Y.), 29 N. E. Rep. 841.

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requires that "a special ordinance ordering the work to be done shall be passed before a public improvement is made, and a general ordinance has been passed which declared that the council shall order the construction of the improvement proposed, and directed the engineer to advertise for bids therefor," it was held that the fact that bids are advertised for before the special ordinance is passed will not invalidate the proceedings.[1]

Usually all preliminary acts and resolutions are held conditions precedent to taking final steps to letting the contract.[2]

The posting of a notice from 9 o'clock A.M. of the first day and which remained posted until 4 o'clock P.M. of the fifth day was held to have been posted five official days.[3] An advertisement stating that bids would be received up to a certain hour on Saturday, September 19, 1875, when the 19th was Sunday, was held an unimportant mistake, the notice being otherwise sufficient as to time.[4]

When it is required that the board of public works should advertise, an advertisement issued from the office of the board signed by its president, and stating that a satisfactory bond must be filed with the board, was held sufficient.[5]

136. Instructions to Bidders—Work is Undertaken by What Authority and under What Restrictions.

PUBLIC WORKS,.....
.....IMPROVEMENT.
PROPOSALS FOR BUILDING.....

..... *Engineer's Office,*
.... *Broadway, New York City,*
....., 1897.

GENERAL INSTRUCTIONS FOR BIDDERS.

"This work is undertaken by virtue of (or in accordance with, or in obedience to, or to conform to, or to comply with) ordinance....., (act of legislature, the act of.....incorporation....., or under the charter of the city of....., or the..... company, or acts of congress) approved the....day of....., 189.., under which act (or charter, or ordinance) this improvement is undertaken, and to which the attention of bidders is especially invited.

"The attention of bidders is also invited to the acts of congress approved 1885, as printed in Vol. 24, page 414, U. S. Statutes at Large, which prohibits the importation or immigration of foreigners and aliens under contract or agreement to perform labor in the United States or territories or the District of Columbia.

"The attention of bidders is especially called to the provisions of legislative act, chapter 277, Laws of New York of 1894; and act chapter 413, Laws of New York of 1895, relating to the dressing and carving of

[1] City of Springfield *v.* Weaver (Mo. Sup.). 37 S. W. Rep. 509; Keane *v.* Cushing, 15 Mo. App. 96, *disapproved.*
[2] Corsicana *v.* Kerr (Tex.), 35 S. W. Rep. 794.
[3] Kneeland *v.* Furlong, 20 Wis. 437.
[4] Case *v.* Fowler, 65 Ind. 29.
[5] Beniteau *v.* Detroit, 41 Mich. 116.

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stone used in New York state work; and also to the provisions of act chapter 622, Laws of New York of 1894, relating to the hours of labor and rate of wages, and to the employment of citizens of the United States."

137. Necessity for Restrictions and Regulations.—Public work is usually authorized by an act of congress or of the legislature of the state, or is undertaken under a charter or franchise bestowed by the government. The fact that it is public work implies that it is for the benefit of the public, and that public interests are involved which must be protected.

To secure competition and prevent combinations and conspiracies tending to favoritism and to defraud the people and the government, it is therefore usual to incorporate into the act or charter a clause requiring the work to be advertised, bids solicited, and the contract awarded to the lowest (responsible) bidder.

138. The Requirements of the Act or Charter are Imperative.—When such an enactment has been made, it is not directory merely, but it is imperative in the requirement that specifications shall be prepared and published, the work advertised, and the contract awarded to the lowest bidder.[1] The law is interpreted strictly, for when in an act the legislature declares that a board of public works "may" advertise for proposals, etc., it has been construed to mean that they "shall" advertise for proposals;[2] but in another case under a statute which provides that a board shall have control of the construction of improvements, and that it may advertise for proposals and *may* accept or reject any proposals, it was held discretionary with it to advertise or not as it might elect.[3] *

When there are two sections to an act, one of which provides that the board of supervisors "must" contract for publishing the delinquent tax list with the lowest bidder after ten days' notice of the letting of the contract, and the other requires the tax collector to publish the delinquent list by a certain date, it was held that, on failure of the supervisors to contract for publishing the list, the tax collector was not authorized to do so.[4]

Under an act which gave an election to commissioners either to carry on the works by their own engineers and with labor employed and materials furnished by themselves, or to let out the whole or parts of the work by contract to the lowest bidder after advertising in the newspaper for proposals, it was held that, the commissioners having elected to let the work out by the latter method, they must give it to the lowest bidder, and a contract awarded to one who was not the lowest bidder according to the terms and

[1] Beaver *v.* The Trustees, 19 Ohio St. 97, *and cases cited*; Dallas *v.* Ellison (Tex.), 30 S. W. Rep. 1128; Greene *v.* New York, 1 Hun (N. Y.) 24.

[2] McBrian *v.* Grand Rapids, 56 Mich. 95.

[3] Fitzgerald *v.* Walker (Ark.), 17 S. W. Rep. 702 [1891]; *and see* People *v.* Buffalo, 25 N. Y. Supp. 50, 5 Misc. Rep. 36; *and* Santa Cruz Co. *v.* Heaton (Cal.), 38 Pac. Rep. 693; Smeltzer *v.* Miller (Cal.), 45 Pac. Rep. 264.

[4] Smeltzer *v.* Miller (Cal.), 45 Pac. Rep 264.

* *See* Secs. 50–55, *supra*.

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specifications advertised and proposed, was unauthorized and void.[1] When commissioners, by a single vote, have once elected the manner in which work shall be done, their power of designation is gone.[2] Bids for public work need not be invited unless it is expressly required by statute, charter, or ordinance.[3] The provisions of a city charter requiring contracts to be made upon advertisement and sealed proposals have been held not to apply to contracts by the commissioner of public works for public work authorized by special enactment.[4] The improvement of a public park belonging to a city has been held not a public improvement within an act requiring the city to advertise for bids for work and materials for public improvements.[5] If the provisions of the law be not carried out, and a contract be awarded in a manner contrary to the express requirements of the statutes and charters of the city or company, the irregularity may be set up as a defense to the action on the contract.[6]

Contracts by a municipal corporation, a county, or the state must be within the act creating them and within the privileges and powers of their charter, constitution, or organization, or they are void, and the contractor may recover nothing for his labor and materials. The statutes are obligatory and not merely directory.[7]

If work has been done under a contract which is void for having been entered into in violation of an express provision of the statute law or the charter, constitution, or ordinance, the contractor cannot recover for the work done or the materials furnished: not on the contract, because the contract is void, which is equivalent to saying there is no contract; and not on an implied contract or *quantum meruit*, because there is nothing from which to imply a request to do the work except in the manner required by law; or by request of the public officer who assumed to make a contract which is null and void, not having the necessary authority.[8]*

The requirements of the act that, before the awarding of any contract for any work authorized by the act, the city council shall invite sealed proposals, and shall award the contract to the lowest bidder, apply to every contract authorized by the act, irrespective of the character of the work to be done, or of the mode in which the expense is to be paid.[9] If the charter provide that no contract shall be made for any public work, or for any supplies for

[1] Dickinson *v.* City of P., 75 N. Y. 65 [1878]; Bigler *v.* Mayor of N. Y., 5 Abb. N. Cas. (N. Y.) 51.

[2] Bigler *v.* Mayor of N. Y., 5 Abb. N. Cas. (N. Y.) 51; *accord* People *v.* Board of Improvement, 43 N. Y. 227.

[3] Cummings *v.* Seymour, 79 Ind. 491; Kingsley *v.* Brooklyn, 5 Abb. N. Cas. (N. Y.) 1; Yarnold *v.* Lawrence, 15 Kans. 126; *but see* Adamson *v.* Nassau Electric R. Co. (Sup.) 33 N. Y Supp. 732.

[4] Greene *v.* Mayor of N. Y., 60 N. Y. 303.

[5] Walsh *v.* Columbus, 36 Ohio St. 169.

[6] *Many cases cited in* 15 Amer. & Eng. Ency. Law 1091.

[7] Evans on Agency 211, 212; 15 Amer. & Eng. Ency. Law 1084–5 *and cases cited*; Young *v.* Mayor of Leomington, L. R. 8 App. Cas. 517 [1883]; *and see* Smith *v.* New York (Sup.), 31 N. Y. Supp. 783.

[8] Bonesteel *v.* Mayor, 22 N. Y. 162; *and many cases in* 15 Amer. & Eng. Ency. Law 1085.

[9] Santa Cruz Rock-Pavement Co. *v* Broderick (Cal.), 45 Pac. Rep. 863.

* *See* Secs. 50–53, *supra*.

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the city, and no such work or furnishing supplies shall be commenced, until the contract therefor has been approved by the council, all contracts must be submitted to the council for its approval or disapproval, without regard to auxiliary and supplementary powers to contract conferred upon commissioners, boards, and other officers.[1]

It is imperative that a contractor exercise every precaution to have the contract in accordance with the law, for although the city officials may be honest and honorable, and the city be inclined to meet his just claims, yet any person interested, as any taxpayer, can object and have mandamus issue against the city to prevent a recovery for anything that has been done under an illegal contract.*

139. Instructions Should Give All Necessary Information to Bidders.—Any irregularity in the proceedings directed by the act or charter by which the work is authorized to be observed may avoid and destroy the contract. Therefore when public work is required to be let to the lowest responsible bidder upon notice of the work or material required, such notice should give all the necessary information to enable parties desiring to bid to make estimates. Resort cannot be allowed to mere verbal explanation to ascertain substantially all that is contemplated to be done, as that might lead to favoritism and other mischief intended to be avoided by the statute.[2]

If a charter provide that before proceeding with any proposed public improvement the detailed estimates of the costs of such work or improvements shall be made, and if the city ordinance provide that the owner is entitled to notice of the intended improvement, a contract made without any estimate of the cost and without proper notice of the improvement is illegal and not binding. The proceedings are void, and the collection of a tax levied to pay for the improvement may be properly enjoined.[3] If the act or charter requires public notice of proposals and that the contract be awarded to the lowest responsible bidder giving adequate security, and security be furnished by the lowest bidder, any contract not in strict compliance with the law or charter is unauthorized and void.[4]† If the act requires that a certain number of days' notice be given of the time for the bids, it is mandatory and must be complied with.[5] The illegality can be pleaded in defense to any action on a contract which has not been made strictly as required by the law.[6]

[1] Common Council of Detroit *v.* Public L. Comm. of Detroit (Mich.), 59 N. W. Rep. 654; People *v.* Waring (Sup.), 39 N. Y. Supp. 193; *and see* Alford *v.* Dallas (Tex.), 35 S. W. Rep. 816.

[2] Littler *v.* Jayne, 124 Ills. 123 [1889].

[3] Mills *v.* City of Detroit (Mich.), 54 N. W. Rep. 897.

[4] *In re* Eager, 46 N. Y. 100; Maxwell *v.* Stamlaus, 53 Cal. 389; People *v.* Gleason, 121 N. Y. 631 [1890]; Smith *v.* Mayor, 10 N. Y. 504.

[5] Boerd *v.* Gillies (Ind.), 38 N. E. Rep. 40.

[6] Dillon's Munic. Corp'ns, § 466 (4th ed.), *and cases cited*; McDermott *v.* Board of Jersey City, 28 Atl. Rep. 424; Shaw *v.* Trenton, 49 N. J. Law 339; State *v.* Cunningham (Neb.), 59 N. W. Rep. 485; Heidleburgh *v.* St. Francis Co., (Mo.), 12 S. W. Rep. 914 [1889]; Littler *v.* Jayne, 124 Ills. 123 [1888]; Dickinson *v.* Poughkeepsie, 75 N. Y. 65 [1878]; Davenport *v.* Klienschmdt, 13 Pac. Rep. 249 [1887].

* *See* Secs. 177, 178, *infra.*

† *See* Secs. 133, 134, *supra.*

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When the statute required "good and sufficient security for the performance of the work," a contract given to the lowest bidder without requiring "good and sufficient security" is not legal, and the contractor cannot recover for the work when done, it not having been accepted or used.[1] The neglect to insist upon security is not material where the charter provides for "good and sufficient security, as required by said board," it not appearing that the board required any security.[2]

When the laws require that certain work be let or franchises be sold, such statute requires that the transaction be on a cash basis or for cash, and an offer to pay percentage of the gross receipts, or to do or provide any other thing, in consideration of such a franchise, cannot be considered.[3]

140. There Must be Competition, in Compliance with the Statute or Charter.—The power of the city to make contracts is limited and can only be exercised in the manner prescribed. There must be competition before a contract can be awarded.[4]

If a charter provides that the contract be given "to the lowest responsible bidder giving adequate security," officials authorized to let the contract may not arbitrarily reject the lowest bid and accept a higher bid without facts justifying it; there must be facts tending to show that the lowest bidder was not responsible, or at least some pretense to that effect.[5]

Canvassing by the engineer, or permission by him to the contractor to alter the bid where the proposals have been referred to him for calculation and comparison, or any acts by which one bidder who was not the lowest bidder is made to appear the lowest, will render the contract void and unauthorized.[6] The making of a contract at different prices, and according to a different classification of the kind of work, and with new and material clauses inserted, which were not offered to the other bidders, will destroy the obligations of the contract and render the contractor's rights thereunder null and invalid. He cannot recover for what his work is reasonably worth.

A contractor should insist upon the contract being executed in the same terms and according to the plans and specifications upon which he has made his bid, and whether to his favor or detriment should be no excuse for his not requiring it. Engineers and commissioners will realize the great detriment they may cause their favorites and friends by seeking to benefit them or favor them to the exclusion of other competitors. The law is well settled, and anything which does not fairly and fully satisfy the requirements of the statute, and does not secure to the state or city the full benefits of the competition which is sought, may render the contract void and not binding upon the city.[7]

[1] Mackey *v.* Columbus (Mich.), 38 N. W. Rep. 399 [1888].
[2] Carey *v.* East Saginaw (Mich.), 44 N. W. Rep. 168.
[3] Thompson *v.* Board of Sup'rs (Cal.), 44 Pac. Rep 230.
[4] Shaw *v.* Trenton, 49 N. J. Law 339 [1887].
[5] People *v.* Gleason, 121 N Y. 631 [1890].
[6] Dickinson *v.* City of Poughkeepsie, 75 N. Y. 65 [1878]; Smith *v.* Mayor, 10 N. Y. 504.
[7] Dickinson *v.* City of Poughkeepsie, 75 New York 65 [1878].

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141. Public Officers cannot Legalize nor Ratify Void Contracts.—Such contracts are not merely voidable; they are void and cannot be made valid by subsequent acts of the city or its officials.[1] Nothing is added to the legality of a claim under such a contract by the common council auditing and allowing it, for they have no jurisdiction so to do.[2] Though the contract was let to one who was apparently, but not in fact, the lowest bidder, it cannot be made binding upon the city by acceptance of the materials or by ratification by an officer or otherwise, except in the form prescribed by law.[3] Nor does the auditing of such a claim by the board of audit stop the city from denying liability on the ground of fraud in the making of the contract.[4] A contract let when the appropriation for the work was insufficient, is not ratified by a subsequent appropriation.[5]

Where the charter requires that, before any improvement shall be commenced, the city council shall pass a resolution ordering the same to be done, the council cannot, after the improvement has been completed, pass an ordinance ordering the same to be done, so as to render an assessment therefor against the property owners valid.[6] And when an act provides that "no person shall be employed or permitted to teach in any of the public schools of the state, * * * who is not the holder of a lawful certificate of qualification or permit to teach, any contract made in violation of this section shall be void"; it was held that where a teacher is employed who does not hold a certificate, the subsequent procurement of such certificate does not render the contract of employment valid.[7] If a city charter provides that a city is not bound by any contract unless authorized by an ordinance and in writing, officers of the city cannot bind it by a contract not in writing.[8] A re-awarding of the contract by the common council over the veto of the mayor and without any question or objection that the lower bids were formed and made by responsible parties, does not make it any more valid.[9]

When contracts are required to be let to the lowest responsible bidder and approved by the governor, and an act makes the payment or acceptance of money for refraining from bidding a misdemeanor, and the criminal code imposes a punishment for a conspiracy to prevent bidding, a letting to a firm, which is formed for the purpose of preventing bidding, some of whose members have been paid by the others for refraining, is void, not

[1] Dillon's Munic. Corp'ns (4th ed.), § 466, *and cases cited;* Noel *v.* San Antonio (Tex.), 33 S. W. Rep. 263; Santa Cruz Pav. Co. *v.* Broderick (Cal.), 45 Pac. Rep. 863.

[2] People *v.* Gleason, 121 N. Y. 631 [1890], *distinguishing* E. R. Gas L. Co. *v.* Donnelly, 93 N. Y. 557; Arnot *v.* Spokane (Wash.), 33 Pac. Rep. 1063; Com'rs *v.* Boyle, 9 Ind. 296, *and note*, 68 Am. Dec. 293, *and* 4 Amer. & Eng. Ency. Law 364.

[3] Nelson *v.* City of New York (N. Y. App.), 29 N. E. Rep. 814; *affirming* 5 N. Y. Supp. 688.

[4] Nelson *v.* City of New York, *supra.*

[5] Indianapolis *v.* Wann (Ind.), 42 N. E. Rep. 901.

[6] Buckley *v.* City of Tacoma (Wash.), 37 Pac. Rep. 441; *and see* Ellis *v.* Cleburne (Tex.), 35 S. W. Rep. 495.

[7] Hamer *v.* Sheldon School Dist. (N. D.), 59 N. W. Rep. 1035.

[8] Arnot *v.* City of Spokane (Wash.), 33 Pac. Rep. 1063.

[9] People *v.* Gleason, 121 N. Y. 631 [1890].

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being a letting to the lowest bidder within the meaning of the constitution, and although the contract is approved by the governor and by an expert printer appointed under the act, and within the maximum price fixed by it. An answer setting up a combination in the form of a firm to prevent competition in bidding, that the bids were made and contracts entered into pursuant to that purpose, and that certain of the conspirators paid certain others for entering into the combination, is sufficiently specific on general demurrer; the presumption arising from such facts that the conspirators would otherwise have competed at the bidding. The state is not estopped by acts of the commissioners of public contracts done on the faith of the validity of the letting prejudicial to the firm.[1]

142. The Legislature may Ratify Contracts.—The legislature may ratify a contract entered into by a municipal corporation for a public purpose which was *ultra vires* and void, and thus render it valid and binding. Such a contract having become valid by a later enactment, it is not affected by a still later act which required certain other forms and ceremonies which had not been complied with.[2]

Legislative enactment will not be held a ratification of illegal acts in the performance of work unauthorized by a previous act unless the intention so to ratify is apparent and beyond question.[3] A later enactment authorizing the Croton aqueduct board "to construct work mentioned and to furnish materials necessary for the same in such places and in such manner by contract as they may deem the public interests require" was held to repeal an earlier act which required "that all contracts should be awarded to the lowest bidder for the same respectively, with adequate security, and every such contract should be deemed confirmed in and to such lowest bidder at the time of opening the bids."[4]

If the constitution of the state require that the work be advertised and let to the lowest bidder, the legislature cannot authorize officers of the state to contract in any other way.[5] The legislature cannot, in some states at least, authorize city officers to pay money to an individual for which there is no legal and enforceable claim, for it is a "*gift of public money* within a constitutional inhibition against such gifts."[6]

143. A Contractor cannot Recover under a Void or Illegal Contract.—When the contract provides that all contracts for work and supplies for more than $100 shall be let to "the lowest responsible bidder giving

[1] Dement *v.* Rokker (Ill.), 19 N. E. Rep. 33 [1889]

[2] Brown *v.* Mayor, 63 N. Y [1875]; *reversing* Brown *v.* Mayor, 3 Hun, 685; *but see* Sault Ste. Marie *v.* Van Deusen, 40 Mich. 429; Palmer *v* Tingle (Ohio), 45 N. E. Rep 313; Mitchel *v* Milwaukee, 18 Wis. 92; Pearsall *v.* Gt. Northern Ry. Co. (C. C.), 73 Fed Rep 933; Clinton *v.* Walliker (Iowa), 68 N. W. Rep. 431.

The law is generally as stated in the text, but there are cases to the contrary. A collection of cases in Dillon's Munic. Corp'ns (4th ed.), § 465. *note*

[3] Kingsley *v.* Brooklyn, *supra*

[4] The People *v.* The Croton Aq Board, 49 Barb. 259 [1867].

[5] Mulnix *v.* Mutual Ben. L. Ins. Co. (Colo.), 46 Pac Rep. 123.

[6] Conlin *v.* San Francisco (Cal), 46 Pac. Rep. 272.

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adequate security," a letting of a contract to one *not* the lowest bidder without showing that the lowest bidder is not responsible, nor his security is inadequate, nor any pretense to that effect, is illegal and void, and the contractor who has done work under such a contract cannot recover for his work.[1] Municipal or public corporations are not liable for the value of materials furnished under illegal or forbidden contracts when the municipality cannot choose whether or not it will retain or reject the benefits of such work or materials;[2] nor will the fact that the contract was let to the contractor as the lowest bidder enable him to recover. He cannot recover the value of the materials furnished under a contract fraudulent or void.[3]

A county is not liable, therefore, for a court-house erected upon public ground under a contract made in disregard of a statute that forbids contracts for public structures to cost more than $500, unless to the lowest bidder, upon plans and specifications previously adopted, even though the county use the buildings. The requirements of such a statute apply to contracts for *parts* of such structures. The rule applies to alteration or additions, in the course of construction under a legally made contract, the cost of which exceeds $500. If bids are not invited and the contract awarded according to law, the county is not liable for the price or value of the work so undertaken.[4]

When the law prescribes a certain method for the exercise and execution of special powers conferred they must be carried out as required. The contractor cannot recover, notwithstanding a statute exists that provides that a contractor shall be entitled to recover if the work has been done and materials furnished in good faith, under a contract with the county authorities, in making which they have not pursued the forms prescribed by law. Such a statute was held to have no connection with the cases in point.[5]

A sewer assessment, valid on its face, is void if the contract was let without advertisement for proposals, and an owner of assessed property may recover a payment made by him in ignorance of the invalidity.[6]

If county commissioners have authority to contract, and work is done and materials furnished with their knowledge and consent, and they have been accepted and used by the county, it is generally held that the con-

[1] Brady *v.* Mayor, 68 N. Y. 312; McDonald *v.* Mayor, 68 N. Y. 23; Dickinson *v.* Poughkeepsie, 75 N. Y. 65; People *v.* Gleason (N. Y.), 25 N. E. Rep. 4 [1890].

[2] Richardson *v* County of Grant, 27 Fed. Rep. 495 · Dickinson *v.* City of P., 75 N. Y. 65 [1878]; People *v.* Gleason, 121 N. Y. 631 [1890]; Bigler *v.* Mayor (N. Y.), 5 Abb. N. Cas. 51.

[3] Nelson *v.* City of N. Y., 29 N. E. Rep 814; *affirming* 5 N. Y. Supp. 688.

[4] Richardson *v.* Grant Co. (Ind.), 27 Fed. Rep. 495 [1883]; Buchanan Bdge. Co. *v.* Walters (Com. Pl.), 3 Ohio N. P. 176; State *v.* Biddle (Com. Pl.), 3 Ohio N. P. 173; *and see* Hovey *v.* Wyandotte Co. (Kans.), 44 Pac. Rep. 17; Townsend *v.* Holt Co. (Neb.), 59 N. W. Rep. 881; Littler *v.* Jayne, 124 Ill. 123 [1888]. Contract for eight statues; so held when the contractor kept at work on a public building after he had instructions to stop work, Epperson *v.* Shelby Co., 7 Lea (Tenn.) 275.

[5] Heidleburgh *v.* St. Francis Co. (Mo.) 12 S. W. Rep. 914 [1889].

[6] Mutual Life Ins. Co. *v.* City of N. Y. (Sup.), 29 N. Y. Supp. 980.

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tractor may recover the reasonable value of his work and materials without an express contract.[1] There must be no statute which requires an express contract.[2]

144. Labor Laws and Limitations Must be Complied With.—The advertisement, proposal, and award of the contract must conform to the laws, charters, and ordinances enacted with regard to such work, not only as regards the manner of soliciting proposals, but of entering into the contract. If there are general statutes, such as those prohibiting foreign contract work, or limiting the number of hours labor per day, or the employment of aliens or minors, the bids and contracts must be made and executed in conformity with such laws and ordinances,[3] and they should be brought to the notice of contractors in the instructions to bidders, and the bidder should be required to observe them in his proposal and estimate. They should be made separate stipulations in the contract. This advice is given for the benefit of the bidder as well as the public officer. It is the duty of the public officer to proceed in accordance with the laws enacted, without questioning their constitutionality or legality, so long as there is no conflict in his various duties; and if the bidder will have his proposal considered, he must make it conform to the standard adopted and by which the bids are to be judged. If he does not do this, his bid is pretty certain to be rejected as informal. The constitutionality or legality of such labor laws can be tested when they are violated.

Laws which forbid contractors to accept more than eight hours for a day's work, except in cases of necessity, have been held not to abridge the privileges of citizens under the United States constitution, art. 14, sec. 1, or to deprive any citizen of his rights and privileges under the constitution of the State of New York, art. 1, sec. 1.[4]

In Colorado a different decision was reached, and the court held that "a bill prohibiting mining and manufacturing companies to contract with their employees for labor for more than eight hours a day is in violation of the rights of parties to make their own contracts, under the constitution of the United States (fourteenth amendment), and the bill of rights of the constitution of Colorado.[5] While a city council may by ordinance designate the number of hours laborers shall work on the public works of the city, it cannot make a violation of such ordinance a misdemeanor.[6]

In Indiana the act providing that eight hours shall constitute a legal day's work applies only where the employment is by the day.[7] Contractors

[1] Madison Co. *v.* Gibbs, 9 Lea (Tenn.) 383; *and see* Atkins *v.* Barnstable Co., 97 Mass. 428.

[2] Walcott *v.* Lawrence Co., 26 Mo. 272; Lehigh Co. *v.* Kleckner, 5 W. & S. (Pa.) 181; 4 Am. & Eng. Ency. Law 364.

[3] People *v.* Croton Aq. Bd., 26 Barb. (N. Y.) 240; Wiggins *v.* Phila., 2 Brws. 444.

[4] White, J., dissenting in People *v.* Beck (Super. Buff.), 30 N. Y. Supp. 473.

[5] *In re* Eight-Hour Law (Col. Sup.), 39 Pac. Rep. 328; *semble*, Hellman *v.* Shoulters (Cal.), 44 Pac. Rep. 915.

[6] State *v.* McNally (La.), 21 So. Rep. 27.

[7] Helphenstine *v.* Hartig (Ind. App.), 31 N. E. Rep. 845.

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and builders usually avoid the law by hiring all labor by the hour and paying them accordingly.

An act of the legislature which requires employers to pay wages once or twice each month between fixed days has been held to impair the obligation of the contracts,[1] and violates the Pennsylvania constitution, which declares that all men have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.[2] In Illinois such a law[3] was held unconstitutional, as a taking of property without due process of law, and as being class legislation.[4]

The Rhode Island courts have maintained the constitutionality and legality of a statute which requires every corporation, other than religious, literary, or charitable corporations, and every corporated city, but not including towns, to pay the wages of their employees weekly, all wages earned by them to within nine days of such payment.[5]

Some other examples of recent legislation on the subject of wages are statutes which require the employers to pay their employees their wages earned by them in full on the day of their discharge, without abatement or reduction, and providing a penalty for their failure to pay as the statute requires. The laws as enacted in some states required the wages to be paid on the day of discharge, notwithstanding the fact they might not be due until a later day by the terms of the contract of employment, which had the effect of impairing the obligation of contracts or of limiting the right to contract, and were therefore unconstitutional—at any rate so far as natural persons were concerned. In respect to corporations the courts have held that under a power reserved in the charter to alter and repeal laws relating to the formation and organization of corporations, that the enactment was valid. That all the powers a corporation has were created and granted by the legislative assembly, and that by accepting the charter the company agreed that they might be amended according to law.[6] The Rhode Island court went further, and held that the power of a corporation to contract, granted by its charter, was not such a property that modifying it or limiting it by the legislature could be called a taking away of the company's property without compensation.[7]

A law which requires railroad companies to pay its employees what is due them within fifteen days after demand therefor, and imposes damages of

[1] Commonwealth *v.* Isenberg (Quart. Sess.), 4 Pa. Dist. Rep. 597.

[2] Commonwealth *v.* Isenberg (Quart. Sess.), *supra;* Godcharles *v.* Wigeman, 113 Pa. St. 431; *but see, contra*, Hancock *v.* Yaden, 121 Ind. 366.

[3] Act approved April 23, 1891.

[4] Braceville Coal Co. *v.* People, 147 Ill. 66.

[5] State *v.* Brown, etc., Mfg. Co. (R. I.), 39 Am. & Eng. Corp. Cas. 190; Rhode Island Pub. Laws, ch. 918, secs. 1, 2.

[6] State *v.* Brown, etc. Mfg. Co. (R. I.) [1892]. *supra;* Leep *v.* St. Louis, etc., R. Co., 58 Ark. 407.

Herein is one feature at least where a corporation doing business, as such, is at a disadvantage with a natural person.

[7] State *v.* Brown, etc., Mfg. Co. (R. I.) [1892], *supra; but see, contra* Braceville Coal Co. *v.* People, 147 Ill. 66.

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twenty per cent. of the same due for a failure to comply with such law, was held unconstitutional as being special or class legislation.[1]

Statutes requiring contractors and employers to pay their help wages in lawful money, and prohibiting payment by orders, "store-pay," etc., have been held constitutional where their application has been general and to all classes of employers.[2] But when the laws require that mine owners and manufacturers shall pay their help in lawful money of the United States, at regular intervals, and fails to include persons and companies engaged in other pursuits, then it is class legislation and unconstitutional. It has been so held in West Virginia, Illinois, Missouri, Pennsylvania.[3]

Under the laws of State of New York it is a misdemeanor punishable with a fine for a contractor to employ any one but citizens of the United States on state or municipal work. Recently the supreme court of the state rendered a decision that the law could not be enforced with regard to Italian laborers, as it conflicted with the treaty between the United States and the king of Italy, which guarantees the latter's subjects residing within the territory of the former country all the rights and privileges with respect to trade and employment that are enjoyed by citizens.[4]

The constitution and laws of the states are subordinate to every treaty made by the authority of the United States, and if the laws of any state refuse certain rights to foreigners or aliens which the treaty of their country secures to its subjects, then such laws are void.[5] A statute that forbids aliens who cannot qualify as electors from fishing in the waters of the state was held in violation of our treaty with China, and therefore void.[6] The right to reside in a state implies the privilege of trading and laboring, and a statute which forbids certain aliens from working in a mining claim, whether for themselves or for others, was declared null and void.[7] That the states as well as their citizens are bound by treaties of the Federal government cannot be doubted.[8]

145. Form of Notice and Instructions. — The notices usually require certain declarations by the bidder, which he must make to entitle his bid to consideration, and specify certain reasonable restrictions and qualifications that are made necessary to become a bidder.

NOTICE TO BIDDERS. GENERAL INSTRUCTIONS AND CONDITIONS

Notice:—Bidders are advised that any and all bids deficient in any of the following requirements may be rejected as informal.

[1] San Antonio, etc., R. Co. *v.* Wilson (Tex. 1892), 50 Amer. & Eng. Corp. Cas. 513.

[2] Peel Splint Coal Co. *v.* State (W. Va.), 15 S. E. Rep. 1000.

[3] 23 Amer. & Eng. Ency. Law 936-7; *but see* Hancock *v.* Yarden, 121 Ind. 366, *contra; and see* Shaffer *v.* Union Min. Co., 55 Md. 74.

[4] Justice White, *in* People *v* Warren, 13 Misc. Rep. (N. Y.) 615 [1895].

[5] 1 Amer. & Eng. Ency. Law 465, *and cases cited.*

[6] *In re* Ah Chong *v.* U. S., Pac. Coast L. J., June 12, 1880.

[7] Chapman *v.* Toy Long, 4 Sawy. (U. S.) 37; Baker *v.* Portland, 5 Sawy. (U. S.) 566.

[8] The La Ninfa (C. C. A.), 75 Fed. Rep. 513; The Alexander (C. C. A.), 75 Fed. Rep. 519; *and see* Hellman *v.* Shoulters (Cal.), 44 Pac. Rep. 915.

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1. *Capacity to Contract.*
No bid will be accepted from, or contract awarded to, any corporation until it shall have furnished satisfactory proof of its legal capacity to enter into and perform the same contract.

2. *Bidders in Arrears or Default.*
No bid will be accepted from or contract awarded to any person or corporation who is in arrears to the Proprietor, State, or City, upon debt or contract, or who is a defaulter as surety or otherwise upon any obligation to the Proprietor, State, or City.

3. *Bidder must be a Practical Contractor or Builder.*
Proposals from parties who are not known to be regularly and practically engaged in the class of work called for by the drawings and specifications, and to possess ample facilities for doing the same, will not be accepted.

4. *Bidder must be Qualified.*
The bidder must satisfy the engineer or commissioner of his ability to furnish the materials and perform the work for which he bids.

5. *No Assistance from Officers or Employees.*
Proposals must be prepared without the assistance, additional information, or suggestion of any person belonging to, employed by, or holding office in the Company, State, or City.

6. *Government Officers can have no Interest.*
In work for the Federal Government this clause is often inserted: No member of or delegate to Congress, nor any person belonging to or employed in the.....service of the United States, shall have any interest in the contract for this work or any benefit that may arise therefrom; but if the contract be made with an incorporate company for its general benefit, this rule will not be construed to extend to this contract so far as it relates to members of Congress.

7. *No Interest in Other Bids.*
Reasonable grounds for supposing that any bidder is interested in more than one proposal for the same item may cause the rejection of all proposals in which he is interested.

8. *All Persons Interested must be Named.*
Bidders are required to state in their proposals or estimates their names and places of residence, their business and the names of all persons interested with them therein; and if no other person be so interested, they shall distinctly state the fact.

9. *Bid, Fair in all Respects.*
The proposal must state that it is made without any connection with any other person making any bid or estimate for the same purpose, and that it is in all respects fair, and made without connection or collusion with any other person making proposals for the same work or materials.

10. *Statement that no Officer or Employee is Interested.*
Bidders are required to state that no person employed or appointed by virtue of any city ordinance, legislative act, or act of Congress relative to the.....[name of work].....has any interest in the proposal or contract; that no member of the Common Council, Head of a Department, Chief of a Bureau, or any Deputy thereof, or Clerk therein,

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or any other Officer of the State, City, or Corporation is directly or indirectly interested therein, or in the supplies or work to which it relates or in any portion of the profits thereof.

11. *Declaration as to Truth of Statements.*

The proposal or estimate must be verified by the oath in writing of the party or parties making the same, that the several declarations and matters stated therein are in all respects true; and if more than one person is interested in the proposal, it is required that the verification be made and subscribed by all parties interested; in case of a firm, by each and every member of the firm.

146. Bidders May be Required to Possess Certain Qualifications.—The extent to which bidders may be required to conform to the "red tape," so called, which is prescribed in the instructions to bidders, and which is so distasteful to practical contractors and builders, must be determined by its reasonableness; and as the powers conferred upon public officers are largely discretionary, it may be said to be almost unlimited. The recording of all information and data as to the parties, their names, addresses, names of members of firms and officers of corporations, and the authority by which they act is necessary to good business methods.

When commissioners or a board of public works have been authorized to invite proposals and to award contracts under certain acts or laws, they may prescribe in their notice to bidders any reasonable formality to be observed that does not interfere with or prevent fair competition, even though the court can assign no reason for or purpose to be served by the specification or requirement.[1]

Neglect on the part of the bidder to conform strictly to the forms and reasonable requirements so prescribed will be fatal to his chances of receiving the award of the contract. No bid should be received that does not comply with the instructions to bidders. If a proposal is informal and irregular, it cannot properly be considered.[2] A reference in the bid to "plans," "specifications," and "diagrams" has been held to be to the plans, etc., furnished the bidder and from which he was supposed to make his estimate.[3] The bid must not be lacking in definiteness: it must be clear as to quantity, quality, and price. A bid to supply materials "at what it cost to lay them down" is too indefinite.[4] A specification for electric lights which stated the candle-power, but failed to name the system, was held sufficiently definite.[5] The omission in a proposal of two items of comparatively insignificant value will not render invalid a bid which is otherwise proper in form.[6]

[1] *Re* Marsh, 83 N. Y. 435 [1881]; State *v.* Governor, 22 Wis. 110 [1867]; Faunan *v.* Comm'rs, 21 Ohio St. 311 [1871]; Interstate, etc., Co. *v.* City of Phila. (Pa.), 30 Atl. Rep 383; May *v.* Detroit, 2 Mich. N. P. 235; State *v.* Board, 42 Ohio St. 374; *but see* People *v.* Contracting Board, 46 Barb. 254 [1865].

[2] *See* Wiggins *v.* Philadelphia, 2 Brews. (Pa.) 444; Weed *v.* Beach, 56 How. Pr. (N. Y.) 470; *Re* Marsh, 83 N. Y. 431.

[3] Sexton *v.* Chicago, 107 Ill. 323.

[4] State *v.* York Co. Comm'rs, 13 Neb. 57.

[5] Detroit *v.* Hosmer (Mich.), 44 N. W. Rep. 622.

[6] State *v.* York Co. Comm'rs, *supra*.

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The reasonableness of the first requirement, that corporations, and all parties, for that matter, should demonstrate their capacity to contract, is too evident to require discussion. Legal capacity of the parties to contract is the first element of a binding agreement.

147. Restrictions which Exclude Certain Persons from Bidding.—The reasonableness of a restriction which denies certain persons the privilege of bidding is not so apparent in that it renders it possible for the parties having the power to award the contract to foster favoritism by excluding experienced as well as inexperienced persons who have been so unfortunate as to have had differences with public officers. A clause that provides that bids from "persons in arrears to the government or who are in default either as contractors or as sureties will not be received," or that "the bidder must be known to be regularly and practically engaged in the class of work bid for," must give to some one the determination of these questions. If a public officer is inclined to be very exacting or officious, he is certain to raise these questions. Whether or not a contractor *is* in arrears or default is a question that sometimes requires a long time to settle conclusively; and the amount of experience a man should have had to be capable of undertaking certain work, the precise character of which may never before have been met, would be a question which no two persons would determine alike. If such questions were decided by an engineer or officer arbitrarily, and the courts subsequently found that the contractor was not in arrears or default, or that he was capable and his bid had proved to be the lowest bid for the work, it might prove an unhappy restriction, the reasonableness of which would be questionable. Decisions of boards under such restrictive clauses should receive the closest scrutiny of the courts.

In Pennsylvania it has been held that a court would not control the discretion of public officers in such a case, and that it was proper to refuse a contract to the lowest bidder, although he was pecuniarily responsible, if he had previously defrauded the city by furnishing inferior supplies, even though he had not been judicially convicted of the act;[1] while in another case it was held that a city council could not arbitrarily refuse to entertain a bid for city printing because the bidder was not the owner of a newspaper.[2]

To be able to demand an award of the contract the lowest bidder may be required not only to offer adequate security for the performance of the contract, but he must also be able to undertake what is expected or demanded of him.[3]

148. There Must be No Collusion or Other Efforts to Prevent Competition.—The reasonableness of a requirement that the contractor shall not have had assistance or advice from employees or fiduciaries of the city or any department of public works, and that no one elected to office or holding

[1] Douglass *v.* Commonwealth, 108 Pa. St. 559.
[2] Berry *v.* Tacoma (Wash.), 40 Pac. Rep. 414.
[3] People *v.* Dorsheimer, 55 How. Pr. (N. Y.) 118.

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positions of trust and confidence should have any interest in the proposal or contract, are manifestly reasonable and just when such acts or interests by the parties mentioned are contrary to the express policy of the law and of good government.*

A statute prohibiting any councilman of a city from being interested in any contract with the city has been held to apply to a member of the council who is a stockholder and secretary of a corporation having a contract for lighting the city, even though the member was elected after the contract was executed.[1] A court of its own motion may institute a prosecution against a public officer for being concerned in a public contract by directing the grand jury to investigate the matter, and after a presentment by them directing the district attorney to submit an indictment.[2]

That bidders should be required to state the names of all parties interested in the bid, and that the bid is made without connection with any other bidder, and that it is in all respects fair and without collusion or fraud, cannot be questioned. It is a uniform doctrine that any combination at public or private sales having the effect of preventing competition in bidding is against the policy of the law and avoids the sale.[3] The same doctrine applies to bidding for public work in response to invitations for tenders by which competition is sought. A combination of contractors for the purpose of destroying competition and securing to one a contract which the law requires should be awarded only after competition is against public policy and illegal, and if it results in unreasonable prices the proposal may be rejected or the contract repudiated or annulled.[4]†

Any agreement between parties designing to make bids, tending either directly or indirectly to restrain or lessen rivalry and competition between them, is void as against public policy, even though it may not appear that such agreement did really produce any result detrimental to public interests.

This is true in auction sales, but it seems that the auctioneer or owner must have been a party to the collusion or deceit. The fact that a person by mistake believed himself employed to attend an auction sale as a "puffer," and by making fictitious bids induced one who was the highest bidder at the sale to bid more than he would otherwise have done, does not render the sale void as to the owner if the auctioneer and owner had no knowledge of such person's conduct.[5] The fact that several of the highest bids made were not enforced by the owner does not entitle

[1] Commonwealth *v.* De Camp (Pa. Sup.), 35 Atl. Rep. 601.

[2] Commonwealth *v.* Hurd (Pa.), 35 Atl. Rep. 682.

[3] Durfee *v.* Moren, 57 Mo. 374 [1874]; Saxton *v.* Sieberling (Ohio), 29 N. E. Rep. 179; *and see* Locke *v.* Willingham (Ga.), 25 S. E. Rep. 693; Jennings Co. Com'rs *v.* Verbarg, 63 Ind. 107.

[4] People *v.* Stevens, 71 N. Y. 527; People *v.* Lord, 6 Hun 390; Woodworth *v.* Bennett, 43 N. Y. 273; Gulick *v.* Ward, 10 N. J. Law 87.

[5] Locke *v.* Willingham (Ga.), 25 S. E. Rep. 693.

* *See* Secs. 42, 85, *supra*, and 512–518, *infra*.

† *See* Sec. 82, Chap. 3, Part I., *supra*.

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another highest bidder for a different lot offered at the same time to rescind his bid.[1]

Agreements between two contractors, sending in distinct sealed proposals, that if the contract should be awarded to either, both should share equally in the profits, if any, or contribute equally for losses, has been held against public policy and void.[2] But agreements between bidders for a public improvement to become partners in doing the work if either of them secured the contract, and that any benefit should inure to the firm, have been held valid and binding when it did not appear that the intent, effect, or necessary tendency of the contract was to stifle fair competition.[3] *

An interesting case is where two contractors by previous agreement made a bid for their joint benefit, in the name of one of them and a third person, for the construction of certain city improvements, and the contract was awarded to them. One of them, with the other's knowledge and consent, had made a separate bid, at a much higher figure, which was not seriously intended. The city engineer's estimate was higher than the latter bid, and there were three other bids still higher. Under these circumstances it was held that, even if the second bid was put in for a fraudulent purpose, there was no room for the inference that it had any influence in the making of the award; and, as the attempted fraud was therefore unsuccessful, it could furnish no ground for refusing to compel one of the contractors to account to the other for his share of the profits made under the contract.[4]

A statute that provides that the contract shall "in all cases be let to the lowest responsible bidder" has been held not to permit the substitution of another person as contractor in place of the lowest bidder, and further that any contract based upon such a substitution is void. The lowest bidder was to have a bonus for the contract.[5] † If as a result of illegal combinations to prevent competition a contract is let at an unreasonable price, the party defrauded may repudiate the contract and recover damages.[6]

A secret contract, between persons proposing to bid on the construction of a public work, by which their bids are to be put in, apparently in competition, but really in concert, with the intention of securing as high a price as possible, and dividing the profits, will not be enforced, though one of the parties secured the contract, executed the same, and received the profits.[7] A note given in part consideration of an agreement to refrain from bidding

[1] Locke *v.* Willingham (Ga.), 25 S. E. Rep. 693.

[2] Atcheson *v.* Mallon, 43 N. Y. 147; Woodworth *v.* Bennett, 43 N. Y. 274; Hunter *v.* Pfeiffer, 108 Ind. 197 [1885].

[3] Breslin *v.* Brown, 24 Ohio St. 565; McMullen *v.* Hoffman (C. C.), 75 Fed. Rep. 547; *accord*, Flanders *v.* Wood (Tex.), 18 S. W. Rep. 572; *and see* Whalen *v.* Brennan, 34 Neb. 129; *contra* Atcheson *v.* Mallon, 43 N. Y. 147.

[4] McMullen *v.* Hoffman (C. C.), 75 Fed. Rep. 547.

[5] Hannah *v.* Fife, 27 Mich. 172.

[6] People *v.* Lord, 6 Hun (N. Y.) 390; People *v.* Stevens, 71 N. Y. 527.

[7] McMullen *v.* Hoffman (C. C.), 69 Fed. Rep. 509, 75 Fed. Rep. 547.

* *See* Sec. 149, *infra*.

† *See* Sec. 15, *supra*.

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at a public sale of goods is invalid except in hands of an innocent purchaser.[1]

Any combination of contractors by which the privilege of bidding is secured by one without competition is illegal, though not criminal in Indiana, and if it results in letting the contract at unreasonable prices, the proposals may be rejected or the contract repudiated. A fraudulent bid renders the contract, with the bidder making, it null and void.[2] Any promise of reward to induce another contractor who had intended to bid *not to bid* renders the contract null and void.[3] Any fraudulent practice, such as collusion between public officers and the contractor, will have the same effect.[4] In Indiana such a combination among the contractors to make high bids and secure an exorbitant price for the work and to divide the profits has been held *not* to be a crime.[5]

148*a*. Possibility of the Law Being Used to Escape Onerous Contracts.—The position of a contractor undertaking public works is a precarious one indeed, when a slight omission of duty by the council or a neglect of duty on the part of a public officer may destroy his supposed rights in a construction contract, or prevent him absolutely from recovering for work done and materials furnished, no matter how conscientiously and skillfully performed. That a man's rights and compensation for an honest effort performed in good faith should depend upon the acts and misfeasance of another over whom he has no control, is a hardship which justice can never require. It may be the effect of a necessary law, but it is wholly wanting in equity.

It has been suggested that a strict application of the law might afford the contractor an avenue of escape from a burdensome undertaking, as when he has made a mistake in his estimate and proposal, or when the conditions are such that he desires to evade the performance of the contract. With the aid of some subordinate officer a fictitious case of collusion or some irregularity could be worked up which would render the award or contract void or illegal, and render it necessary to readvertise the work, to the relief and escape of the cunning contractor. From what has preceded it would not seem necessary to secure the assistance of a public officer, but fellow contractors might afford relief by exposing a fake combination to prevent competition in bidding. If such irregularities were made out and the lowest bidder was not shown to be a party, the city or state could not equitably retain his certified check nor hold his bondsman for his failure to enter into or to complete his contract. If the state or city refused to enter into the contract or was enjoined from so doing, the contractor could hardly be made to suffer in consequence. There are cases where conspiracies have been

[1] Atlas National Bank *v.* Holm (C. C. A.), 71 Fed. Rep. 489.

[2] 15 Amer. & Eng. Ency. Law 1100.

[3] Jennings County Comm'rs *v.* Verbarg, 63 Ind. 107; Woodworth *v.* Bennett, 43 N. Y. 273; Gulick *v.* Ward, 10 N. J. Law 87.

[4] Nelson *v.* New York, 5 N. Y. Supp. 688, s. c. 29 N. E. Rep. 814; *In re* D. & H. C. Co., 8 N. Y. Supp. 352; *In re* Anderson, 109 N. Y. 554.

[5] State *v.* Bruner (Ind.), 35 N. E. Rep. 29.

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formed to secure contracts, but the author has found none in which the object has been to get rid of them. In New York it has been decided that a contract secured by corrupt means was voidable only at the election of the city, one of the parties.[1]

Some of the cases seem to have anticipated the possibility of such a conspiracy and evasion, as in those cases where the courts have held that the attempt to prevent competition must have been successful to avoid the contract, that to render the bid or contract void the result must have been a letting at an unreasonable price.[2] For a contractor to prove that the work had been let at an exorbitant price or that the public interests had suffered might not be an easy matter, especially when he himself was in a tight place on account of having bid too low.

149. What is Good Evidence of Fraud and Collusion of Public Officers and Servants.—An estimate of the quantity of work which was only a random guess, and made the amount of stone excavation at more than double and the earth excavation at less than one-half the actual amount, was held not an estimate that would form a basis for a valid contract; that such an estimate, taken in connection with a bid of more than five times the actual cost of excavation earthwork and less than one and one-half per cent. of the actual value of stone work, thus showing on its face, according to the engineer's estimate, that he was the lowest bidder, when he really was the highest bidder, raised a just inference of fraud and collusion.[3]* So it may be shown in proof of fraud that the bidder had offered to sell materials at prices lower than those stated in his bid.[4]

The facts that the bidder secured the contract as the lowest bidder by putting in an unbalanced bid; that the city officers, exercising the option given them by the contract, only called for those materials the price for which was in excess of the fair price, and in greatly increased quantities; and that the advertised estimated amount of some of such materials was greatly less than the amount actually needed at the time,—are sufficient to show fraud and collusion in the letting of the contract.[5]

Public officers having public works in hand are presumed to know the usual prices paid for work, and evidence that a higher price was agreed upon than was shown by the city bid-book to have been paid before and after the contract, for similar work, was held competent as bearing upon the alleged combination and collusion of the commissioners. Discretion and good judgment must be exercised, and such contract be fairly made, and at reasonable

[1] Devlin *v.* New York (Com. Pl.), 23 N. Y. Supp. 888.

[2] 15 Amer. & Eng. Ency. Law 1100.

[3] *In re* Anderson (N. Y.), 17 N. E. Rep. 209 [1888]; *but see contra in* Reilly *v.* The Mayor, 111 N. Y. 473 [1889], s. c. 18 N. E Rep. 623: *and see* McMillen *v.* Hoffman (C. C.), 75 Fed. Rep. 547.

[4] Nelson *v.* New York (App.), 29 N. E Rep. 814, *affirming* 5 N. Y. Supp. 668.

[5] Nelson *v.* New York, *supra.*

* *See* Sec. 54, Chap. I., *supra*

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prices, with due regard to the interests of those concerned, or a court of equity will relieve against them.[1]

In general, contracts are not void as against a public officer if from the agreements it does not appear that their intent, effect, or necessary tendency is to stifle competition.[2] Therefore, a contract between several architects, who had each put in plans and specifications in competition for the erection of a public building, to retire from further contest and let the plans alone compete, and that whichever plan should be accepted all should share equally in the remuneration, is not against public policy, the competition not being in the least influenced by the agreement.[3]

Likewise when one of the parties who had filed his bid and another who was about to file his bid entered into an agreement to become partners in doing the work, in the event of either party being the successful bidder, both to share the profits alike, the agreement was held not against public policy, it not appearing that the intent, effect, or necessary tendency of the contract was to stifle competition.[4] *

150. Oath as to Truthfulness of Statements.—It seems that bidders may be required to verify the statements made in their proposals under oath, and that when the bidder is a firm, each partner may be required to make oath to the truthfulness of the statements made.[5]

If a question be raised as to the truth of statements made in proposal, which on its face entitles the bidder to the contract, it has been held that a board of public officers could not decide the question against the bidder and award the contract to another without giving him an opportunity to be heard;[6] † and in this case the board was clothed with discretionary powers providing that contracts should be awarded to the lowest bidder who furnished such security as the board approves, unless in the interests of the public the board determines to reject *all* bids.

MATTERS TO BE CONSIDERED IN PREPARING BIDS.

151. Forms to be Used and Formalities to be Observed.—

1. *Made in Triplicate.*

All bids must be made in triplicate upon the printed forms obtained at the office of the Engineer, No..... Street, City of ....., County of....., State of....., and must be accompanied by a copy of the Advertisement, Instructions and Conditions, the Specifications, and Contract.

2. *Addressed and Indorsed.*

All proposals must be addressed to the..... Engineer, to his

[1] Cook *v.* City of Racine. 49 Wis. 243 [1880].

[2] Whalen *v.* Brennan (Neb.). 51 N. W. Rep. 759; Breslin *v.* Brown, 24 Ohio St. 565.

[3] Flanders *v.* Wood (Tex.), 18 S. W. Rep. 572 [1892].

[4] Breslin *v.* Brown. 24 Ohio St. 565; *accord* Gulick *v.* Webb (Neb.). 60 N. W. Rep. 13.

[5] People *v.* Croton Aqueduct, 26 Barb. (N. Y.) 240.

[6] Connolly *v.* Board (N. J.), 30 Atl. Rep 548.

* *See* Sec. 148, *supra.*

† *Compare* Sec. 147, *supra.*

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office, and indorsed "Proposals for the Construction [Building of] ...., with the name [or number] of the person making the bid or proposal and the date of its presentation.

2¹. *Indorsement and Time of Delivery.*

The proposals must be delivered at the office of the Engineer, ... in a sealed envelope, addressed to....., Engineer, ..., indorsed "Proposals for the Construction [Erection] of, etc., ..., at or before 12 o'clock, Monday, ... 18...

3. *No Bids Received after Date Named.*

Any and all bids received after the hour named [fixed] for delivering the proposals will not be opened or considered unless all of the bids then presented shall have been rejected and reconsidered.

4. *Prices to be Written Out.*

The prices must be written out as well as expressed in figures, in the respective columns provided for the same.

5. *Blank Forms Furnished must be Used.*

Bidders are required, in making their bids or estimates, to use the blanks prepared and furnished for that purpose by the Engineer, a copy of which, together with the forms for the Contract and Bond, including the Specifications and Plans, can be obtained upon application therefor at the office of the Engineer.

5¹. *Blank Forms.*

Each bidder must obtain blank forms of proposal, and prepare and submit his proposal thereon. The original drawings named in the specification will be retained on the files of the office of the Engineer (Architect), but tracings or copies of the same will be prepared for the use of the bidders.

6. *Proposals must be Confined to the Estimates.*

Proposals or estimates must contain neither more nor less than is called for in the advertisement or provided for in the blank form of proposal and the Specifications and Plans. Any bid which does not contain bids for all items for which bids are invited, or which contains bids for items for which bids are not asked, will be considered informal. No change shall be made in the terminology or phraseology of the proposal.

6¹. *Proposal must be Regular.*

Proposals that contain any omission, erasures, alterations, additions, or items not called for in the Specifications, Plans, and Bill of Quantities contained in the blank form of proposal, or that contain irregularities of any kind, may be rejected as informal.

6². *Alterations should be Explained if Alterations are Permitted.*

Alterations by erasures or interlineations should be explained or noted in the proposal over the signature (or number) of the Bidder.

7. *Unbalanced Bid not Acceptable.*

Any bid in which the prices stated for the several items are unbalanced may be rejected.

8. *Bids may not be Withdrawn nor Changed.*

Permission will not be given to withdraw, modify, or explain any proposal or bid after it has been deposited with the Engineer.

8¹. *Bids may be Withdrawn.*

If a bidder wishes to withdraw his proposal, he may do so after it has been delivered to the Engineer at any time before the time set for opening the proposals, without prejudice to himself.

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9. *Bidders Agree to Forms Furnished.*

Parties making bids are understood to accept the terms and conditions contained and expressed in the forms of Contract, Specifications, Plans, etc., annexed to the proposal submitted.

10. *Forms must be Kept Intact.*

No bid will be received if detached from the other forms with which it is bound; the entire package must be delivered unbroken and in good order, complete in all respects.

11. *Drawings must be Returned.*

Parties obtaining copies of the Plans and other drawings must return them to the Engineer within....days from the date of receipt.

12. *Estimate of Quantities.*

The following is a statement, based upon the estimates of the Engineer, of the quantity, quality, nature, and extent, as nearly as possible, of the work and materials required, and the several bids will be tested and compared by the quantities given in this estimate:

				PRICE
3,000	cubic yards	Rock Excavation....	.....	$.....
5,000	" "	Earth "	.....	$.....
4,000	" "	Filling.....	.....	$.....
1,000	" "	Rubble Masonry.....		$.....
500	" "	Concrete.....		$.....
800	square yards	Paving to be furnished and laid		$.....
1,000	linear feet	of Curb and Guttering.....		$.....
10,000	feet, board measure,	Pine Lumber.....		$.....
1,800	pounds	Wrought Iron.....		$.....
etc.		etc.	etc.	etc.

12¹. *Estimate of Quantities.*

The bids will be compared on the basis of the Engineer's estimate of the quantities of work to be done and the materials to be furnished, which are as follows:

Item [*a*]. 10,000 feet B. M. Pine.
Item [*b*]. 20,000 Paving Bricks.
etc. etc. etc.

13. *Estimate is Approximate.**

The above-mentioned quantities, though stated with as much accuracy as is possible in advance, are approximate only, and bidders are required to submit their estimates upon the following express conditions which shall apply to and become a part of every estimate received:—

a. Bidders must determine quantities for themselves.

b. Bidders must satisfy themselves by personal examination of the location of the proposed works, and by such other means as they may prefer, as to the accuracy of the foregoing estimates of the Engineer and the nature and extent of the work to be performed according to the Specifications and Plans, and shall not at any time after the submission of his proposal dispute or complain of such statement or estimate of the Engineer, nor assert that there was any misunderstanding in regard to the work to be done or the materials to be furnished.

c. Bidders should make an inspection and estimate.

13¹. *Contractor should Make Personal Examination.*

Before submitting a proposal each bidder should make a careful

* *See* Secs. 588–589, *infra.*

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examination of the drawings and specifications, and fully inform himself as to the quality of the materials and character of the workmanship required, and he should visit the locality where the work is to be done and make a careful examination of the place where the materials are to be delivered, for should his proposal be accepted he will be responsible for any and every error in his proposal resulting from his failure to do so.

13². *Estimate is Correct.*

The quantities given above are correct, and are the quantities that will be used in the final estimate. The prices bid must include all items of expense attending the work as herein specified.

14. *Work and Materials are Itemized. Bid is for Whole Work.*

In the form of proposal the materials to be furnished and the work to be done are itemized for the purpose of comparing the bids and as a basis for the monthly estimates, but if the contract be awarded it will be as a whole.

15. *Itemized Bid Required.*

Bidders must state the proposed price for each separate item of the work by which, together with the time required to complete the work, the bids will be compared; but each bid must cover the entire work, and no partial bids will be received.

16. *Nothing Allowed for Work not Mentioned.*

Work or materials not specified, and for which a price is not named in the contract, will not be allowed for nor considered.

17. *Quantities may be Increased or Diminished.*

It must be understood that these quantities are given merely as a basis for comparison of bids, and the right is expressly reserved to increase or diminish the quantities or altogether omit any items that in the judgment of the Engineer may be deemed unnecessary.

18. *No Claims for Damages or Extra Work.*

Such additions or omissions do not entitle the contractor to any claim for extra work in the completion of the work, or to any other claims for damages, if the quantities of work and materials should prove to be greater or less than estimated.

18¹. *Additions and Changes to be at Contract Prices. No Extra Claims.*

It must, therefore, be expressly agreed that the Engineer may, in his discretion, and either before or after the commencement of the work, increase or diminish the quantities to an extent not exceeding thirty [30] per cent. thereof. If the quantities be increased, the increase shall be paid for, but only for the actual amount thereof, and at the price fixed in the contract; and if the quantities be diminished, such diminution shall not in any case constitute a claim for damages or anticipated profits on the quantity or quantities so dispensed with, but only the quantities actually delivered and accepted and the work done and approved, will be paid for.

18². *Engineer may make Additions, Omissions, and Alterations at Market Price.*

The successful bidder must understand that the right and privilege is reserved to the Engineer to make any additions to, omissions from, changes or alterations in the materials and work called for by the drawings and specifications and contemplated by or embraced in his proposal; and that any addition to, or omission from, said materials or work is to be made on the basis of the contract unit value of the work or materials referred to; and that any changes in the quality of

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the materials or alterations in the work are to be made on a basis of market rates prevailing at the time that such changes or alterations are ordered; and further, that no claim for compensation for any extra materials or work shall be made or allowed without the same has first been agreed upon and specifically authorized in writing by the Engineer, under the approval of the owner, commissioner, etc.

19. *Samples to be Submitted.*

Each bidder must submit with his proposal, at his own expense, samples of the materials and workmanship [finish] which he proposes to use [furnish], the samples to have the name of the bidder, the title and location of the work, and the date of the proposal, plainly marked thereon. Each sample of stone.....must be....inches by....inches by....inches, one face showing natural fracture, and the other faces showing different styles of finish, with the location of its quarry distinctly marked upon it. The samples submitted with the proposal of the successful bidder will be retained, and when required he must at his own expense furnish duplicates of the samples.

20. *Quality of Materials to be Considered.*

The character of the materials proposed will be considered, and if it be deemed to the interests of the city, state, or company, or owner for this or any other reason to accept any proposal other than the lowest, the right to do so is expressly reserved.

20¹. *Materials Offered and Time required to Complete will be Considered.*

Each bidder may understand that the quality of the materials offered and the time stated for the supply of the materials and the completion of the work will be considered in the matter of acceptance of the proposal. The value of a day in estimating the time required for performance will be $....

21. *Materials furnished by City, State, or Owner.*

The following-named materials [and labor] will be furnished to the bidder by the city, state, or owner at the prices given in the blank form of proposal or bill of quantities, the same to be included in the bidder's estimate and proposal.

22. *Patent Rights.*

Each bidder must understand that he is to protect and indemnify all persons acting for and in behalf of the city, state, or owner for any liability which may be claimed by any party on account of any patent rights connected with any of the materials, articles, or processes used or employed in the work or in its performance, or any contemplated or embraced in his proposal.

23. *Bid for a Part or the Whole.*

Bidders are requested to state whether their bids must be considered as a whole or whether a part thereof may be accepted.

24. *Tenders.*

Tenders are to be made in the form of a lump sum, which sum must be taken to cover the cost of the completion of the work in every respect, in accordance with the specifications and drawings.

FORMALITIES TO BE OBSERVED.

152. Propriety of Certain Requirements and Restrictions.—Any restriction or requirement imposed upon a bidder which will facilitate the business of letting the contract and secure uniformity and a standard for comparison

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of the bids, and not entail too much work or expense upon the contractor, can without doubt be considered reasonable, and within the discretion accorded to public officers by our courts. Such requirements are those which insist that proposals shall be made upon printed forms in triplicate and shall be delivered by a certain day named, and that the prices shall be written out as well as expressed by figures to give greater certainty and to guard against mistakes, and many other similar requirements. The act of the board in directing the city engineer to reject bids for public improvement unless accompanied by an offer to purchase bonds has been held not a ground for attacking a contract actually made, it not appearing that the bids were influenced by that fact.[1]

153. There should Be a Standard for Comparison of Bids.—In order to have a fair and equitable comparison, it is essential that all should have the same data concerning the same subject-matter, and that the bidders one and all be furnished with the same information or be afforded the same means of acquiring it.

An act or a charter which requires a contract "to be given to the lowest responsible bidder" has therefore been held to render illegal and void a contract awarded on plans and specifications prepared by each of the different bidders. The court says the term lowest bid necessarily implies a common standard by which to measure the respective bids, and that a common standard must necessarily have been previously prepared of the work to be done.[2] Such a letting not only prevents the competition which it is the object of the statute to secure, but furnishes no standard by which the board can determine the lowest bid, and gives an opportunity for favoritism in awarding the contract.[3]

154. Full Information as to the Work should Be Furnished.—A provision that certain contracts shall be let to the lowest responsible bidder after advertising for bids requires that information shall be given to bidders which will enable them to bid intelligently.[4] They should be informed either by the notice of letting or by proper specifications of the amount of work embraced in each contract, the time within which it is to be completed, the manner in which it is to be done, and the quality of the materials to be furnished.[5]

It is the manifest duty of the contracting officer or board which is authorized to make such public improvements to prepare plans and specifications, and to give a detailed statement or estimate of the work and of the

[1] Rice *v.* Board of Trustees (Cal.), 40 Pac. Rep. 551.

[2] Urazet *v.* Pittsburgh (Pa.), 20 Atl. Rep. 693 [1890]; *but see* State *v.* St. Bernard (Ohio), 10 Ohio Cir. Ct. Rep. 74; *and* Connersville *v.* Merrill (Ind. App.), 42 N. E. Rep. 1112.

[3] Erie *v.* Leary (Cal.), 46 Pac. Rep. 1.

[4] Detroit *v.* Hosmer (Mich.), 44 N. W. Rep. 622 [1890]; *and see* Kneeland *v.* Hosmer, 20 Wis. 437.

[5] Kneeland *v.* Furlong, 20 Wis. 437; *see* Peeples *v.* Byrd (Ga.), 25 S. E. Rep. 677; *and see* Otis *v.* City of Chicago (Ill. Sup.), 48 N. E. Rep. 715; *semble*, Guaranty & T. Co. *v.* Chicago (Ill. Sup.), 44 N. E. Rep. 832 [1896].

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kinds and quality of the materials required, for the purpose of affording bidders data from which to estimate the cost of the undertaking and to induce fair and honest competition.[1] It has been held that the bidder cannot be required to furnish his own plans.[2] The notice must provide for plans and specifications.[3]

Such provisions in a city charter or special enactment, that contracts for public works shall be let to the lowest responsible bidder after advertising for bids, require that such information be given as will enable the bidder to bid intelligently, and that the same requirements, estimates, and specifications be given each and all the bidders, and that they shall bid upon the same work and materials and under the same specifications.[4] Such estimates and specifications must be definite as to quantity as well as to quality of materials required, or the contract will be void.[5] They should be rendered upon a cash basis.[6] Under a charter requiring ordinances for public work to specify the materials to be used, an ordinance is void if it fails to specify the material,[7] but the notice need not specify that an asphaltum pavement proposed is to be of a certain kind of asphaltum.[8] When the statute requires that the nature, character, locality, and a description of the improvement proposed shall be set forth, an ordinance providing for the paving of a street or the construction of a brick sewer "with necessary manholes" is not defective because it fails to specify the location of the manholes and catch-basins.[9] The exact amount of paving composition required per square yard need not be specified.[10] An act that requires the advertisement to "specify briefly the locality to which it is limited, and the time in which it must be completed," does not render it necessary to give the dimensions of the improvement nor the materials of which it is to be built.[11]

155. The Bid Should Contain neither More nor Less than is Called for by the Instructions, Plans, and Specifications.—The standard adopted, the necessity of requiring bidders to conform to it, and to include neither more nor less, is at once apparent. The addition of one single item, such as a different kind of stone, brick, or timber, a different quality of work, or a longer or better guaranty, destroys the equality and renders the bid worthless for comparison with the others which conform to the standard.[12] It

[1] McBrian *v.* Grand Rapids, 56 Mich. 95; *and see* N. P. Perrine Co. *v.* Pasadena (Cal.), 47 Pac. Rep. 777.

[2] People *v.* Com'rs, 4 Neb. 150.

[3] Wilkins *v.* Detroit, 46 Mich. 190.

[4] City of Detroit *v.* Hosmer (Mich.), 44 N. W. Rep. 622.

[5] Bigler *v.* New York, 5 Abb. N. Cas. (N. Y.) 51; Reilly *v.* New York, 54 N. Y. Super. Ct. 463.

[6] Kansas Town Co. *v.* Argentine (Kans. App.), 47 Pac. Rep. 542 [1897].

[7] Verdin *v.* St. Louis (Mo. Sup.), 27 S. W. Rep. 447.

[8] Verdin *v.* St. Louis (Mo. Sup.), 27 S. W. Rep 447; Otis *v.* Chicago (Ill.), 43 N. E. Rep. 715.

[9] City of Springfield *v.* Mathus, 124 Ill. 88 [1888]; Vane *v.* City of Evanston (Ill. Sup.), 37 N. E. Rep. 901; Cochran *v.* Hyde Park (Ill.), 27 N. E. Rep. 939 [1891].

[10] Wood *v.* Chicago (Ill.), 26 N. E. Rep. 608.

[11] Main *v.* City of Fort Smith (Ark.), 55 S. W. R. 801 [1887]; *and see* Felker *v.* New Whatcom (Wash.), 47 Pac. Rep 505 [1897].

[12] Weed *v.* Beach, 56 How. Pr. (N. Y.) 470

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cannot benefit a contractor or builder to include in his proposal other or more or better labor and materials than are specified in the advertisement. Under an act or charter requiring the work to be advertised, proposals received, and the contract to be given to the lowest bidder, the bid can be regarded only as a proposal for the labor and materials so advertised for, and if the price is not lower than that of any other bidder whose proposal embraces only the labor and materials called for in the advertisement, he is not entitled to have the contract awarded to him.[1]

Bids submitted according to certain specifications which contain a warranty of durability for six years cannot be compared with a bid that contains a warranty for more than six years. If the additional warranty were considered and influenced the award to one who was not the lowest bidder, the contract will be void.[2] When bids were asked for a storage reservoir capable of holding a water-supply for 100 days' delivery at the rate of 50,000,000 gallons per diem, the contract was not lawfully awarded to a bidder solely because of his having offered to provide a storage capacity sufficient for 250 days.[3] The same was held of a case where a contract was awarded to one who was not the lowest bidder, but who had furnished specimens which were not called for in the notice asking for bids, the contract having been given to him because of the greater fitness for use as shown by the samples. The contract was declared void, as contrary to the charter.[4] Samples or specimens furnished cannot be compared, and the lowest price then determined by reference to the comparative fitness of the specimens, unless the advertisement has asked for samples and proposals to do work according to such samples, so that all should bid with the same understanding.[5] When samples of materials which the bidder will use have been furnished as required by the instructions to bidders, and the sample of the lowest bidder is not acceptable to the engineer as provided in the contract, he cannot demand the award of the contract, nor can it be given to him, even though he does offer to use brick of another kind which comes up to the requirements of the specifications.[6]

While the acts and requirements of a board of public works are subject to review by the courts, yet, the acts being discretionary, the courts do not interfere unless the motive be fraudulent or does positive injury. They tolerate restrictions and requirements for which they can assign no just cause, and that are frequently burdensome to bidders.[7] *

[1] Boren *v.* Com'rs of Darke Co., 21 Ohio St. 311 [1871]; *but see* Weed *v.* Beach, 56 How. Pr. (N. Y.) 470, where it was held that when state officers had made an effort to obtain bids in a certain form and had failed in the attempt, that they might, as against such faulty bidders, examine all the bids, and according to their best judgment award the contract to the lowest [regular] bidder.

[2] State *v.* City of Trenton, 49 N. J. Law 339.

[3] Van Reipen *v.* City of Jersey City (N. J. Sup.), 33 Atl. Rep. 740.

[4] State *v.* City of Trenton, *supra.*

[5] Shaw *v.* Trenton, 49 N. J. Law 339 [1887].

[6] Hermann *v.* State, 11 Ohio Cir. Ct. Rep 503.

[7] *Semble, Re* Marsh, 83 N. Y. 431.

* *See* Sec. 146, *supra.*

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When the bid is accepted the bidder is bound only by the specification shown him at the time he makes his bid.[1] If other specifications are shown him when he executes the contract and he agrees thereto, they become a part of the contract and he is bound by them.[2] Statements or explanations by members of the board or its clerk will not be accepted in contradiction to the terms of the formal invitation to bidders. Clerks, engineers, and individuals have no power to vary the terms of the advertisement nor to volunteer additional information not given to all bidders. If a contractor acts upon representations by such unauthorized persons, it seems he does it at his peril, and must take the consequences.[3]

156. Contract Must be Strictly According to Terms of Advertisement, Plans, and Specifications by which Bids were Invited.—It is obligatory upon the officers of a city or state to execute the contract strictly in accordance with the terms and specifications by which the bids were made.[4] The letting of a contract containing provisions materially more favorable to the contractor than the requirements under which the bids were invited and received destroys the benefit of the competition intended to be realized by the statute. Such contracts are illegal, and their performance may be enjoined.[5] Neither the quantity nor quality of the work or materials nor the conditions prescribed can be changed, nor new burdens imposed, nor any alterations made, nor any new undertakings or pledges of the contractor be considered in awarding the contract.[6] So when the instructions require that the price paid for earth excavation should be one fourth that bid for rock excavation, it was held not improper and that a bid which named $1.77½ for rock and 44¾ cents for earth might be rejected for not conforming to the specifications, the price for earth works not being precisely one fourth that of rock excavations.[7]

The making of a contract to pave a street 37 feet wide, when the bids were received for a street 42 feet wide, omitting a space of five feet between the rails of a street-car track which it was the duty of the car company to keep in repair, was held not such an irregularity as would warrant the setting aside the assessments in view of the fact that the specifications did include the space between the rails, and that the cost thereof was not included in the assessment, and there was no showing of injury resulting to property-owners.[8]

157. When Amount of Work Cannot be Determined.—When plans and specifications have been made and estimates prepared of the amount and

[1] Hobbs *v.* Texas, etc., R. Co. (Ark.), 55 S. W. Rep. 586 [1887]; Hughes *v.* Clyde, 41 Ohio St. 339.

[2] Elgin *v.* Joslyn (Ill.), 26 N. E. Rep. 1090 [1891]; *see also* 108 Ill. 323, and 118 Ill. 567.

[3] Langley *v.* Harmon (Mich.), 56 N. W. Rep. 761; Littler *v.* Jayne (Ill.), 16 N. E. Rep 374 [1888].

[4] Smith *v.* Mayor, 10 N. Y. 504.

[5] Wickwire *v.* City of Elkhart (Ind. Sup.). 43 N. E. Rep. 216.

[6] Nash *v.* St. Paul, 11 Minn. 174; People *v.* Board of Improvement, 43 N. Y. 227; Nichols *v.* State (Tex.), 32 S. W. Rep. 452.

[7] Matter of Petition of March, 83 N. Y. 435 [1881].

[8] Voght *v.* Buffalo (N.Y. App.), 31 N. E Rep. 340. *reversing* 14 N. Y. Supp. 759.

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kind of work and materials required, it becomes a comparatively easy matter to get bids upon the same basis; but when the quantity and character of the work cannot be determined, the standard of comparison must be an approximate one. In such cases it is not only prudent but necessary to so describe the work that a comparison can be made of the several proposals without knowing the aggregate and exact cost of the whole work. This is usually accomplished by inviting bidders to name prices per unit of measure, the quantities being given approximately only, to enable the contractor to determine at what price he will undertake a job of the same size estimated. In such cases it is customary and prudent to insert a statement that the quantities named are approximate only, and that the contractor must be his own judge as to the correctness of the estimate given, both as to quantity and kind.*

Every important item contemplated in the work must be included in the advertisement and specifications under which tenders were made. A part of the work may not be given outright to one person or party, nor can a price be fixed for a considerable part of the work and the remainder be given for competition. A contract which *fixed the expense of part of the work by agreement* between the contractor and the commissioner of public works, and not by competitive bidding, as required by law, is void as to such part.[1] A price cannot be fixed for rock excavation in an advertisement for proposals for constructing a sewer, because it is in violation of the charter of the city which requires contracts for work and supplies to be founded on sealed proposals and given to the lowest bidder.[2]

It is a violation of the law for public officers to test the bids by a comparison which omits a substantial part of the work to be contracted for. A contract awarded upon a comparison of bids which omitted an estimate of the rock excavation anticipated to be met was, therefore, held illegal and void.[3]

It has been held that the ratio of the price of rock excavation to that of earth excavation might be fixed as four to one.[4] A minimum price to be paid for labor cannot be fixed, and a contract awarded upon the basis of such a specification is in violation of the statutory provision requiring work to be awarded to the lowest bidder.[5]

Extra work that has not been mentioned in the announcement of the work and prices named in the proposals cannot be ordered unless excepted by the statute or especially provided for in the charter. Thus an acceptance of a bid to do rock excavation and other work which omitted the consideration of rock excavation, and undertook to pay what the rock

[1] Mutual Life Ins. Co. *v.* New York (N. Y. App.), 89 N. E. Rep. 386.
[2] Merriam on Petition, 84 N. Y. 596 [1881]; *see also* Village of Hyde Park *v.* Carton, 182 Ill. 100; Lake Shore R. Co. *v.* City (Ill.), 88 N. E. Rep. 602; *Re* Mahan, 20 Hun (N. Y.) 301.
[3] Brady *v.* Mayor, 20 N. Y. 312 [1859].
[4] *Re* Marsh, 88 N. Y. 435 [1881].
[5] Frame *v* Felix (Pa.), 31 Atl. Rep. 375.

* *See* Sec. 151, art. 13, *supra*, and Secs. 588–589, *infra*.

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excavation was reasonably worth as extra work, was declared against the policy of the law.[1] Under a contract by a city which provided that the architect might direct deviations and the increased cost be added to the agreed price it was held that the city was not bound by the architect's promise and order for piling, necessary for securing a firm foundation, because it had not been advertised and mentioned in the specifications for the work and proposals received for its construction.[2]

The contract as drawn and executed must not include extra work, nor contain other or different classifications than those competed under and included in the proposals.[3] The prices must not be changed when the contract is given from those named in the bid, nor provisions made for extra work, as an allowance of 15 per cent. additional to the actual cost, when no such provision has been put in the notice for proposals. If such acts are committed, they may render the contract void and leave the contractor without any recovery for the work he has done. "For," says the court, "though this principle of the law may work hardships, yet it is better that an individual should occasionally suffer from the mistakes of public officers or agents than to adopt a rule which by improper combinations or collusions might be turned to the detriment or injury of the public."[4]

It does not matter that the bid is the lowest, or that it is less than the amount appropriated specially for the work; the difference between the sum bid and the amount appropriated cannot be recovered, as such additional contract is not binding on the state, because not let in the manner provided by law.[5] However, it has been held in New York State that when the appropriation for a public work is limited, and a contract is made for it according to a plan to be adopted, and with a proviso that the cost shall be limited to a certain sum, if the price agreed upon is within that amount it is a valid contract, even though it reserves authority to make such changes of detail as may be necessary, and authorizes the engineer directing the work to determine the price of the extra work required.[6]

Any property-owner or taxpayer may maintain a suit to enjoin the prosecution of work under an illegal contract or the payment of the prices specified, even though it be conceded that the suit is brought in lieu of a suit by an unsuccessful bidder.[7]

Extras cannot be ordered, for if that were allowed the statute would be no safeguard to the public interests. The contract might include but a

[1] McBrian *v.* Grand Rapids, 56 Mich. 95 [1885]; Brady *v.* Mayor, 20 N. Y. 313 [1859].

[2] Stuart *v.* Cambridge, 125 Mass 102; Litler *v.* Jayne (Ill.), 16 N. E. Rep. 374 [1888]; *but see* Fleming *v.* Suspension Bridge, 92 N. Y. 368 [1883].

[3] Tullock *v.* Webster County (Neb.), 64 N. W. Rep 705.

[4] Dickinson *v.* City of Poughkeepsie, 75 N. Y. 65 [1878]; *and see also* 11 Minn. 174, 93 U. S 247–257, 96 U. S. 691, 2 Clifford 590; Texas Transp. Co. *v.* Boyd, 2 S. W. Rep. 364.

[5] Nichols *v.* State (Tex.), 32 S. W. Rep. 452.

[6] Kingsley *v.* Brook'yn, 78 N. Y. 200 [1879].

[7] Moynahan *v.* Birkett, 31 N. Y. Supp. 293; Mazet *v.* Pittsburgh (Pa.), 20 Atl. Rep. 693 [1890].

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part of the work, while a larger and more profit-paying part could be ordered as extras.[1] Thus under a contract awarded by a village to the lowest bidder to do flagging, paving, and curbing, the village having undertaken to do the necessary grading and to furnish the sand and gravel, it was held that the contractor could not recover for the sand and gravel he had furnished in obedience to a resolution by the trustees of the village requiring him to do so, as the resolution was in violation of the city charter, which required that sealed proposals for work should be advertised for and the contract awarded to the lowest bidder.[2] It has been held that where a contract was let for the laying of Nicholson pavement (patented) and ordinary stone cross-walks, after proposals for Nicholson pavement only the assessment for the work could be vacated.[3] Yet in another case it was held that where a contractor did work necessary to carry out his contract, either as extra work or to meet exigencies unforeseen when the contract was made, he was entitled to recover therefor on a *quantum meruit*, though the city charter provide that if any work shall involve an expenditure exceeding seventy-five dollars it shall be done by contract let to the lowest bidder.[4]

The contract must be confined to the work and materials contained in the proposals. Nothing can be added or omitted without due notice having been given, as the object of the law is to secure competition and the benefits to be derived from it. The contract must be the same that was advertised.[5] A change by public officers of a foot in the depth to be dug for curbing, and permission to the contractor to appropriate stone that was by the specifications to be used for filling in a certain place, he furnishing earth which could be used on the street, are unauthorized and void. The proposals made by the contractor and the specifications form the only basis of a contract, and no contract can be made under any other terms.

If the contractor execute work not in strict conformity to such specifications and proposals, he is entitled to no compensation for his work, for there is no contract, and none can be implied.[6] A recent case has even decided that where, after letting the contract for grading a street according to plans and estimates, an ordinance was passed changing the grade, but no new plan or contract was made, though the grading was done in accordance with the last established grade, an assessment for such work was invalid.[7] A change in the lines or levels which lessens the amount and the cost of the work may render the contract inoperative, and invalidates the assessment.[8] A board of

[1] McBrian *v.* Grand Rapids, 56 Mich. 95.

[2] Parr *v.* Village of Greenbush, 11 New York 246; *and see also* 76 N. Y. 463; *but see* Bryson *v.* Johnson Co. (Mo.), 13 S. W. Rep. 239; McBrian *v.* Grand Rapids, 56 Mich. 95 [1885], *and other cases reviewed therein.*

[3] *Re* Eager, 46 N. Y. 100.

[4] Abells *v.* City of Syracuse (Sup.), 40 N. Y. Supp. 333.

[5] Nash *v.* St. Paul, 11 Minn. 174.

[6] Bonesteel *v.* The Mayor, 22 N. Y. 162 [1860]; *but see* Barkley *v.* Oregon City (Or.), 33 Pac. Rep. 978.

[7] City of Argentine *v.* Simmons (Kan.), 37 Pac. Rep. 14; Argentine *v.* Dagett, 37 Pac. Rep. 14; *semble* Hague *v.* Philadelphia, 48 Pa. St. 527 [1865]; *but see* Fuller *v.* Grand Rapids (Mich.), 63 N. W. Rep. 530.

[8] Warren *v.* Chandos (Cal.), 47 Pac. Rep. 132.

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public works has no authority to exact from the contractor a bond that the pavement will last for five years where it is not required by the resolution of intention.[1] If, as is sometimes the case, the charter of the city provides that repairs shall be paid for by the city, and improvements by the property-owners benefited, the same to be let to lowest bidder; an ordinance, advertisement, and letting of a contract for the construction and maintenance (or repair) of a street together and to be paid for by either party alone, is void, being in violation of the charter.[2] *

158. Right to Make Changes and Alterations Reserved.—Whether public officers can reserve the right to make changes and alterations in the specifications by giving notice of such reservation in the advertisement for proposals may well be doubted. Certainly not if the work were for a lump sum, nor under any circumstances which might foster favoritism or lessen the obligations or work which the contractor had assumed. Labor and materials paid for by the unit of measurements must be subject to such changes, and it can work no hardships to the public nor to the contractor. Even when it is provided in the contract that the contractor shall make any alterations in the form, dimensions, or materials when directed by the board of public works; that the work shall be prosecuted in such order and at such places as the board of public works may direct; that the excavations be made to depths shown on profile and plans on file, of such widths and in such directions as may be necessary; that any work required to be done that is not specified shall be done in accordance with the directions of such board, it is held that the board was not authorized to order any material change in the plan as to location or course of a sewer (which was being done at a price per linear foot), without the approval of the city council.[3] If in the construction of works it is anticipated that difficulties, requiring changes, will be encountered, or that the work may become much more burdensome, as by the meeting of quicksand, hard-pan, or rock excavation, which would largely increase the cost, and the extent of which it may be impossible to ascertain in advance; such contingencies should be mentioned in preparing the specifications and contracts, and their payment be provided for, so that they may be taken into account by bidders in making their proposals by the cubic yard, linear foot, unit weight, etc.[4]

159. Instances Where Contract has been Sustained.—The fact that plans for street improvement were in the alternative is immaterial in the absence of proof that any one was misled or prevented from bidding, or that the cost of the work done was enhanced thereby.[5]

Such contracts are divisible. When a contract has been let for work, a

[1] McAllister *v.* City of Tacoma (Wash.), 37 Pac. Rep. 447.

[2] Verdin *v.* St. Louis (Mo.), 33 S. W. Rep. 480; *and see* Santa Cruz R. P. Co. *v.* Broderick (Cal.), 45 Pac. Rep. 863; *and* Cole *v.* People (Ill.), 43 N. E. Rep. 607.

[3] Compau *v.* Detroit (Mich.), 64 N. W. Rep. 336.

[4] McBrian *v.* Grand Rapids, 56 Mich. 95; Insley *v.* Shepard, 31 Fed. Rep. 869 [1887]; *accord* Kingsley *v* Brooklyn, 78 N. Y. 200 [1879].

[5] Gilmore *v.* City of Utica (N. Y. App.), 29 N. E. Rep. 841, *affirming* 15 N. Y. Supp. 274.

* *See* Sec. 334, *infra.*

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part of which has been legally authorized and contracted for, and another part of which is illegal and unauthorized, the contractor may recover for that which was done in pursuance of the charter and according to law.[1] When a contract is in violation of the charter of a city as to a part of the work, it will render the assessment for the work so far void, as the work done was contrary to the provisions of the charter, and will not furnish a ground for vacating the whole assessment.[2] It may be reduced by the amount which it may have been increased by reason of fraud or substantial error or irregularity.[3]

160. Works Whose Cost Exceeds a Certain Amount Within the Statute, Charter, or Ordinance.—The question often comes up as to whether the statute or charter requires all work, however insignificant, to be included in the specifications and contract, and if it includes alterations and additions and extras from whatever cause. The delay and annoyance resulting from such a requirement would be expensive and aggravating beyond measure if it were necessary to advertise and wait for proposals for every small extra item or minor change required on or in works. This trouble is usually obviated by a clause in the act or charter that only such contracts for materials and work whose cost is more than a specified sum, *e. g.*, $500, shall be advertised and let to the lowest bidder.[4]

The addition of such a clause, if the sum is made large, enables public officers to let work in parts and to evade the law, thus defeating its very object. Courts are alive to this fact, and seek to require the most scrupulous care and strictest honesty of all parties. Evidence of dishonest practices will be construed against the contractor and in favor of the public.

When a certain amount is specified as the limiting cost of work that may be let without advertising for proposals, it must not be exceeded. Under an act requiring "any expenditure of more than $2500, to be let to the lowest bidder after advertising for bids," an informal contract for work and materials, including eight bronze statues, to cost more than $2500, without advertising for bids, was declared void; and it was held that they could not be included under an advertisement and specification "for the iron inner dome and other ornamental ironwork," nor did verbal explanations made at the time the proposal was made remedy the omission of them.[5]

When proposals have been made to furnish labor and materials for a structure according to a schedule of prices for specific qualities, and a contract was subsequently entered into, to erect the structure for a certain sum of money, "being the aggregate cost at the prices specified in the said proposals," it was held that the statement of the cost was intended only as an

[1] Texas Transp. Co. *v.* Boyd, 2 S. W. Rep. 364 [1886]; *see also In re* McCormick, 60 Barb. 128 [1870], *not fatal to the assessment.*

[2] Merriam in Petition, 84 N. Y. 596 [1881].

[3] *In re* Anderson, 17 N. E. Rep. 209 (N. Y. 1888); *In re* McCormack, 60 Barb. 128 [1870].

[4] It may be doubted if $500 is an appropriate sum. *See* Littler *v.* Jayne (Ill.), 16 N. E. Rep. 374 [1888], where the act was amended, making the sum $2500 instead of $500, which seems an opposite extreme.

[5] Littler *v.* Jayne (Ill.), 16 N. E. Rep 374 [1888].

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estimate, and that the intention was to pay the prices named for such materials and labor as were actually furnished.[1]

161. What Work Comes Within the Statute.—A charter of a city that requires that "all contracts for doing work and furnishing materials for an improvement shall be given to the lowest bidder" was held *not* to apply to a contract to furnish hose to the fire department;[2] but a contrary construction was put upon the same charter the following year, when it was held that a charter that required that all contracts should be awarded to the lowest bidder did include a contract to purchase fire-hose, and that an award of a contract contrary to the charter, and including additional qualifications not included in the estimate and specifications advertised, was void.[3] The work of cleaning streets of a city, and of supplying it with water, have been held to come within the prohibitions of the charter against making contracts for work without previously advertising for proposals.[4] A statute which requires all contracts for the improvement of roads to be let to lowest bidder has been held to include contracts for repairs to permanent bridges and culverts,[5] and cells of a jail have been held to be a part of a public building.[6]

The removal of garbarge at $800 per month was held not to be within a statute requiring "that work necessary to be done to complete a particular job and involving more than $1000" should be let to the lowest bidder, as the work in question was not done to complete a particular job and did not necessarily involve an expenditure of $1000 or more.[7] If it be provided that no contract or purchase involving an expenditure of more than $1000 shall be made without first advertising for bids, an exchange, without advertising for bids, of pumping-engines incurring an expenditure of more than $10,000 will not bind the city, even though it is made by order of the city council authorizing the board to make such an exchange, such order being held not to abrogate the terms of the ordinance.[8] So under a contract for the construction of a public building a substitution of another kind of work which increases the amount to be paid for the building by more than $1000 cannot be made.[9] The cost of the materials substituted, it seems, is not to be added to the cost of furnishings whose place they take.[10] Verbal explanations that certain work will be required and certain materials must be furnished are not sufficient to include items not mentioned in the advertisement or specifications, though they be a part of, or properly belong to, the structure advertised. They cannot be included if their cost exceed the statutory limit.[11]

[1] Swift *v.* New York, 26 Hun (N.Y.) 508, *reversed by Court of Appeals* 89 N. Y. 52.

[2] City of Trenton *v.* Shaw (N. J.), 10 Atl. Rep. 243 [1887].

[3] State *v.* City of Trenton (N. J.), 12 Atl. Rep. 902 [1888].

[4] State *v.* Kern, 51 N. J. Law 259 [1889]. *Water;* Davenport *v.* Kleinschmidt, 13 Pac. Rep. 249, *Water;* Frame *v.* Felix (Pa.), 31 Atl. Rep. 375

[5] Follmer *v.* Commissioners, 6 Neb. 204.

[6] Ertle *v.* Leary (Cal.), 46 Pac. Rep. 1.

[7] Swift *v.* Mayor, 83 N. Y. 528.

[8] Worthington *v.* Boston (Mass.), 41 Fed. Rep. 23 [1890]

[9] Brady *v.* New York, 55 N. Y. Super. Ct. 45; *and see* Sadler *v.* Eureka Co. Comm'rs., 15 Nev. 39; *and* Swift *v.* Mayor, 83 N. Y. 528.

[10] Brady *v.* New York, 112 N. Y. 480.

[11] Littler *v.* Jayne (Ill.), 16 N. E. Rep. 374 [1888].

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162. State or City to Furnish Certain Things at a Specified Price.—It is sometimes the practice of public corporations to purchase a certain brand or make of materials, the engineer and council being satisfied that they are the best, or it may be necessary to secure conformity thoughout a system of works. When a city has contracted for supplies under such circumstances or has them in stock, it may require the contractor to purchase them at the price paid by the city and use them in the works.[1]

163. Contracts for Patented Articles or Materials of a Special Manufacture.—If proposals are invited in good faith, it has been held that a city may contract for the use of such materials as it deems best, though such materials are the subject of private ownership or the product of exclusive manufacture, or the methods of preparing them are covered by patents.[2]

An ordinance providing for paving a street with a particular kind of asphalt in which there is a monopoly is not void, though the city charter provides for letting contracts to the lowest responsible bidder,[3] the council having the right to reject the bid if it is exorbitant; the fact that there is a monopoly does not require that it be assessed.[4] If the thing needed for public use is part of a patented article and can be bought only in one place, it is sometimes held that the article need not be advertised.[5]

In New York state it has been held that the provision which entitles the person making the lowest estimate to have the contract awarded to him does not apply to estimates for patented articles or processes.[6] Some states hold to the view that such contracts are not prohibited; but the tendency of the courts, according to Judge Dillon,[7] is that the statute prohibits any contract that cannot be advertised or let in the manner it prescribes, and he cites cases in which it has been held that a contract for a patented pavement with a person who had the exclusive right to lay the same was void.[8] Mr. McKinney, in the American and English Encyclopædia of Law, says that the majority of the cases take the same view, and hold that the statutory prohibition applies to patented articles, citing numerous cases.[9]

It is impossible to tell, except in states where it has been already decided, what law would be sustained, and engineers or contractors would do well to take good counsel if the question come up in their business. The cases which hold that materials or processes which are patented or are the subject of a

[1] Merriam in Petition, 84 N. Y. 596 [1881].

[2] City of Newark *v.* Bomel (N J.), 31 Atl. Rep. 408; N. P. Perrine, etc., Co. *v.* Quackenbush (Cal.), 38 Pac. Rep. 533; State *v.* Board of Comm'rs (Kan.), 45 Pac. Rep. 616.

[3] Verdin *v.* City of St. Louis (Mo. Sup.), 33 S. W. Rep. 480. Burgess, J., dissenting.

[4] Verdin *v.* St Louis (Mo.), 27 S. W. Rep. 447.

[5] Silsby Manfg. Co. *v.* Allentown (Pa.), 20 Atl. Rep. 646; *accord* Hobart *v.* Detroit, 17 Mich. 246; Matter of Petition of Dugro, 50 N. Y. 513; *but see* Dolan *v.* Mayor of N. Y., 4 Abb. Pr. N. S. (N. Y.) 397.

[6] People *v.* Van Nort, 65 Barb (N. Y.) 331; *but see* Boon *v* Utica, 26 N. Y. Supp. 932; *and* Matter of Eager, 46 N. Y. 100.

[7] Dillon's Munic. Corp'ns., § 467 4th ed.).

[8] Dillon's Munic. Corp'ns, § 468, *note* (4th ed. 1890).

[9] 15 Amer. & Eng. Ency. Law 1093-94.

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monopoly may be made the subject of a proposal and contract are given below,[1] as well as those which are to the contrary.[2]

164. Instances where Contracts have been Made for Things in Which there was a Monopoly.—Perhaps the law will be better understood by a few cases. Those which most frequently occur are in contracts for patented pavements and sidewalks, and there is no uniformity in the decisions of the different states. There are several cases of patented machines, one a pump, in which it was held that the fact that the pump authorized was patented did not relieve the board from the necessity of advertising for bids.[3] Another case decides that a requirement that work shall be let to the lowest bidder does not forbid a contract for a garbage crematory, parts of which are patented, when the patents have been offered to the city or any contractor at a fixed price, and there is in fact free competition as to work and materials.[4] In the same state it has been held that a city cannot contract for a patented pavement, no arrangement having been made with the patentee binding him to sell the privilege of using the process to the bidder at a fixed price.[5] Where the royalty required to be paid on a patented article required to be used in the performance of a contract for public works was fixed, and the proposal inviting bids for the contract definitely stated that the royalty should be paid by the accepted contractor in a particular way, and several bids were actually made for the work, and the contract was let to the lowest bidder, there was actual competition by bids, in compliance with the law requiring the letting of the contract to the lowest bidder.[6]

In Louisiana it has been held that a city may contract with the highest bidder in order to remove and destroy, under certain regulations, the offal that is annoying to health.[7]

When the job embraces several kinds of work, some of which are patented, while others are not, it has been held in New York that separate proposals should be invited, one for that part which *is not* patented, and another for that which *is* patented and for which there can be no competition.[8] Specifications in the alternative have been allowed in a case where the lathing to be used was required to be a certain "patent lathing," or "some other lathing of equal quality to be manufactured from sheet iron within the limits of the city."[9]

[1] Hobart *v.* Detroit, 17 Mich. 246; *Re* Jugro, 50 N. Y. 513; N. P. Perrine Co. *v.* Quackenbush (Cal.), 38 Pac. Rep. 533; Verdin *v.* St. Louis (Mo.), 27 S. W. Rep. 447; Dean *v.* Charlton, 23 Wis. 590; Kilvington *v.* City of Superior (Wis.), 53 N. W. Rep. 487; *Re* McCormack, 60 Barb. 128; Worthington *v.* Boston (Mass.), 41 Fed. Rep. 23 [1890]; Harlem Gas Co. *v.* New York, 33 N. Y. 309; Nebraska City *v.* Nebraska Gas Co., 9 Neb. 339; Yarold *v.* Lawrence, 15 Kan. 126; People *v.* Van Nort, 65 Barb. (N. Y.) 331.

[2] State *v.* Elizabeth, 35 N. J. Law 351. Boon *v.* Utica, 26 N. Y. Supp. 982; Nicholson Pavement Co. *v.* Painter, 85 Cal; 699; Burgess *v.* Jefferson City, 21 La. Ann. 143; Dean *v.* Charlton, 23 Wis. 590; Dean *v.* Borchsenius, 30 Wis. 236; Barber Asphalt Co. *v.* Hunt, 100 Mo. 22.

[3] Worthington *v.* Boston, 41 Fed. Rep. 23 [1890].

[4] Kilvington *v.* City of Superior (Wis.), 53 N. W. Rep. 487.

[5] Dean *v.* Charlton, 23 Wis. 590.

[6] State *v.* Board of Com'rs of Shawnee County (Kan.), 45 Pac. Rep. 616; *see also* Detroit *v.* Robinson, 38 Mich. 108.

[7] State *v.* Payssan (La.), 17 So. Rep. 481.

[8] *Re* Eager, 46 N. Y. 100.

[9] Mulrein *v.* Kalloch, 61 Cal. 532.

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Contracts for work or public undertakings for which franchises or exclusive rights already exist, and by which competition is prevented, it seems are not within the statute requiring all contracts for work and materials to be advertised and let to the lowest bidder. It was therefore held that a contract made without inviting proposals with a gas company who had the exclusive right to supply a particular part of a city with gas was valid and binding.[1] A contract with the only electric-light company in the city without advertising was held valid.[2]

When professional services, as those of a surveyor, are required and he is to be employed, it has been held that the common council or board have the power to select with references to securing the necessary skill, and no advertisement is required.[3] It has therefore been held that it was not necessary to advertise and to give to the lowest bidder a contract to furnish fireworks, for the reason that the articles were of a peculiar character, depending for their value upon the personal skill of the manufacturer.[4] This is an interesting case, and the question may be properly asked if a contract for the erection of a lighthouse would come under the same rule, it having been held that the construction of such a structure was particular work, depending upon the personal skill of the contractor, and such work as could not be completed by his executor or administrator.[5] It is thought not.

The renting of chambers for the recorder of the city of New York has been held not to fall within a provision requiring all contracts for work or supplies to be let to the lowest bidder ;[6] nor do contracts for carriage hire of aldermen and councilmen when engaged in public service.[7]

165. Conditions and Stipulations as to the Performance and Completion of the Work.

1. *Work and Materials to be to Satisfaction of Engineer or Architect.*
Bidders will be required to furnish materials and to complete the entire work to the satisfaction of the engineer and in substantial accordance with the specifications hereunto annexed and the plan therein referred to. No extra compensation, beyond the amount payable for the several classes of work before enumerated, which shall be actually performed at the prices therefor to be specified by the lowest bidder, shall be due or payable for the entire work.

1[1]. *Inspection and Acceptance of Work.*
Each bidder must understand that should his proposal be accepted the materials delivered and the work performed by him, at any and all times during the progress of the work, and prior to final acceptance and payment, the same shall be subject to the inspection of the engineer or architect, or his authorized agent, with the full right to

[1] Harlem Gas Co. *v.* New York, 33 N. Y. 309; Nebraska City *v.* Neb. Gas Co., 9 Neb. 339.
[2] Hartford *v.* Hartford Elec. Lt. Co., 65 Conn. 324.
[3] People *v.* Flagg, 5 Abb. Pr. (N. Y.) 232.
[4] Detwiller *v.* Mayor, 46 How. Pr. (N. Y.) 218.
[5] Wentworth *v.* Cock, 10 A & E. 45.
[6] Davies *v.* New York, 83 N. Y. 207.
[7] Smith *v.* New York, 21 How. Pr. 1.

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accept or reject any part thereof that in the opinion of the engineer or architect, or his authorized agent, is not strictly in accordance with the drawings and specifications; and that he must, at his own expense, within a reasonable time, to be specified by the engineer or architect, remedy any defective or unsatisfactory materials or work, and that in the event of his failure to do so after notice the engineer or architect will have the full right to have the same done and to charge the cost thereof to his account. Each bidder must understand that, should his proposal be accepted, inspection of or payment for, any portion of the work embraced therein by the engineer or architect, or his authorized agent, will not relieve him of responsibility to remedy any defective materials or workmanship, at his expense, at any time before final inspection and acceptance of and final payment for all of the materials and work contemplated by and embraced in his proposal.

2. *Prices to Include Everything.*

The prices bid are to cover all expenses of furnishing materials [except.....,which will be furnished by the company or city] and to cover all expenses and furnishing of tools, labor, and utensils incidental to and necessary for the full completion of the work in conformity with the contract and specifications.

2¹. *Price Bid to Include Everything.*

Bidders will state a price for completing the work specified in the bill of quantities and described in the contract and specifications, which price is to include and cover the furnishing of all the material and labor and the performance of all the work requisite or proper for the purpose, and the completing of all the above-mentioned work and the materials in the manner set forth, described, and shown in the specifications and on the plans furnished for the work, and in the form of contract exhibited and furnished by the engineer.

3. *No Deviation from Plans and Specifications.*

Bidders are informed that no deviation from the specifications will be allowed unless a written permission shall have been previously obtained from the engineer or architect.

4. *Bonds to Maintain and Keep in Repairs.*

The successful bidder will be required to furnish bonds to maintain and keep in repair the whole of the works undertaken by him, and all other works, roads, and streets interfered with or rebuilt, for a period of.....months after the full performance and completion of the contract.

5. *Protection of Work and Materials.*

The successful bidder will be responsible for the proper care and protection of all materials delivered and work performed by him until the completion and acceptance of and final payment for all the work embraced in his proposal, and part payments from time to time on account of such materials and work will not in any way relieve him of such responsibilty.

6. *Building Regulations.*

The successful bidder must fully comply with all municipal building ordinances and regulations, and obtain all required licenses and permits, and pay all charges and expenses connected therewith, and be responsible for all damage to persons or property which may occur in connection with the prosecution of the work.

7. *Skilled Labor.*

The successful bidder is to employ only skilled and reliable workmen

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in the performance of the work, and must agree that the engineer or architect shall have the right to decide upon and discontinue the services of any workman employed by him on the work who does not possess satisfactory skill and qualifications or is otherwise objectionable.

8. *Bidder Must Furnish Bond for Payment of Labor and Materials.*

Each bidder must distinctly understand that if his proposal is accepted, he will be required to execute a formal bond or contract; and the part and final payments, as the vouchers are issued on account of the contract, shall be subject to a reserved right of the engineer or architect to withhold any part of the money to be paid under the contract in the event of the failure of the contractor to promptly make payments to all persons supplying him with labor or materials in the prosecution and completion of the work provided for in the specifications, drawings, and proposal.

9. *Commencement and Progress of Work.*

The work must be commenced ten days after the execution of the contract and prosecuted to completion without interruption or delay; the whole work is to be completed and delivered by the....day of ....., 189..

10. *Number of Days Required to Complete the Work.*

Each bidder must also state the number of working-days he will require to complete the work, which number of days will be counted in the comparison of bids at the rate of twenty-five dollars ($25) per day.

11. *Contractor's Delay.*

All additional expense to the.....by reason of extension of the contract at the request of the contractor shall be deducted from payments due or to become due the contractor at the rate of..... dollars for each and every day.

11¹. *Liquidated Damages.*

The damages to be paid for each day that the contract may be unfulfilled after the time specified for the completion thereof shall have expired are, by a clause in the contract, fixed and liquidated at..... dollars per day.

11². *Liquidated Damages.*

Each bidder must understand that should his proposal be accepted the sum of.....dollars as liquidated damages will be fixed for each and every day's delay not caused by the.....that may occur beyond the time stipulated in his proposal for the supply of all the materials and the performance and completion of the work.

11³. *Liquidated Damages.*

Liquidated damages of.....dollars per day are fixed by the terms of the contract for each and every day that the contract remains unfulfilled after the date of completion specified.

12. *Bonus for Early Completion.*

A bonus of....dollars per day will be paid for each and every day that the work is completed before the date specified for completion.

13. *Payments on Estimate.*

After the acceptance of a proposal, and execution and approval of a formal bond and contract, monthly payment will be made on account of the work actually done and in place in the structure; and such payments will be based upon the estimated value of the quantity of such work, computed from the contract unit of value, less 10 per cent. to be retained until the entire and satisfactory completion, final inspection, and acceptance of all the materials and work embraced in the contract,

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at which time final payment of the balance due will be made; but no payment will be made for any materials delivered, but not actually put in place.

14. *Payments to Contractor Only.*

Payments will be made only to principals. Assignments and powers of attorney to collect moneys will not be recognized.

15. *Payments Contingent on Appropriations.*

Payments will be made upon monthly estimates, but contingent upon such appropriations as may from time to time be made by law, and ten (10) per cent. will be reserved from each payment until the completion of the contract.

16. *Officers Not Responsible.*

The payments to the contractor shall be made out of the funds under the control of the city, county, or state in their public capacity; and no member or officer of such city, county, or state, whether or not a party to this agreement, is to be personally responsible to the contractor.

17. *Cannot Assign or Sublet.*

The original contractor will be held to the performance of the contract, and transfers of contracts or of interests in contracts are prohibited (by law).

166. Conditions and Stipulations as to Performance and Completion of the Work.—The above stipulations are common to construction contracts and belong strictly to the contract itself, and are treated and discussed in sections specially devoted to them in Part III.* They do not enter into the proposal except as being terms of the agreement which the bidder must execute.

167. Bond or Certified Check to Insure the Execution of the Contract, and Security for its Faithful and Complete Performance.

1. *Certified Check.*

Each bidder must submit with his proposal a certified check for.... dollars...., drawn to the order of....., as a guaranty that he will fully and faithfully comply with the terms of his proposal should the same be accepted, and that within ten days after the form is sent him he will execute a formal bond and contract in accordance therewith.

1'. *Bond or Certified Check.*

Each bid or proposal must be signed and sealed by the bidder and witnessed, and be accompanied by a bond, approved by....., in a sum equal to one tenth of the sum bid, as liquidated damages, conditioned that the party making the bid shall, within ten days after the acceptance of said proposal, execute the contract, with security approved by the engineer [commissioner] for its faithful performance. In case the bid be accepted, the formal bond to be executed and approved will be attached to and form a part of the advertisement, instructions, and conditions, specification, accepted proposal, letter of acceptance, and the drawings, all properly signed, within the time specified in this advertisement; or, in place of the bond to accompany proposal, the bidder may deposit with the commissioner a sum of money or a properly certified check of the same amount payable to....., said check to be returned to the bidder on the execution and delivery of the final contract and the bond required for its faithful performance.

See Secs. 200–800, *infra.*

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1¹. *Bid Must be Accompanied by Certified Check.*

No proposal will be received and considered unless accompanied by either a certified check upon a state or national bank drawn to the order of....., or money, to the amount of....per centum of the amount of the security required for the faithful performance of the contract.

1². No bid will be considered which has not responsible sureties upon its accompanied bonds, or, if without bond, is not accompanied by a certified check, as aforesaid.

1³. *Bond for Execution of Contract (U. S. Form).*

The bond attached to each bid must be signed by two responsible sureties, to be certified to as good and sufficient guarantors, by a judge of the United States court, a United States district attorney, collector of customs, or by some other officer under the United States government. Each guarantor must justify in a sum not less than one tenth of the whole amount of the proposal.

2. *Forfeiture of Check.*

Should the successful bidder fail or refuse to execute a formal bond or contract within ten days after the same is sent to him, his certified check may be declared forfeited, the letter of acceptance of his proposal may be revoked, and all obligations in connection therewith will be released and annulled.

2¹. *Forfeiture of Check.*

If the successful bidder shall refuse or neglect, within five days after notice that the contract has been awarded to him, and that the adequacy and sufficiency of the security offered by him is approved....., to execute the contract, the amount of the aforesaid deposit made by him shall be forfeited to and retained by.....as liquidated damages for such neglect or refusal; but if he shall execute the contract within the time aforesaid, the amount of his deposit will be returned to him forthwith.

3. *Delivery of Certified Check.*

Such check or money is not to be inclosed in the sealed envelope containing the estimate, but it is to be delivered to..... No proposal will be received until such check or money has been deposited and examined and found to be correct.

4. *Return of Certified Checks.*

All deposits except that of the successful bidder will be returned to the persons making the same within three days after the contract is awarded.

4¹. *Return of Certified Check.*

The certified check of the successful bidder will be retained until the execution of a formal bond or contract, and the approval of the same by....., and the certified checks of the unsuccessful bidders will be returned within three days after the proposal of the successful bidder shall have been accepted.

5. *Names of Sureties.*

Bidders are required to name the sureties or surety company who will sign the required bond in case the contract should be awarded to him or them.

5¹. *Consent of Sureties.*

Each bid or estimate shall be accompanied by the consent in writing of two householders of the state of....., with their respective places of business or residence, to the effect that:

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a. If the contract be awarded to the person making the estimate, they will upon its being so awarded become bound as his sureties for its faithful performance.

b. If he shall omit or refuse to execute the same, they will pay to the corporation any difference between the sum to which he would be entitled upon its completion and that which the corporation will be obliged to pay to the person to whom the contract may be awarded at any subsequent letting, the amount to be calculated upon the estimated amount of the work by which the bids are tested.

5[2]. *Oath of Sureties.*

The consent above mentioned shall be accompanied by the oath or affirmation in writing of each of the persons signing the same that he is a householder or freeholder in the state of....., and is the owner of property in value equal to the amount of the security required for the completion of the contract and stated in the proposals, over and above all his debts of every nature, and over and above his liabilities as bail, surety or otherwise; that he has offered himself as a surety in good faith and with an intention to execute the bond required by the law if the contract shall be awarded to the person or persons for whom he consents to become surety.

6. *Acceptability of Sureties.*

The adequacy and acceptability of all sureties and the amount and character of the surety for the fulfillment of the contract will be determined by the commissioners after the proposals are opened, the award made, and the contract signed.

7. *Sureties Must be Residents of State.*

If a bond be required with the contract, the sureties thereon must be residents of the state of..... .. and satisfactory to the commissioner.

8. *Surety Not an Officer or Partner.*

An officer of a corporation will not be accepted as surety for such corporation, nor will a firm be accepted as surety for a member of the partnership.

9. *Surety Must Not be in Default.*

No person will be accepted as surety who as a contractor has failed to satisfactorily perform any contract with the. ....., or as a surety has failed to abide by a bond for the performance of such a contract, or as a guarantor has failed to abide by a guaranty accompanying a proposal. The surety must be signed by two responsible persons, who must justify before an official, authorized to administer oaths.

10. *Time in Which to Execute the Contract.*

The person or persons to whom the contract may be awarded will be required to appear at the office of the commissioner of public works with the securities offered by him or them and execute the contract within ten days (not including Sunday) from the date of notification of such award and that the contract is ready for signatures and sign the contract in triplicate.

11. *Ratio of Security to Proposal.*

The security required for faithful performance of the contract and specifications will not be more than one fourth ($\frac{1}{4}$) of the amount of the contract, and the right is reserved to increase the amount of said security after proposals are opened to a sum not exceeding one third ($\frac{1}{3}$) of the total consideration of the contract.

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168. Bond and Certified Check to Insure the Execution of the Contract and Surety for Faithful Performance and Completion of the Work.—The bidder may be required to file, before the bids are opened, a satisfactory bond or certified check, conditioned that he will enter into a contract with good and sufficient surety if he is found to be the lowest bidder. Such a requirement is reasonable, and the lowest bidder cannot insist upon the acceptance of his bid without first filing such bond.[1] If he has neglected to do so before the proposals have been opened, it may be doubted if he can do so afterwards if the board refuse him the privilege. It seems that public officers may in their discretion excuse the failure to accompany the bid with such a bond. It has been held that a bond furnished on the same day that the proposal was accepted was sufficient.[2]

If, however, the statute or charter provides that whenever any improvement shall be declared necessary the council shall authorize the department of city works to advertise for bids under seal, which bids shall be publicly opened and announced, with the name of the bidder, the amount proposed, "and the names of the sureties," it will be held that such provision requires security to be given with every bid, such security to be a guaranty of the bid, as well as of the performance of the contract if awarded to the bidder.[3] If a charter require security, but there is no provision as to the amount of the bond or as to its form, or whether it was to be furnished with the bid or after its acceptance, the regulation of such matter is left to the officers who are to receive the bid.[4]

Such a provision is necessary to insure good faith in bidders and to make sure that the proposals are not withdrawn before the contract is awarded. A proposal is a formal offer which by the law of contracts may be withdrawn or revoked at any time before it has been accepted; when accepted in precisely the terms of the proposal it becomes a binding contract. An acceptance which varies the terms of the offer is a counter-offer which may invalidate the offer.[4]*

Therefore a deposit by one bidding for a city contract, made on condition that it be forfeited if the bidder fail to qualify after award of the contract, cannot be forfeited for his failure to sign a contract and bond securing its performance when the conditions therein are more burdensome than were the specifications contained in the advertisement,[5] or where the contract is not based on legal proceedings of the municipal authorities.[6]

Where it is an express condition of the acceptance of a bid that the bidder shall make a deposit, which is to be forfeited on his refusal to enter

[1] May *v.* Detroit, 2 Mich. N. P. 235

[2] Rabling *v.* Board (Ind.), 40 N. E. Rep. 1079; *semble* Smith *v.* Philadelphia, 2 Brews. (Pa.) 443.

[3] Selpho *v.* City of Brooklyn (Sup.), 39 N. Y. Supp. 50.

[4] Tuttle *v.* Love, 7 Johns. (N. Y.) 470; *and see also* Lloyd's Law of Building and Buildings, 93.

[5] Cotter *v.* Casteel (Tex. Civ. App.), 37 S. W. Rep. 791.

[6] N. P. Perrine Co. *v.* Pasadena (Cal.), 47 Pac. Rep. 777.

* *See* Law of Contracts, Chap. IV., Secs. 92–97, *supra.*

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into the contract, the bidder, when he has abandoned such a contract without just cause, is not entitled to be relieved against the forfeiture.[1]

Public officers have no discretion in the matter; if the lowest bidder has refused or neglected to execute the contract, the check that he has deposited as security must be forfeited and retained by the city as liquidated damages and paid into the sinking-fund, and any other disposition of the bid or the check is unlawful.[2]

When the act provides that the bidder whose bid is accepted and who fails to furnish proper security "within five days after written notice" that the contract has been awarded him shall forfeit the deposit accompanying his bid, the forfeiture will not occur if the authorities have failed to give him the written notice, though he has been informed of the acceptance of his bid.[3]

The decisions may be modified or conditioned upon whether the court regards the certified check as a penalty or as liquidated damages. When the notice required each bid to be accompanied by a check for $500, "as a guaranty of good faith that the bidder, in case his bid is accepted, will enter into a contract," and the plaintiff's bid was accepted, but he failed to enter into a contract within a reasonable time, whereupon defendant appropriated his check, it was held that the money deposited by plaintiff was not liquidated damages, but a penalty, and defendant was entitled to retain only so much as would cover its actual damages.[4]

The fact that the resolution provides that, if any person whose bid is accepted shall fail to enter into a written contract and give the required bond within ten days, the certified check deposited by him shall be forfeited, etc., does not limit the city council to ten days in which to accept a written contract and bond, and require a forfeiture of the contract in case they are not furnished within that time.[5]

169. Proposal to be Accompanied by Consent of Sureties.—A notice to bidders requiring that "the proposal should specify the names of the sureties offered, with the written consent of the persons so named," has been held reasonable, and it was held that by reason of neglect to furnish the written consent prescribed, the lowest bidder was not entitled to have the contract awarded him; and the fact that he was present at the opening of the proposals accompanied by responsible persons for the purpose of giving their written consent to the use of their names as sureties did not remedy the omission to specify their names in the sealed proposals. It was held too late to perfect the bid.[6] When the statute requires that each bid "shall be accom-

[1] Village of Morgan Park *v.* Grahan (Ill.), 26 N. E Rep. 1085 [1891].

[2] Kimball *v.* Hewitt, 2 N. Y. Supp. 697 [1888].

[3] Erwing *v.* New York, 16 N. Y. Supp. 612 [1891]; *see also* Mitchler *v.* Easton (Pa.), 23 Atl. Rep. 1109.

[4] Lindsey *v.* Rockwall County (Tex.), 30 S. W. Rep. 380; Willson *v.* Baltimore (Md.), 34 Atl. Rep. 774.

[5] City of Springfield *v.* Weaver (Mo. Sup.), 37 S. W. Rep. 509.

[6] State *v.* Governor, 22 Wis. 110 [1867]; State *v.* Bartley (Neb.), 70 N. W. Rep. 367; *and see* Roberts *v.* Brett, 6 C. B. N. S. 635; Stafford *v.* Lowe, 16 Johns (N. Y.), 67; Cremer *v.* Higginson, 1 Mason C. C. R. 323, 368.

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panied by sufficient guaranty of some disinterested person," the act is not complied with by merely writing the name of the person offered as surety as such.[1]

When one of the sureties who was named in the bid refused to execute the bond as surety, it was held sufficient to justify a refusal to execute the contract even after the bid had been accepted and the details of the contract agreed upon, and even though the lowest bidder did offer other securities.[2] The bid must conform to the form of the proposal required.[3] It may be required that the sureties shall be residents of the state, and the award of the contract may be refused to a bidder who neglects to furnish such security.[4]

The public officers may determine the responsibility of the sureties offered, and if they are sufficient; and it seems they are not limited in their inquiry to their reputed or actual responsibility, but may consider their vocation, business habits, character of their investments and property, and their reputation for integrity and prudence.[5] A requirement that "all proposals must be accompanied by a certificate of deposit for the sum named to the credit of the auditor," is satisfied by a certificate of deposit to the credit of the bidder and indorsed as "Pay N. S. B. Auditor, etc., or order." It was held that the board could not reject the bid, that being the lowest bidder, and, having furnished the requisite security, he was clearly entitled to the contract: that he was entitled to it as a matter of right and of law. Such technicalities cannot be prescribed.[6] *

THE AWARD AND FINAL EXECUTION OF THE CONTRACT. ACCEPTANCE OF THE PROPOSAL.

170. Information to be Furnished and Conditions to be Imposed when Contract is Executed.

1. *Bidder's Residence and Address.*

The place of residence of each bidder, with post-office address, county, and state, district, or territory, must be given after his signature, which must be written in full.

2. *Signatures and Seals.*

All signatures must be witnessed and have affixed to them seals of wax or wafer.

3. *Partnership Bids.*

When a firm bids, the individual names of the members shall be written out, and shall be signed in full, giving the Christian names; but the signers may, if they choose, describe themselves in addition as doing business under a given name and style as a firm.

4. *Bids by Corporations.*

In cases where a corporation submits a proposal, the proposal must be signed with the full name of each officer of the corporation, and their

[1] State *v.* Board of Ed., 42 Ohio St. 374.
[2] Adams *v.* Ives, 63 N. Y. 650 [1875].
[3] Wiggins *v* Philadelphia, 2 Brewster (Pa.) 444; Weed *v.* Beach, 56 How. Pr. (N. Y.) 470; *accord* Wilson *v.* Baltimore (Md.), 34 Atl. Rep. 774.
[4] Farman *v* Comm'rs of Darke Co., 21 Ohio St. 311 [1871].
[5] Adams *v.* Ives, 63 N. Y. 650 [1875]; Shaw *v.* Trenton, 49 N. J. Law 339 [1887].
[6] People *v.* Contracting Board, 46 Barb. 254 [1865].

* As to Sureties in General *see* Secs. 18-22, *supra*.

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addresses given, in addition to the corporation signature, with official corporate seal thereto.

5. *Bids by Agents.*

Any one signing a proposal as the agent of another or of others must file with it legal evidence of his authority to do so.

6. *Officer's Authority to Bid.*

If a person signs for a corporation, he must present legal evidence that he has rightful authority to such signature, that the signature is binding upon the corporation, and that the corporation has a legal existence.

7. *Award of Contract.*

The award of the contract, if awarded, will be made to the bidder who is the lowest for doing the whole of the work, and whose estimate is regular in all respects. It must be understood that an acceptance by the board, council, or state, of proposals made, shall be conditional upon the execution of the formal contract (of which the plans and specifications are a part), and the furnishing of the required bond for its faithful and complete performance.

8. *Right to Reject Bids Reserved.*

The right to reject [any and] all bids (plans, and estimates), is reserved if the Commissioners of Public Works shall deem it for the interest of the ..... so to do.

9. *Right Reserved to Waive Informalities.*

The board or owner reserves the rights to waive any informalities in any proposal that may be received, and to reject (any or) all proposals submitted in response to the advertisement, and to disregard the bid of any failing contractor known as such to the Engineer.

10. *Invitation to Opening of Bids.*

Bidders are invited to be present at the opening of the bids.

[Signed]

.....

Dated .....

.....

Commissioners, Council, or Board.

171. Acceptance of Proposal and Execution of Contract. Right to Reject Bids.—When the statute does not require that the contract be awarded to the lowest bidder, public officers may, if they choose, invite competition, and in their discretion make alterations in the plans and specifications advertised before executing the contract and without the knowledge of competing bidders.[1] They must not abuse the discretionary power conferred, and their acts must be free from fraud.[2]

To determine what is the lowest aggregate bid, the bids must be considered in their entirety, and not by taking separate items from different bids.[3]

Where an advertisement for bids for the erection of public school buildings states that the board reserves the right to reject all bids, one making

[1] Kingsley *v.* Brooklyn 5 Abb. N. Cas. (N. Y.) 1; Brevoort *v.* Detroit, 24 Mich. 322; Cummings *v.* Seymour, 79 Ind. 491; Insley *v.* Shipard, 31 Fed. Rep. 869.

[2] Elliot *v.* Minneapolis (Minn.), 60 N. W. Rep. 1081; Shefbaur *v.* Board (N. Y.), 31 Atl. Rep. 454; Gilmore *v.* Utica (N. Y. App.), 29 N. E. Rep. 841; Hubbard *v.* Sandusky, 9 Ohio Cir. Ct. Rep. 638.

[3] Hubbard *v.* Sandusky, *supra.*

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the lowest bid has no right of action against the board where the bid is rejected and the contract given to another, though it was the rule of the board that contracts should be let to the lowest bidder.[1] It has been held that a contract may be awarded to one at any price within the legal rate fixed for public printing, though another offers to do the work for sixty per cent. less.[2] If the charter or a statute require the contract to be awarded to the lowest bidder after advertising for bids, a contract not so made and awarded will be void.[3] If the statute provides that the contract "shall be let to the lowest responsible bidder," an ordinance or advertisement which states that "the commissioner reserves the right to reject *any* proposal at his discretion," is invalid.[4] If the act or charter says the contract shall be awarded to the lowest bidder it is useless to "reserve the right to reject *any and all* bids," though it has been frequently held that "*all* the bids might be rejected."[5] The body awarding the contract acting in good faith may refuse to award to any one if they deem it for the best interests of the public to do so. They may reject all the bids and readvertise for new proposals.[6] It seems that the awarding of the contract may be indefinitely postponed,[7] or the work may be abandoned altogether or the plans and specifications changed.[8]

It seems that the contract cannot be awarded to another who makes a better offer after the bids have been received and opened.[9]

172. Power to Determine Responsible Bidder is Discretionary.—If the statute provide that the contract be awarded to "the lowest responsible party" or to "the lowest responsible party furnishing good and sufficient security," the courts have usually held it to confer discretionary powers upon the public officers to determine whether or no the bidder was responsible and if his surety was good and sufficient.[10] When such discretionary powers belong to a board of public officers the right "to reject any and all bids"

[1] Anderson *v.* Board of Public Schools (Mo. Sup.), 27 S. W. Rep. 610.

[2] Board of Com'rs of Henry County *v.* Gillies (Ind. Sup.), 38 N. E. Rep. 40.

[3] Littler *v.* Jayne, 124 Ill. 123; State *v.* Licking Co., 26 Ohio St. 531.

[4] Lake Shore & M. S. R *v.* City of Chicago (Ill.), 33 N. E. Rep 602.

[5] Walsh *v.* Mayor, 113 N. Y. 142 [1889]; People *v.* Croton Aqueduct, 49 Barb. 259; Bell *v.* City of Rochester, 30 N. Y. Supp. 315; People *v.* Aldridge, 31 N. Y. Supp. 920; Connolly *v.* Board (N. J.), 30 Atl. Rep. 548; Booth *v.* City of Bayonne (N. J.), 28 Atl. Rep. 381, 15 Amer. & Eng. Ency. Law 1096; Gunning G. Co. *v.* New Orleans (La.), 13 So. Rep. 182; People *v.* Willis (Sup.), 39 N. Y. Supp. 987; State *v.* Directors, 5 Ohio St. 234; Kelly *v.* Chicago, 62 Ill. 279.

[6] Walsh *v.* Mayor, 113 N. Y. 142 [1889]; Connolly *v.* Board (N. J.), 39 Atl. Rep. 548.

[7] People *v.* Aldridge, 31 N.Y. Supp. 920.

[8] Keogh *v.* Wilmington, 4 Del Ch 491.

[9] Kerr *v.* Philadelphia, 8 Phila. (Pa.) 292.

[10] Douglass *v.* Commonwealth, 108 Pa. St 559; Kelly *v.* Chicago, 62 Ill. 279 [1871]; Findley *v.* Pittsburgh, 82 Pa. St. 351; Interstate, etc., Co. *v.* Phila. (Pa.), 30 Atl. Rep. 383; Comm. *v.* Mitchell, 82 Pa. St. 343; Hoole *v.* Kinkead, 16 Nev. 217; People *v.* Dorsheimer, 55 How. Pr. (N. Y.) 118; Hubbard *v.* Sandusky, 9 Ohio Cir. Ct. Rep. 638; People *v.* Mooney (Sup.), 38 N. Y. Sup. 495; State *v.* Bd. of Ed. (Ohio), 20 Bull. 156; *semble*, Van Reipen *v.* Jersey City (N. J.), 33 Atl. Rep. 740; *and see* State *v* Marion Co., 39 Ohio St. 188; People *v.* Gleason, 4 N. Y. Supp. 383; Weed *v.* Beach, 56 How. Pr. (N. Y.) 470; May *v.* Detroit, 12 Am. L. Reg. (N. S.) 149; McBrian *v.* Grand Rapids, 56 Mich. 95.

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seems to be properly reserved, the exercise of which right is subject to the close scrutiny of the court.[1]

Sometimes the ordinance or act itself authorizes the engineer to reject any and all bids if deemed too high or the parties bidding are deemed irresponsible.[2] Under such a clause the act of the engineer in rejecting the lowest bid can be impeached only on the ground of bad faith.

If, as is sometimes the case, the statutes provide that "every such contract shall be deemed confirmed in and to such lowest bidder at the time of the opening of the bids,"[3] then there is no discretion; the contract goes to the lowest bidder.

173. Discretion Must be Exercised in Good Faith.—The body or board or council accepting the bids must determine whether the lowest bidder is responsible and shows the ability and offers the security prescribed; and if the bid is not rejected because of a *bona fide* determination of the lack of such qualifications, it cannot be rejected for other extraneous causes.[4] The word "responsible" has been held not to have reference to pecuniary ability alone, but to have reference to the skill, ability, and integrity of the bidder, and that it is proper to consider which bidder would be most likely to do faithful, conscientious work.[5] The word "responsible" has been held to mean the ability to perform all the conditions of the contract; and the commissioner of public works may reject a bid, notwithstanding it is the lowest made, and the bidder is able to give the required bond, if, in the judgment of such official, after due investigation, the materials customarily used and the workmanship exhibited by the bidder in the performance of the kind of work required are poor and unsatisfactory.[6]

The discretion must be exercised in good faith and without fraud or collusion;[7] and such a power to dispense with certain requirements conferred upon a board or council by act of legislature being discretionary, it cannot be delegated.[8] The board cannot exercise an arbitrary discretion in awarding the contract, but must base its discretion on facts reasonably tending to support its determination.[9]

It seems that evidence is admissible to impeach the contract and show

[1] People *v.* Willis (Sup.), 39 N. Y. Supp. 987; Peeples *v.* Byrd (Ga.), 25 S. E. Rep. 677; State *v.* New Orleans (La.) 19 So. Rep. 690; Gunning G. Co. *v.* New Orleans (La.), 13 So. Rep. 182.

[2] Johnson *v.* Duer (Mo.), 21 S. W. Rep. 800; State *v.* New Orleans, *supra*.

[3] The People *v.* The Croton Aqueduct, 49 Barb. 259 [1867].

[4] Shaw *v.* Trenton, 49 N. J. Law 339 [1887].

[5] Comm. *v.* Mitchell, 82 Pa St. 343; Hoole *v.* Kinkead, 16 Nev. 217; Reuting *v.* Titusville (Pa. Sup.), 31 Atl. Rep. 916

[6] People *v.* Kent (Ill. Sup.), 43 N. E. Rep. 760; Peeples *v.* Byrd (Ga.), 25 S. E. Rep. 677; State *v.* St. Bernard, 10 Ohio Cir. Ct. Rep. 74.

[7] Reuting *v.* Titusville (Pa.), 34 Atl. Rep. 916; Ross *v.* Bd. of Ed., 42 Ohio St. 374; Hubbard *v.* Sandusky, 9 Ohio Cir. Ct. Rep. 638; Van Reipen *v.* Jersey City (N. J.), 33 Atl. Rep. 740; Gunning G. Co. *v.* New Orleans (La.), 13 So. Rep. 182; People *v.* Town of Campbell, *note* 8; State *v.* Betts, 4 C. C. (Ohio) 86.

[8] *Re* Emigrant Ind. Sav. Bank, 75 N. Y. 388; *but see* People *v.* Town of Campbell (Sup.), 36 N. Y. Supp. 1062, *where engineer was authorized to receive proposals and award contract; and see* Board *v.* Kemp (Ind. App.), 43 N. E. Rep 314.

[9] McGovern *v.* Board (N. J Sup.), 31 Atl. Rep. 613; *semble*, *In re* McCain (S. D.), 68 N. W. Rep. 163.

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that the bid accepted was not in fact the lowest according to the data proposed as tests, without alleging a fraudulent collusion between the bidder and the officers awarding the contract.[1]

174. Bids Rejected but Reconsidered Without a New Advertisement.—A common council which has rejected all bids received in reply to an advertisement for proposals may at a subsequent meeting, without readvertising for new proposals, reconsider the vote of rejection and award the contract to one of the original bidders. It has been so held.[2] It may be doubted if the bidder could be held to his offer, it having been once rejected and not renewed again. Therefore when the instructions to bidders required a guaranty that the bidder would not withdraw his proposal within sixty days, and that if the same were accepted he would enter into a contract within ten days after the day on which he should be notified of such acceptance, it was held that after that time, as against the bidder, the bid could not be accepted; and it was further held, that though personal notice of the acceptance was intended, and that though notice was deposited in the mail a few days before the expiration of the sixty days, but which did not reach the bidder until after the expiration of that period, was insufficient to render him or his guarantors liable for a failure to enter into a contract.[3] *

A second advertisement for bidders has been held unnecessary in case of nonperformance by the original contractor, the liability of the contractor and his sureties having been deemed adequate indemnity against additional expense in completing the work. If the expense has not been increased by fraud and irregularity, an assessment levied under the act cannot be vacated or reduced.[4] The fact that the work was completed at an expense considerably exceeding the contract price does not, it seems, require that it should have been readvertised and relet.[5]

175. Not Always Necessary to Readvertise.—When the lowest bidder had failed or refused to enter into the contract and to give the guaranty required, it was held that the contract might be awarded to the next lowest bidder without readvertising for bids;[6] but it seems that the next lowest bidder cannot compel the award of the contract to him.[7]

There are cases to the contrary which hold that if the lowest bidder withdraw his bid it is necessary to advertise again, and not to award the contract to the next lowest bidder.[8] The charter may require that notice be given at a reletting of a contract the same as at the first letting, and the contract reawarded to the lowest bidder, in which case it must be strictly followed.[9]

[1] Brady *v.* Mayor, 20 N. Y. 312 [1859].
[2] Ross *v.* Stackhouse, 114 Ind. 200 [1887].
[3] Haldane *v.* United States (C. C. A.), 69 Fed. Rep. 819.
[4] *In re* Leeds, 53 N. Y. 400 [1873], *Justice Allen dissenting.*
[5] *In re* Leeds, *supra;* Brass Foundry Works *v.* Parker Co., 115 Ind. 234, *construction of a public building.*
[6] Gibson *v* Owens (Mo. Sup.), 21 S. W. Rep. 1107.
[7] State *v.* Shelby Co., 36 Ohio St. 326, *see also* Mackenzie *v* Baraga Tp., 39 Mich. 554.
[8] Twiss *v.* Port Huron, 63 Mich. 528 [1886]; s. c., 30 N. W. Rep. 177.
[9] Dillon's Munic. Corp'ns [4th ed.], § 466, *note, and cases cited.*

* *See* Sec. 95, *supra.*

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Some cases hold that after bids have been received material alterations cannot be made in the contract awarded without a new advertisement.[1] *

If the contractors abandon the work, the act of their surety in finishing the building for the city as their agent has been held simply the completion of the original contract, and hence that the letting of a new contract to a new "lowest bidder" is unnecessary.[2]

If the contractor has abandoned the work, a contract by the county with the subcontractor to pay him for work done by him or to be done by him was held not void if the work had progressed so that in the judgment of the commissioners it might be completed substantially under the original contract, and by keeping in operation the agencies already in motion.[3] Work so abandoned may, it seems, be completed without readvertising or competition at fair prices, even though the expense considerably exceeds the contract price.[4] If the lowest bidder be allowed to withdraw his bid on the ground of a mistake, it seems it is improper to award the contract to the next lowest bidder. The work should be advertised again, and other bidders be allowed to revise their bids.[5]

These are special cases, and are so fortified with conditions that a general statement of the law can scarcely be made. Indeed, it can hardly be desired that such general law should exist, for it might be employed as a means of avoiding the statute by getting a mock contractor to undertake the work and then abandon it to the merciless grasp of conspirators and boodlers.

When proposals have been solicited for public work and they have been received, giving separate bids for the material and different kinds of work required in the construction, one of which has been accepted with the understanding that when the structure is located the amount to be paid will be determined by its length and size upon the basis fixed in the bid, it is not necessary to advertise for new proposals when the structure is located, even though it is considerably shorter than was the one bid upon.[6] And when the advertisement and proposal was for paving a specified distance and the contract entered into was to pave only a part of that distance, "or further if ordered," it was held that it was not necessary to readvertise for proposals when the balance of the work was ordered to be done; that it was covered by the original contract.[7] If the council resolve to readvertise for bids for a street improvement because the lowest bid is in excess of the estimate by the engineer, their act must be approved by the mayor, or passed over his veto, as provided in the city charter.[8] If no notice to the

[1] Dickinson *v.* Poughkeepsie, 14 N. Y. Super. Ct. 1.

[2] McChesney *v.* City of Syracuse (Sup.), 22 N. Y. Supp. 507.

[3] Bass F. & F. Works *v.* Parker County (Ind.), 115 Ind. 214 [1888].

[4] Matter of Leeds, 53 N. Y. 400.

[5] Twiss *v.* Port Huron, 63 Mich. 528.

[6] Insley *v.* Shepard, 31 Fed. Rep. 869 [1887]; Brevoort *v.* Detroit, 24 Mich. 322.

[7] Brevoort *v.* Detroit, *supra.*

[8] Booth *v.* City of Bayonne (N. J.), 28 Atl. Rep. 381.

* *See also* Sec. 155–160, *supra.*

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mayor be required by law, a contract for a public improvement may be awarded legally, without any notification by the commissioners to the mayor of the meeting when the award was made.[1]

176. Whether Lowest Bidder can Compel an Award to Himself.— Whether or not a board may be compelled to award the contract to the lowest bidder is not fully settled. There are numerous decisions partly to the effect that a court will not compel the city or its board to award the contract to the lowest bidder;[2] that when a board is invested with a discretion, the court will not seek to control it in the absence of fraud or bad faith.[3] The fact that the lowest bid is considerable [$1500] greater than the estimate cost does not warrant the inference that its acceptance was fraudulent.[4] *

It has been held that when an act directs municipal officers to award a contract "to the lowest responsible bidder" it vests discretionary powers in such officers, the word "responsible" applying not only to pecuniary ability, but also to judgment and skill of the contractor.[5] † Such officers are free from control so long as they act in good faith, though they do act erroneously and indiscreetly.[6] The court will not interfere with the commissioners if they have exercised reasonable care to advise themselves whether the lowest bidder could be depended on to do the work bid for with ability, promptitude, and fidelity, and in good faith concluded that he could not, though the court be satisfied that such conclusion was erroneous,[7] or that they have been indiscreet.[8] A board of public works is better qualified to determine what bid for a public work should be accepted than a court of chancery can be, and the court will interfere only where the chancellor can see that the board has either acted in violation of law or in such a manner that its contract virtually amounts to a fraud.[9]

The lowest bidder is usually held to acquire no legal right to compel by mandamus that the contract shall be awarded to him when discretionary power has been conferred upon the commissioners.[10] The fact that a bidder

[1] Terrell *v.* Strong (Sup.), 35 N. Y. Supp. 1000; *see also* Barber Asph. P. Co *v.* Ullman (Mo. Sup.), 38 S. W. Rep. 458.

[2] Dillon's Munic. Corp'ns, § 32, *note, and many cases cited.*

[3] Kelly *v.* Chicago, 62 Ill. 279 [1871]; Douglass *v.* Commonwealth, 108 Pa. St. 559; Howlett *v.* Directors, 5 Ohio St. 235; [1856]; People *v.* Croton Aq. Board, 49 Barb. 259; Findley *v.* Pittsburgh, 82 Pa. St. 351; *see also* Grant *v.* Common Council (Mich.), 52 N. W. Rep. 997; Comm. *v.* Mitchell, 82 Pa. St. 343; Hoole *v.* Kinkead, 16 Nev. 217; Weed *v.* Beach, 56 How. Pr. (N. Y.) 470; People *v.* Contracting Bd., 27 N. Y. 378, 33 N. Y. 382; State *v.* Bd. of Ed., 42 Ohio St. 374; People *v.* Kent (Ill.), 43 N. E. Rep. 760; *In re* McCain (S. D.), 68 N. W. Rep. 163; Johnson *v.* Sanitary Dist. (Ill. Sup.), 45 N. E. Rep. 218; Wright *v.* Com'rs, 6 Mont. 29.

[4] Booth *v.* City of Bayonne (N. J. Sup.), 28 Atl. Rep. 381.

[5] Interstate, etc., Co *v.* City of Phila. (Pa.), 30 Atl. Rep. 383; Douglass *v.* Commonwealth, 108 Pa. St. 559.

[6] Douglass *v.* Commonwealth, 108 Pa. St. 559.

[7] State *v.* Village of St. Bernard, 10 Ohio Cir. Ct. R. 74.

[8] Findley *v.* City of Pittsburgh, 82 Pa. St. 351.

[9] Johnson *v.* Sanitary Dist. of Chicago, 58 Ill. App. 306.

[10] 15 Amer. & Eng. Ency. Law 1097; State *v.* Kendall, 15 Neb. 262; State *v.* Dixon Co. (Neb.), 37 N. W. Rep. 936; State *v.* McGrath, 91 Mo. 386; *and see* De-

* *See* Chap. I., Secs. 50–56, *supra*, and 428–429, *infra, as to proof of fraud*

† *See* Sec. 173, *supra.*

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was the lowest, and has been reported to the common council as such, does not establish a binding contract with a city until approved and ratified by the common council, as required by law.[1]*

When a charter provides that the contract shall be "let to the lowest reliable and responsible bidder," it requires public officers to exercise discretion and determination, and it has been frequently held that courts would not issue an injunction to prevent an award of a contract to one who was not the lowest bidder.[2] The facts must be made to appear sufficiently to show that they bring the case within the officers' discretion, and that it was exercised in obedience to law.[3]

177. Public Officers may be Enjoined from Illegally Awarding Contract.—It is well settled that any taxpayer can, or if a taxpayer be the lowest bidder he can himself, bring suit in equity to enjoin the execution of a contract illegally awarded.[4] The lowest bidder can do this though he is prompted by other considerations than his liability to excessive taxation.[5] So where a council merely finds that the one to whom the contract was awarded was "the lowest and best bidder" without finding any facts which rendered another, who was apparently the lowest bidder, not the lowest bidder in fact, the performance of the contract will be enjoined.[6]

The discretion vested in commissioners will be controlled by the courts only when necessary to prevent fraud, injustice, or the violation of a trust;[7] and the mere fact that the commissioners awarded the contract to one not the lowest bidder is insufficient to establish the charge that they acted fraudulently or illegally.[8]

If public officers are about to award a contract without advertising for bids as required by law, or if a contract has been let in violation of the law, a court of equity will prevent the execution or performance of the contract at the instance of any taxpayer. The allegation and proof of fraud will cause an injunction to issue to restrain the awarding of the

troit F. P. Co. *v.* Auditors, 47 Mich. 135; State *v.* Supervisors York Co., 17 Neb. 643; People *v.* Bd. of Ed., 5 N. Y. Supp. 392; Mayo *v.* Hampden Co. Comm'rs, 141 Mass. 74; People *v.* Campbell, 72 N. Y. 496; Deckman *v.* Oak Harbor, 10 Ohio Cir. Ct. Rep. 409; State *v.* Scott, 17 Neb. 686; People *v.* Croton Aq. Board, 26 Barb. (N. Y.) 240; Rabling *v.* Board of Comm'rs (Ind. Sup.), 40 N. E. Rep 1079; *cases collected* 14 Amer & Eng. Ency. Law 210, note 6; East River Gas Co. *v.* Donnelly, 93 N. Y. 557; Times Pub. Co. *v.* City of Everett (Wash.), 37 Pac. Rep. 695.

[1] Smith *v.* Mayor, 10 N Y 504; *and see* Walsh *v* New York, 113 N. Y. 142; *and see also* United States *v.* Lamont, 15 Sup. Ct. 97.

[2] 15 Amer. & Eng. Ency. Law 1096; *and see* Grant *v.* Common Council (Mich.), 51 N W. Rep. 997.

[3] Commonwealth *v.* City of Philadelphia (Pa. Sup.), 35 Atl. Rep. 195.

[4] Board *v.* Gillies (Ind.), 38 N. E. Rep. 40; *and see* Christian *v.* Dunn (Com Pl.), 8 Kulp 320; Wood *v.* Pleasant Ridge, 12 Ohio Cir. Ct. Rep. 177; Comm'rs *v.* Templeton 51 Ind. 266.

[5] Times Pub. Co. *v* Everett (Wash.), 37 Pac. Rep. 695; *semble*. People *v.* Contracting Board, 33 N. Y. 382; *and see* Peeples *v.* Byrd (Ga.), 25 S. E. Rep 677.

[6] Times Pub. Co. *v.* Everett (Wash.), 37 Pac. Rep. 695.

[7] Terrell *v* Strong (Sup.), 35 N. Y. Supp. 1000; Johnson *v.* Sanitary Dist (Ill. Sup.), 45 N. E. Rep. 213.

[8] Terrell *v.* Strong (Sup.), 35 N. Y. Supp 1000.

* *See* Sec. 183, *infra*.

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contract;[1] and injunction seems to be the proper remedy,[2] though not a necessary remedy, it seems. If a taxpayer has before the commencement of the work notified the contractors that he would contest the legality of the proceedings under which they were acting, he is in a position, after they have completed the work, to ask that the placing of a lien on his property for the cost of construction be enjoined.[3]

It has been held that when a contract was awarded to a bidder who was only $200 higher than the lowest bid, only $30 of which was to be paid by the city, and the mistake was one of judgment merely and not intentional, it did not warrant the intervention of the attorney-general.[4] It has been held to be illegal to divide the work between the highest and lowest bidder.[5]

178. What Remedies a Bidder May Have.—Contractors before demanding the rights of the lowest bidder under the charter of a city or a special act of legislature should make sure that the law requires the contract to be given to the lowest responsible bidder. They should have taken pains to conform strictly to the notices, instructions, and ordinances made in regard to the work.[6] A statute conferring the entire control of the work for procuring a water-supply upon water-commissioners, and directing them to give public notice for proposals, but which does not require them to let the work to the lowest bidder, was held to give the commissioners full discretion as to the acceptance or rejection of all sealed proposals.[7] When public officers have exceeded their powers and deprived the lowest bidder of his lawful rights to the award of a contract, the question very naturally comes up as to what remedies he has to recompense him for the loss and the injustice he has suffered. There are a few cases to the effect that if the bidder can show that he is legally entitled to the contract under the terms of the act, he may enforce the award by mandamus although the contract has been awarded to another party. The lowest bidder must have used reasonable diligence in asserting his rights and have done nothing to waive his rights.[8]

There are decisions to the effect that the bidder has no ground for mandamus, as he has no cause of action and no clear legal rights until the contract is made and concluded.[9] In Ohio it has been held that if the

[1] Smith *v.* Phila., 2 Brews. (Pa.) 443; Follmer *v.* Nuckolls Co., 6 Neb. 204; Schumm *v.* Seymour, 24 N. J. Eq. 143.

[2] Hoffman *v.* Board (Mont.), 44 Pac. Rep. 978.

[3] Brace, C.J., and Sherwood and Robinson, J.J., dissenting.—Verdin *v.* City of St. Louis (Mo. Sup.), 33 S. W. Rep. 480. *See also* Dibble *v.* New Haven (Conn.), 56 Conn. 199, *where the building committee had been instructed by vote to let work to lowest bidder;—no injunction was granted.*

[4] Attorney-General *v.* Detroit, 26 Mich. 263: *and see* Attorney General *v.* Boston, 123 Mass. 460.

[5] McDermott *v.* Board of Street and Water Com'rs of Jersey City (N. J. Sup.) 28 Atl. Rep. 424.

[6] Wiggins *v.* Philadelphia, 2 Brews. (Pa.) 444; State *v.* York Co. Com'rs, 18 Neb. 57; Weed *v.* Beach, 56 How. Pr. (N. Y.) 470; State *v.* Bartley (Neb.), 70 N. W. Rep. 367.

[7] Flemming *v.* City of Suspension Bridge, 92 N. Y. 368 [1883].

[8] Boren *v.* Com'rs of Darke Co., 21 Ohio St. 311 [1871]; Wood's Master and Servant (2d ed.) 162.

[9] People *v.* Croton Aq. Board, 26 Barb. (N. Y.) 240; Weed *v.* Beach, 56 How. Pr. (N. Y.) 470; Kelly *v.* Chicago, 62 Ill. 279.

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lowest responsible bid be rejected and any other be accepted, the action of the board may be controlled by mandamus without doing violence to the rule that in matters involving judgment and discretion the board cannot be controlled by mandamus proceedings. The lowest bidder must show a clear legal right in himself.[1] Another case holds that even when a bid for public work has been accepted, and the contractor has a clear right to the contract, yet mandamus will not lie to compel the commissioners to execute the contract; that the proper remedy is an action against the city for damages.[2] It has been held that the lowest bidder had no right of action *at law* against the city to recover profits which he might have made had his bid been accepted.[3]

A recent case decides that the provision in a city charter that contracts for public work shall be awarded to the lowest reliable and responsible bidder is not for the benefit of a bidder for such work, but to protect the property-holders and taxpayers, and therefore the lowest reliable and responsible bidder has no such vested or absolute right to a compliance with such provisions of the statutes as will entitle him to maintain a suit to enjoin their violation by public officials; that the presentation by a reliable and responsible bidder of the lowest bid to officials whose duty it is to let the contract to the lowest reliable and responsible bidder, but who have the right, under the statute, to reject all bids, and who have given notice in their advertisement for bids that they reserve the right to reject any and all bids, does not constitute an agreement that they will make a contract for the work with such a bidder; nor does it vest in him such an absolute right to the contract as will authorize a court of equity, at his suit, to compel the officials, or the municipality they represent, to enter into a contract for the work with him, when they are about to award, or have awarded, it to a higher bidder.[4]

Whether mandamus will lie is in the discretion of the court; and an allegation by the board of public works that no appropriation exists to cover the expense of the works, and that they have changed the design and character of the work to be done, and have decided that the public interests required that the work should be readvertised and let under proposals framed in accordance with such alterations, was good, and a discretion they might properly exercise.[5]

A refusal to approve the contract on the ground that the work was to be done with a certain brand of material named, when it appears that the contractor has furnished samples of material of the kind and quality required and named, and that the contract has been made with reference to such samples, is technical and without foundation; but when the contract

[1] State *v.* Bd. of Ed., 42 Ohio St. 374.
[2] People *v* Campbell, 72 N. Y. 496.
[3] Talbot Pav. Co. *v.* Detroit (Mich.), 67 N W. Rep. 979; East Riv. G. Lt. Co. *v.* Donnelly, 93 N. Y. 557.
[4] Colorado Paving Co. *v.* Murphy (C. C A.), 78 Fed. Rep. 28.
[5] People *v.* Croton Aq. Board, 49 Barb 259.

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has been given to another party and the work done, a court in its discretion would not grant a writ of mandamus to compel the city council to approve the contract.[1]

If the act undertaken by the city council or public officers is unlawful, it seems fairly well settled that the prosecuting officer of the state may file a bill in equity to restrain illegal acts or have them corrected; but when the officers had acted in good faith, and by an error of judgment committed unintentionally, a contract was let to a bidder who was not the lowest, but which increased the expense by $20 only, and the contractor had incurred large expense to carry out the contract, and there was no complaint by the taxpayers, it was held that the amount was too small to warrant any interference by the attorney-general.[2]

179. Liability of Public Officers for Acts Discretionary or Quasi-Judicial; Misdeeds in Awarding the Contract.*—It is a well settled rule that no public officer is responsible in a civil suit where his acts have been judicial or discretionary, however erroneous or indiscreet they may have been. Some cases have gone so far as to hold that public officers in their judicial capacity were exempt from civil actions, however erroneous or malicious their acts may have been.[3] To a contractor this will seem questionable law—law quite devoid of justice. The hardships it promises are tempered somewhat by many decisions that modify this declaration. It has been said that a judicial officer acting without corrupt or malicious motives is not liable in damages for an erroneous interpretation or application of the law and that this same exemption embraces his acts in a *quasi*-judicial capacity.[4] So it has been said by good authority that certain acts and duties of public officers partake of the character of legislative and judicial functions, though not strictly so; but they may be so far of that nature as to exempt the officers from any liability for injuries resulting from their acts.

Among the duties and acts that belong to this class are those frequently required of engineers and commissioners, such as the location of sewers and other improvements, the adoption of plans and the determination of dimensions and sufficiency of things which should be distinguished from the subsequent carrying out of the plans. In the one case the officers and city are considered as acting judicially, which excuses it and them from liability for injuries resulting from errors of judgment, and perhaps even those from negligence.[5]† The letting of contracts to the lowest responsible bidder has

[1] Talbot Paving Co. *v.* Council of Detroit (Mich.), 51 N. W. Rep. 933 [1892]; *citing* State *v* Bd. of Ed., 24 Wis. 683; People *v.* Contracting Bd., 27 N. Y. 378; People *v.* Campbell, 72 N. Y. 496; People *v.* Kent (Ill.), 43 N. E. Rep. 760; Kelly *v.* Baltimore, 53 Md 134.

[2] Dillon's Munic. Corp'ns § 912 *and note; see also* 15 Amer. & Eng. Ency. Law 1093, *note.*

[3] East River Gas Co. *v.* Donnelly, 93 N. Y. 557, *and* 25 Hun 615 [1881]; People *v.* Gleason (N. Y.), 25 N. E. Rep. 4, [1890]; 19 Amer. & Eng. Ency. Law 489.

[4] The Muscatine R. Co. *v* Norton, 38 Iowa 33 [1873].

[5] Bishop's Non-Contract Law, § 746; Kirchman *v.* West & S. T. Ry. Co., 58 Ill. App. 515.

* *See also* Secs. 844–859, *infra.*

† *See* Secs. 245–8 and 844–859, *infra.*

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been held a judicial act, for the erroneous exercise of which no action would lie against the city.[1] The act should clearly be one which requires the exercise of judgment and discretion of a judicial or legislative nature, or its corrupt or negligent performance will create a liabilty to the injured party.[2]

In New Jersey it has been held that when a city charter or act of legislature expressly prohibits the making of a contract for work without having previously advertised for proposals in a prescribed mode, an award of a contract by a city official without such previous advertisement, made willfully and with evil intent, has been held to constitute a criminal offense, and to render the officer liable to indictment. It was the officer's duty to award the contract to the lowest responsible bidder, and a charge that the officer willfully and corruptly gave the contract to a bidder who had not offered the more advantageous terms was held to constitute a criminal offense.[3]

Neither the city nor its board is liable to an action of damages for refusing to accept the lowest offer or tender made, if the refusal is in good faith and judgment.[4] The duty to award the contract has been held a duty to the public, and not to an individual, for the violation of which duty the statute gave no action; the lowest bidder could not therefore recover profits he would have made if the contract had been awarded to him.[5] It is well settled that *the city* is not liable for damages arising from the rejection of the lowest bid by a department of public works intrusted with its works. This was held even when the statute declared that the contract "shall be let to the lowest bidder at the time of the opening of the bids, and shall be forthwith duly executed with such lowest bidder."[6]

Selectmen who have been directed at a town meeting to contract for a public work, "the proposal to be advertised and the contract given to the lowest bidder," and who advertised for work and reserved to themselves "the right to reject all bids if none were satisfactory," were held to be authorized to refuse to award the contract to the lowest bidder and to reject all bids, and that the bidder had no right of action against the town on the contract, nor for time and money spent in making estimates of the work, and that his rights were not affected by a subsequent town meeting referring the whole matter to the selectmen to build at the earliest possible moment.[7]

180. Liability of Public Officers for Ministerial Acts.—If the duties of the public officer are not discretionary or of a judicial nature, he is liable for

[1] Bishop's Non-Contract Law, § 747.
[2] Bishop's Non-Contract Law, § 748.
[3] State *v.* Kern, 51 N. J. Law 259 [1889].
[4] Dillon's Munic. Corp. (4th ed.), *cases collected*, § 470.
[5] East River Gas Lt. Co. *v.* Donnelly, 93 N. Y. 557.
[6] Walsh *v.* New York City, 20 N. E. Rep. 825 [1889]; s. c., 113 N. Y. 142; *and see* Mecchem on Agency, *and* Dillon's Munic. Corporations.
[7] Palmer *v.* Haverhill, 2 Amer. Corp. Cas. 450; s. c., 98 Mass 487 [1868]; Peeples *v.* Byrd (Ga.), 25 S. E. Rep. 677; Murdough *v.* Town of Revere (Mass.), 42 N. E. Rep. 502; *and see* Audsley *v.* New York (C. C. A.), 74 Fed. Rep. 274. *where architects were invited to submit competitive prize plans, and the project was abandoned.*

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negligence or wrongdoing to any one sustaining special damage in consequence thereof. So held when the same powers and duties which once belonged to a public officer were bestowed upon a contractor. Contractor was held responsible.[1]

When commissioners have accepted a proposal and directed a contract to be made with the bidder, but later they rescinded the resolution and resolved to do the work themselves on plans reported by and under the supervision of a committee, and to appoint a superintendent of the work; they are undertaking to carry out the work which as judicial officers they had resolved on and they cease to act as officers exercising judicial and legislative duties,[2] and become liable individually for the consequences of their negligent acts, the city being relieved from responsibility.[3]

So, too, public officers intrusted with the conduct of public work are subject to a personal action for damages if they have willfully exceeded their powers or have maliciously or corruptly transgressed their prescribed duties. The element of malice and corruption must exist when public officers are clothed with discretionary powers, for a court will not inquire into them so long as they are honestly exercised.[3]

Though the members of a common council, acting judicially in determining who is the lowest bidder, are not liable in a civil action or a criminal prosecution for their action, yet such immunity cannot be evoked by a higher bidder, who has been given the contract, to establish the validity of the contract; nor will the fact that the council has audited and allowed the claim give it any validity.[4] *

181. Bids Cannot be Recalled.—When bids have been made and accompanied by certified checks, they cannot be recalled or withdrawn neither before nor after the bids are opened—not even by permission of the public officers who have the work in charge and who award the contract.[5]

Public officers are invested with no discretion to permit amendments or alterations of proposals on account of any alleged mistake therein, unless the fact of such mistake and the requisite data for its correction are apparent on the face of the proposal.[6] *

182. The Acceptance or Award.—A notice to the public of proposed works, asking for proposals, is an invitation for tenders or a request for offers, and cannot be regarded as an offer to be accepted by the person who makes himself the lowest bidder. The tender or proposal submitted by the bidder must be accepted before a contract is created.[7] Not until the proposal of the

[1] Robinson *v.* Chamberlain, 34 N. Y. 389 [1866].

[2] Robinson *v.* Rohr (Wis.), 40 N. W. Rep. 668 [1888].

[3] Edwards *v.* Ferguson, 73 Mo. 686 [1881], *and cases cited.*

[4] People *v.* Gleason (N. Y.), 25 N. E. R. 4 [1890]; Gas Light Co. *v.* Donnelly, 93 N. Y. 557.

[5] Kimball *v.* Hewitt, 2 N. Y. Supp. 697 [1888]. A like decision was rendered by the attorney-general of the United States in June, 1895.

[6] Beaver *v.* Trustees, 19 Ohio St. 97; Twiss *v.* Port Huron, 68 Mich 528.

[7] Dillon Munic. Corp. (4th ed.), § 470;

* *See* Liability of Engineer, Secs. 826–859, *infra.*

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bidder, but not equivalent to awarding the contract to him.[1] And when the engineer informed a bidder in writing that his tender was accepted, and that intimation was confirmed by the directors of the company upon his attendance at one of their meetings, no document being executed accepting the tender in such a manner as to be binding at law, and the project was afterwards abandoned, it was held that the contractor could not compel the company to execute a contract, nor could he recover from them the loss he had sustained in preparing for the works.[2]

A bid properly made under valid and regular proceedings and once accepted, and the contract awarded to the lowest bidder, is good always.[3] A contract so made cannot be destroyed by the rescission of the ordinance by the council;[4] but if the ordinance has not been legally passed, any and all proceedings under it are invalid, and a contract under such an ordinance gives a contractor no rights to recover damages for refusing him the work.[5] A written proposal and an oral acceptance thereof have been held not to constitute a written contract.[6] But a written bid and a verbal acceptance by a managing receiver, and a signing of the specifications and plans by the bidder and the company's architect, have been sustained as a binding contract.[7] Proceedings which consist of opening bids and awarding the work, without stating the amount of the bids submitted, or the sum for which the work was awarded, have been held sufficient to authorize the contract.[8]

Where a contractor's bid for the construction of a building is accepted, and the terms of the building contract are left to be stated in a writing subsequently entered into by the parties, that writing is the highest evidence of the terms of the building contract.[9]

The proceedings of public officials in opening the bids and awarding contract is such business as should be overt and open to public inspection. Frequently, therefore, the bidders are invited to be present when the proposals are opened.

When the charter requires that bids shall be opened on the day named in the notice, or on such subsequent day as the council might adjourn to, and provides that the "council shall determine which proposal is most favorable," it does not require the determination of such question at the meeting at which the bids are opened.[10]

[1] Leskie *v.* Haseltine, 155 Pa. St. 98.

[2] Jackson *v.* The N. W. Ry. Co., 1 Hall & Twelle R. 75 [1848].

[3] Lewis v. Brass, L. R. 3 Q. B. Div. 667.

[4] Baird *v.* Mayor, 23 N. Y. 254.

[5] Baird *v.* Mayor, 33 N. Y. 254; *but see* Carey *v.* E. Saginaw (Mich.), 44 N.W. Rep. 168, [1890], where contract was not in writing and sealed, as charter required.

[6] Specht *v.* Stevens (Neb.), 65 N.W. Rep. 879; *acco d.* Bruce *v.* Pearsall (N. J.), 34 Atl. Rep. 982.

[7] Girard L. Ins Co. *v.* Cooper, 16 Supp. Ct. Rep. 879.

[8] Megrath *v.* Gilmore (Wash.), 39 Pac. Rep. 131.

[9] Town of Hamilton *v.* Choparo (Wash.), 37 Pac. Rep. 472.

[10] Lilienthal *v.* City of Yonkers (Sup.), 39 N. Y. Supp. 1037; *and see* People *v* Yonkers, 39 Barb (N. Y.) 266. *See also* Mayor *v.* Keyser (Md.), 19 Atl. Rep. 706, and People *v.* Croton Aq. Bd., 2[illegible] Barb (N. Y.) 240.

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If the bidder has made a mistake and withdraws his proposal after it has been accepted, he may be held liable to the owner for what the work costs in excess of his bid.[1] Fraud or false misrepresentations by the owner or his authorized agents as to the character of the work undertaken, and an immediate notification as soon as discovered by the bidder, will relieve him from his original offer, as it would also from the contract.[2]

The mere fact that a party is the lowest bidder, and knows that fact, does not constitute an award to him of such contract under an act regulating the letting of work upon competitive bids, which provides that "if the lowest bidder shall refuse or neglect, within five days after due notice that the contract has been awarded, to execute the same, the deposit made by him shall be forfeited to the city."[3] *

184. Bid to Furnish Materials.—If, in answer to an advertisement for proposals to supply goods, to furnish materials, or to perform work, a bidder submits a bid offering to furnish the materials or do the work in such quantities or at such times as may be ordered, which bid is accepted, it has been held that the bidder is bound to supply the goods or perform the work when ordered although there is no binding contract on the part of the acceptor to take or order anything, and that there is sufficient consideration for the bidder's promise.[4] If this is good law and the bidder's offer cannot be recalled or revoked, contractors and materialmen will do well to limit their proposals as to quantity and time, so that they may not be compelled to carry a stock of materials, or hold themselves in readiness to perform such a contract, for an indefinite length of time.

If the dealer or manufacturer is bound to furnish materials when ordered, it would seem that there would be a reciprocal obligation on the part of the one inviting the bids to order from the bidder what materials he required or purchased during the period named. So it has been held.[5] A contract to furnish stone "at such times and in such quantities as may be required" was construed to refer to the needs of the work or service.[6]

A contract to furnish materials in which the quantities were stated as "more or less," and it was agreed that the materials should be delivered in such quantities "as shall be directed by the treasurer and according to the specifications and the requirements of the treasurer under them," and pay-

[1] Lewis *v.* Brass, L. R. 3 Q. B. D. 667.
[2] Martine *v.* Nelson, 51 Ill. 422.
[3] Erving *v.* City of New York (N. Y. App.), 29 N. E. Rep. 1101, *affirming* 16 N. Y. Supp. 612.
[4] Gt. Northern Ry. Co. *v.* Witham, L. R. 9 C. B. 16 [1873].
[5] Levey *v.* N. Y. Central R. Co., 24 N. Y. Supp. 124.
[6] Mueller *v.* United States, 19 Ct. of Cl. 581.

* The form of Instructions to Bidders has been made more comprehensive than ordinary work will require, but it is submitted that frequently circumstances exist where they all may have a bearing, and conditions will arise which may be met by the clauses here given.

If the circumstances do not require the use of all the clauses given, the engineer or architect may omit such clauses as seem unnecessary by and with the advice or consent of the company's or owner's legal adviser.

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ments were "to be made upon the engineer's certificate that the quantities have been delivered as per requisition and in accordance with the specifications," the words *more or less* always following each statement of quantity, was held to be a contract for only what materials were needed, and that no damages could be recovered for not taking the quantities stated in the specifications.[1]

If proposals are made for certain materials, as the stone in an old structure about to be torn down, specifying no limitations or qualifications, an unconditional acceptance thereof has been construed a contract for all the materials specified [stone].[2]

185. Form of Proposal for Public Work.

PROPOSAL

FOR THE CONSTRUCTION; ERECTION; FOR IMPROVING, REMOVING, AND BUILDING; TO FURNISH ALL THE LABOR, TOOLS AND MATERIALS; TO FURNISH AND DELIVER, TO EXAVACATE, ETC. ETC.....NEAR, OR ON, OR OVER.....STREET, WAY, OR RIVER AT..... CITY, TOWN OF....., COUNTY OF....., STATE OF..... COUNTRY.

To the Chief Engineer, Architect, or *Surveyor.*
To the Board or *Commissioner of Public Works.*
Dear Sir or *Gentlemen.*

We....., the President, Secretary, Treasurer, and General Manager of.....Company, a corporation duly authorized by act of Congress or Legislature....., 18...., to contract and to do such other business as is required under the annexed contract.

The undersigned do[es] hereby declare:

1. *Not in Arrears or Default.*—That I, [We or the.....Company,] am [are or is] not in arrears to the.....Company, City, or State, upon debt or contract or by default as surety or otherwise.

2. *Capacity to do Work.*—That I, [We or the.....Company or Firm,] have [has] been regularly engaged in contract work or in building or in the erection of.....of the class of work required by the annexed contract and specifications for....years, and that I [We or it] respectfully invite attention to the following works that have been erected by me [or us or the said.....Company], and respectfully refer to the following parties for whom I [We or it] have performed construction work: The New York and Brooklyn Bridge, erected 1870–1883, for the New York and Brooklyn Bridge Trustees, cost $15,000,000; Office Building for The Manhattan Life Insurance Co., 16 stories, 67 ft. by 125 ft., 72 Broadway, New York, 1893; etc. etc.

3. *No Help from Engineer's Office.*—That this estimate and proposal submitted has been prepared without any assistance from any person belonging to, employed by, or holding office in the Engineering [Architectural] Department, or the Department of Public Works of the .....

[1] Collmeyer v. Mayor, 83 N. Y. 116.

[2] Thorn v. Comm'rs, 32 Beav. 490.

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4. *No Employee or Officer Interested.*—That no member or delegate ...., nor any person acting for or employed by the Department of Public Works of the City, [State, or United States,] nor any person appointed by virtue of any city ordinance, [legislative act, or act of Congress] relative to the work, is directly or indirectly interested in this proposal or in the supplies or works to which it relates, or in any portion of the profits thereof contrary to the ordinance or laws of the City, [State, or United States....].

5. *Bidder is the only Person Interested.*—That I [We, the..... Company,] am [are, is] the only party[ies] interested in this proposal or in the contract proposed to be taken; that it is made without any connection with any other person or persons making any proposal for the same work, and that it is in all respect fair and without collusion or fraud.

5[1]. *Bidder alone Interested.*—And I [We, or the.....Company] of.....City, ...County, ...State, do further declare that I [We or It] am [are or is] the only person[s], party or parties interested in this proposal, and that no other person than the person herein named has any interest in this proposal or in the contract proposed to be taken.

6. *Ordinance, Charter, or Act Examined.*—That I [We] have examined and am [are] familiar with the Ordinances...., [Acts of Legislature, Act of Congress, or Charter of the City or Company,] mentioned in the Advertisement and Instruction to Bidders, annexed, and relating to the work in question, and will undertake to conform to such laws, ordinances, and charter.

7. *Locality Examined and Quantities Estimated.*—That I [We], with our Engineer, have personally examined the location of the proposed work, and have satisfied myself [ourselves] as to the amount and charac- of the work and materials necessary to complete the work according to the annexed plans, specifications, and contract.

8. *Terms and Prices.*—That I, [We] the undersigned, further declare that I [We] have carefully examined the annexed form of contract, prepared by....., and that I [We] will contract to provide all necessary machinery, tools, apparatus, and other means for the construction and do all the work called for by the said contract and specifications and furnish all materials called for in the bill of quantities, contract, and specifications in the manner therein prescribed and according to the requirements of the Engineer, as therein provided, upon the following terms and for the following sums [prices], to wit:

Item (*a*).....$.....Item (*b*).....$.....Item (*c*).....$.....

.....

.....

8[1]. That I [We] [the said Company], undersigned, do hereby offer to perform the whole of the work and furnish all materials, labor, watchmen, implements, tools, and machinery of every description necessary for the perfect construction and completion of the work contemplated in the annexed specifications, in accordance with the plans, specifications, contract, etc., which have been examined by me [us] at the office of the Engineer, and to conform to all the conditions appended hereto at and for the prices given in the attached schedule.

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Approximate Quantities.	Description.	Denomination.	Price. [Written out.]	Price. [Figures.] $	c.
	Slashing, clearing, close cutting, and grubbing	Per acre			
2,000 cub. yds.	EXCAVATIONS, all kinds, in any soil, including all incidentals and refilling	Per cubic yd.			
500 cub. yds.	MASONRY, in abutment and wing walls, including newels, set in Portland cement	"			
420 cub. yds.	MASONRY, in piers for trestle-bents, set in Portland cement	"			
If required	In 12-inch cedar piles	Per lineal ft.			
100 cub. yds.	In concrete foundations	Per cubic yd.			
If required	In timber for platforms	Per M. B. M.			
147,000 lbs.	Steel in main girders and wind bracing	Per lb.			
4,800 lbs.	Wrought-iron standards for sidewalk guard	"			
2,000 ft.	Wrought-iron gas-tube for sidewalk guard	Per foot			
11,800 lbs.	Cast-iron handrail standards	Per lb.			
152,000 F.B.M.	Timber decking	Per M. B. M.			
1,500 lbs.	Sheet lead	Per lb.			
8	Ornamental lamps, fixed	Each			
	Etc., etc., etc.				

9. *Special Terms and Prices.*—For all lumber used for sheeting and shoring, but left in place by order of the Engineer, the sum of..... per M feet, B. M.

For all extra work not included in the above items, by written order of the Engineer, the various prices set against the following several items:

Laborers.....per day.
Single teams and drivers.....per day.
Double teams and drivers.....per day.
First-class masons.....per day.
" " blacksmiths.....per day.
Helpers.....per day.
Foremen.....per day.

For all extra work done and extra materials furnished by written order of the Engineer, not contemplated by this contract, the actual cost of said work and materials, as determined by the Engineer, plus fifteen (15) per cent. of said cost.

For all earth excavation of extra depth below grade, made by written order of the Engineer, except....., the sum of.....per cubic yard.

10. *Prices Include Everything.*—The above prices are to include the cost of doing all other work required by the contract and specifications or appertaining thereto.

10'. *What Prices Include.*—The prices named are to include [cover] any and all work and materials that may be necessary to connect the work done with the adjoining work in a proper and workmanlike man-

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ner, and in accordance with the plans, sections, and profiles prepared by the Engineer, and according to the terms of the contract and specifications attached, and the rules and regulations of the city, and under the direction and to the satisfaction of the Engineer, at the following rates, to wit: .....

.....

10². *Prices Include Everything.*—The prices are to cover all expenses of every kind involved in, or incidental to, the completion of the contract, including any claims that may arise through delay from any cause in the performance of the work thereunder.

11. *Delivery.*—The prices are also to include the delivery of all materials on the wharf, or at the works, or at the structure, etc., on the. ....street, river, way, of the city of.....

12. *Samples Submitted.*—The bidder pursuant to the [annexed] instructions to bidders has prepared and herewith submits the following samples of materials and workmanship, the equal of which he will undertake to furnish throughout the execution of the work according to the contract and specifications. The samples are marked as follows: Sample 302 C.—Rock-faced Gray Limestone, 16″ × 20″ × 36″. Sample 12 B.—Test Specimen, Basic Open-hearth Steel; Tensile Strength.....lbs; Reduction Area.....per cent; Elongation..... ins. in..... inches. Etc....., etc..... .., etc.

13. *Commencement of Work.*—I [We, the said.....Company], undersigned, will commence the work within ten days of the execution of the contract, and will prosecute the work to completion within the limit of time hereinafter named, in accordance with the requirements and provisions of the contract.

14. *Time to Complete.*—I [We, the..... .Company] will require .....working days from the date of commencement to complete the whole of the work.

15. *Liquidated Damages.*—I [We, the.....Company] will pay the sum of.....dollars, liquidated damages, for each and every day that the contract is unfulfilled after the time mentioned for completion in the contract, the....day of....., 189..

16. *To Keep in Repair.*—I [We, the.....Company] undersigned, also agree to maintain in complete repair the whole of the works undertaken in this contract, and all roads, ways, streets, etc., interfered with or required to be rebuilt in the construction of the works, for a period of twelve months after the complete performance of this contract.

17. *Limit of Awards.*—Notwithstanding I [We, the.....Company] have proposed for several sections of the work advertised, it is my [our] wish that the total work awarded to me [us] shall be limited to.....dollars, and to be not less than.....dollars.

18. *Certified Check.*—Accompanying this proposal is a certified check [accepted bank cheque] for the sum of.....dollars [$], as called for in the advertisement, instructions, or notice to bidders; and it is hereby agreed and understood that in case of refusal or failure to execute the contract and furnish the bond hereto annexed with the..... City [Company or State], within ten days after the acceptance of this proposal, the said check shall be forfeited to the said .....City [Company or State] as liquidated damages for such failure, and that all contract rights acquired by the acceptance of this proposal shall be forfeited, and all obligations assumed by the parties in connection there-

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with shall be released and mutually rescinded; that if this proposal be rejected or the contract awarded to another party the certified check shall be returned to the undersigned within three days after such rejection.

18¹. *Certified Check.*—Accompanying this proposal is a certified check for.....dollars [$], which shall become the property of the City [Company or State] of ....., if in case this proposal is accepted by the said City [Company or State], or its authorized officers the undersigned shall fail or refuse to execute the contract and furnish a bond, according to the requirements of the instructions to bidders, hereto appended, within the time provided by said notice; otherwise the said check shall be returned to the undersigned within three days after the date set for opening the bids.

19. *Sureties Offered.*—In case this proposal is accepted by the..... .....Messrs. .....resident of .....and .....resident of..... are offered as sureties for the faithful execution of the contract.

19¹. *Consent to Become Surety.*—If this proposal be accepted and the contract awarded to me [us] [the.....Company] I [we, the.....Company] hereby agree to furnish approved sureties for the construction of the said works and to execute the contract and bond therefor in the form attached, and according to the general conditions forming a part thereof, within... days after being notified so to do by the engineer; and in the event of default or failure on my [our] part in any particular or, for any cause whatever, the said.....shall be at liberty to accept the next lowest bid or any bid, or he [it] may readvertise for proposals, and I [we] hereby agree to pay to the said.....the difference between the above proposal and any greater sum which they [it] may be obliged to pay by reason of such default or failure, including the cost of any advertisement for new bids, and to pay the attorney of the said.....the cost of the preparation of such contract and bond, which is hereby fixed at ten dollars; and to indemnify and save harmless the said corporation and officers from loss and damage, cost, charges, and expense, with which they may suffer or be put to by reason of any such default or failure.

And I [we] propose Mr.....of .....and Mr..... .....of.... .....as sureties who are willing to become bound with.....for the due performance of the said contract.

Signature { .... } Address { .... }

We, the undersigned, do hereby offer [consent] to become bound for the above-named.....in the annexed Bond for the fulfillment of any contract for any of the works named in the annexed specifications which may be awarded to..... at the prices herein above set forth.

Signature of Sureties { .... }

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20. *Signatures, Addresses, and Date.*—Signature of Person, Firm, or Corporation making proposal:

.....Post Office Address.....

.....Dated.....

The full names and residences of all persons interested in this proposal [as principals] are as follows:

.....

.....

[NOTICE.—Give Christian names as well as surnames, and, in case of corporations, sign name of President, Treasurer, and Manager. The names of bidders will be made public; but the names of all parties interested with them, being required for the information and guidance of the Board only, will not be made public.]

21. *Oath as to Statements.*—

City of.....

County of.....

State of.....

The undersigned, ...

.....

being duly sworn, say that the several declarations and matters stated in this proposal are in all respects true.

[Signed].....

.....

Residence.....

Subscribed and sworn to before me, this.....

day of.....A.D. 189.., at.....

....., *N. P. or J. P.*

[NOTICE.—This affidavit must be made by the person or persons bidding for the contract; in case of a firm, by each and every member of the firm.]

22. *Bond for Execution of Contract.*—

Know all Men by these Presents,

That we ..... are held and firmly bound unto the City of .....[State or Company] in the sum of.....dollars, lawful money of the United States of America, to be paid to the said The City of..... [State or Company], its successors and assigns, as liquidated damages, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the.....day of..... in the year one thousand eight hundred and ninety.....

Whereas, the said.....

ha.....made a proposal to the City of .....[State or..... Company],.....bearing date the.....day of.....one thousand eight hundred and ninety....., and annexed hereto:

Now the condition of this obligation is such that if the said.....

.....

shall, within ten days after the acceptance of the said proposal, well and truly execute the contract in accordance with said proposal, then this obligation shall be of no effect; otherwise it shall remain in full force and virtue.

(*Seal.*)
(*Seal.*)

Signed and sealed in the presence of

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CHAPTER VII.

BIDS AND BIDDERS. WORK FOR PRIVATE PARTIES.

186. Lowest Bidder on Private Work. Owner may Adopt such Formalities and Make such Requirements as he Pleases.—Advertisement and proposal for private work are less formal and ceremonious than for public work, but many of the instructions, conditions, and stipulations given hereinbefore, with slight modifications, will do for private work if an owner desires to have public competition. It is more usual for a private owner, and even companies, to invite by letter such contractors and builders as they desire to entertain proposals from, to make bids. The expense of printing blank forms of proposals, specifications, and contracts is then saved, the engineer or architect keeping on file at his office, and open for the inspection of the bidders, the specifications and plans and general contract form to be used, with his estimate of the quantities. Sometimes three or four sun-print copies are made to enable more bidders to estimate or to give a few bidders more time to make their estimates.

The forms presented heretofore for public work are so elaborate and complete that the author deems it hardly necessary to submit a new set of forms for private work, but recommends that the clauses of the public form be used in so far as the owner and architect consider it pertinent and desirable, such modifications being made as seem necessary to make it conform to private needs and ends. The important questions that arise in advertising for public work and the award of the contract, and all questions as to what the owner or proprietor may or may not require, what he may include, whether or no he secures competition, and to whom or how he awards the contract do not arise in private work, except as they have been made matters of agreement between the owner and the bidders.[1] The owner can adopt his own methods in soliciting, receiving, and accepting proposals; can make whatever rules, conditions, and restrictions he sees fit; can make any amount of work and trouble for the contractors who in good faith go to the expense of preparing estimates, plans, and specifications; and may then award them or not, as he pleases, and to whom he pleases. The owner may, it seems, appropriate and make use of the fruits of their labors with-

[1] English cases in Emden's Law of Building, etc., p. 59, *note*.

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out any thoughts of recompense, without a grain of remorse, and if it be a a church society, without sacrificing a pennyweight of piety.

187. In Absence of Agreement or Pledge, Owner may Exercise his Own Preference.—As just stated, the rights of the lowest bidder on private work are confined to those created by agreement. He has no rights except such as have been agreed to by the owner, and if there is no contract expressed or implied, then the lowest bidder has no claims to the contract, and the proprietor is under no obligation to award it to him. In the absence of a pledge or definite understanding between the parties that the lowest bidder shall be employed to do the work, the owner may exercise his own judgment and give personal preference in determining whose offer he shall accept. He is not liable to one whose offer is rejected for the time and labor employed by him in examining the plans and specifications to prepare himself to make his offer.[1] The owner may inquire into the fitness, skill, integrity, and sobriety of the respective bidders.[2]

To establish any claim against private parties an agreement to award the contract to the lowest bidder must be clearly proven.[3] The agreement need not, it seems, be in writing, and its proof may be largely established by the acts of the parties and by supplemental promises.[4] If there is anything in the invitation for proposals that shows an undertaking to accept the offer of the lowest bidder, then the person inviting the bids may be holden to his agreement,[5] and the testimony of other bidders may be admitted to show the statements made to them by the architect and the owner respecting the terms under which the bids were made.[6]

The mere fact that valuable services are rendered does not raise a liability on the part of the person for whom they were executed, even though at his request, if the circumstances are such as to rebut the inference that compensation was expected to be received or paid. In the case of architects putting in bids for the construction of buildings or of engineers for the construction of bridges or other works, and furnishing plans and specifications therefor, unless the parties calling for bids expressly agree to pay for such plans and estimates, there can be no contract implied, for there is nothing in the circumstances that shows that pay was expected to be received or given, except through the possible benefit to the parties performing the service in acceptance of their bids.[7]

[1] Topping *v.* Swords, 1 E. D. Smith, 609 [1852]; *see also* Reusch *v.* Amer. Brewing Co. (La.), 11 So. Rep. 719.

[2] Leskie *v.* Haseltine (Pa. Sup.), 25 Atl. Rep. 886; State *v.* Bd. of Ed., 42 Ohio St. 374; *and see* Spencer *v.* Harding, L. R 5 C. P. 561.

[3] Doyle *v.* Dusenberg, 74 Mich. 79.

[4] McNeil *v.* Boston Chamber of Commerce (Mass.), 28 N. E. Rep. 245 [1891].

[5] Roscoe's Digest of Building Cases 48; *and see* Allen *v.* Yaxall, 1 C. & K. 315; *and see* Reusch *v.* Amer. Brew. Ass'n, 44 La. Ann. 1111, and *supra*.

[6] Huckstein *v.* Kelly & Jones (Pa. Sup.), 25 Atl. Rep. 747.

[7] Wood's Master and Servant (2d ed.) 103; Palmer *v.* Haverhill, 98 Mass. 487, in which the contractor was the lowest bidder, but all bids were rejected, and it was held he could not recover; Topping *v.* Swords, 1 E. D. S. (N. Y.) 609; Buck *v.* Amidon, 41 How. Pr. (N. Y.) 376; Noury *v.* Lord, 2 Keyes (N. Y.) 617.

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If a contractor will protect himself against the loss of time and labor in preparing proposals for work, he should insist upon an agreement with the proprietor that the lowest bidder shall be awarded the contract. If he does not do this he may expect to make fruitless bids for work, and his time and trouble be employed simply to give the proprietor a basis on which to let the work to some favorite contractor or builder previously selected.

188. Implied Agreement to Remunerate Bidder for His Labor or to Award Contract to Lowest Bidder.—It has been intimated that if bidders had had no knowledge that the competition was not in good faith, and could show that bids were invited solely for the purpose of making the lowest possible contract with a party previously chosen, they could recover for their time and labor spent in preparing the bids. It would be almost out of the question to establish such proofs, and even then it would be doubtful if an implied contract would arise in favor of the contractor.[1]

Acceptance of a bid has been inferred and a contract implied from an owner's conduct, in connection with evidence of a usage in the building trade to accept the lowest bidder. So when builders were present at the opening of the bids and it was generally understood that the lowest bid was to be accepted, because nothing was said or intimated by the owner or his agents to the contrary, and, acting on that assumption, the unsuccessful bidders dined at the successful bidder's expense, and all parties by their conduct showed apparently the same understanding, it was held to amount to an acceptance of the bid.[2] The terms of the proposal must be definite and expressed so that they show the terms of the contract, and the subject-matter must be described. Instructions or directions to the bidder to go on and do the work have been held an acceptance when he had made a proposal to do the work as specified.[3]

When an agreement is alleged between private persons that the lowest bidder shall have the contract, but it is not proven, and the contractor's bid is an unsigned memorandum, without reference to any particular building and without names of parties or specifications, and no mutuality of obligation is shown, the contractor has no rights.[4] An intimation in the written acceptance of a tender that a contract will be afterwards prepared does not prevent the parties from becoming bound to perform the terms of the tender and acceptance, if the intention of the parties was thereby to enter into an agreement, and if the preparation of the contract was contemplated merely for the purpose of expressing in formal language the agreement already arrived at.[5]* If, however, it can be gathered from the tender and

[1] 2 The Engineering Magazine 482.
[2] Pauling *v.* Pontifex, 20 Law Times 126 [1852].
[3] Burch *v.* Hotel Co., 7 Mo. App. 583.
[4] Doyle *v.* Dusenburg (Mich.), 74 Mich. 79 [1889].
[5] Lewis *v.* Brass, L. R. 3 Q. B. D. 667; *but see* Lefurgy *v.* Stewart (Sup.), 23 N. Y. Supp 537, where the price of stone named in bid was held to be the fair and reasonable value of the stone, coming precisely within the bid.

* *See also* Secs. 183, *supra*, and 796, 797, *infra*.

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acceptance that an agreement was made subject to the preparation and approval of a formal contract, then there is no agreement independent of that stipulation, and it is by the formal contract that the parties will be bound.[1]

When proposals for a contract are in writing and executed by the parties, *i. e.*, have been made and accepted, the terms of the contract being in all respects definitely understood and agreed upon, and either party refuses to execute the contract, it seems he is liable on the breach of his agreement for the same damages as would be recoverable for an entire refusal to perform the contract after its execution in writing.[2] When, however, the document was not executed, accepting the tender in such manner as to be binding at law, the engineer having merely informed the bidder that his proposal was accepted, which intimation had been confirmed by the directors of the company at a meeting at which the bidder was present, and the project was afterward abandoned, it was held that the contractor could not compel the company to execute the contract, or recover from it the loss he had sustained in preparing to do the work.[3]

Plans and specifications referred to in a call for bids are treated as incorporated into and forming a part of the contract as well as other matter referred to in the call.[4] *

A proposal to receive bids for certain things to be sold, specifying no limitation or qualification, constitutes a contract to include the whole of such thing.[5] This case arose out of the sale of stone contained in an old bridge, and would apply with equal force to the sale of materials of an old building.†

[1] Winn *v.* Bull, L. R. 7 Ch. D. 29 [1877]; Com'rs *v.* Fetch, 10 Ex. 611.

[2] Pratt *v.* Hudson River R. Co., 21 N. Y. 305 [1860]; *and see* Highland Co. *v.* Rhoades, 26 Ohio St. 411.

[3] Jackson *v.* The N. W. Ry. Co., 1 Hall & Twelle 75 [1848].

[4] Woods Law of Master and Servant (2d ed.) 164; *citing* Windhorst *v.* Deeley, 2 C. B. 253.

[5] Verm *v.* Commissioners, 32 Beav. 490 [1863].

* *See* Secs. 214-223, *infra.*

† Secs. 189-199 *are omitted.*

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PART III.

A CONSTRUCTION CONTRACT. ITS PHRASEOLOGY, TERMS, CONDITIONS, STIPULATIONS, PROVISIONS AND REQUIREMENTS, AND THEIR INTERPRETATION, CONSTRUCTION, AND FORCE.

CHAPTER VIII.

INTRODUCTION. AUTHORITY TO CONTRACT. REQUIREMENTS.

MUTUAL AGREEMENTS, THE CONSIDERATION. DESIGNATION OF PARTIES. SUBJECT-MATTER OR UNDERTAKING DESCRIBED.

200. Form of Introduction.

CITY OF.....

DEPARTMENT OF PUBLIC WORKS.

CONTRACT AND SPECIFICATIONS
FOR THE IMPROVEMENT OF.....

.....

1897.

"THIS AGREEMENT, made and entered into this..... day of.....in the year one thousand eight hundred and ninety....., by and between.....his heirs, executors, and assigns [or, if it be a company or board, their successors and assigns], part.... of the first part, by the Commissioner of Public Works, or by its Board of Park Commissioners, or acting by and through the .....Commissioners, by virtue of the power vested in them by Chapter.... of the Laws of 189.. of the State of....., parties of the first part, and John Doe, his heirs, executors, or assigns, of the City of....., County of....., State of ....., Contractor, party of the second part."

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201. Another Form of Introduction.

CONTRACT AND SPECIFICATIONS FOR

.....

LETTING NO.....

"THIS AGREEMENT, made and entered into this.....day of ....., 189.., by and between the City of....., of the County of....., State of....., party of the first part, and....., of ....., County of....., State of....., party of the second part, Witnesseth:

WHEREAS, The Board of Public Improvements of the City of..... ....., under the provisions of Ordinance No....., approved..... ....., and by virtue of the authority vested in the said Board by the charter and general ordinances of the city, did let unto the said....., party of the second part, *the work of* ...."

202. Remarks upon the Matter of Introduction.—The form of introduction, date, parties, and residence have been dwelt upon sufficiently in Part I for all practical purposes. As stated in Chapter I, "the power or authority by which public officers or agents act should be set forth in the written instrument, and the act, ordinance, or charter under which the contract is assumed should be given."

203. The Mutual Agreements and Undertakings—Technically the Considerations of the Contract.

"NOW THEREFORE, In consideration of the covenants, agreements, and payments hereinafter mentioned to be performed and made by the said first party the said.....hereby covenant(s), agree(s), undertake(s), and promise(s), under the penalty expressed in a bond bearing even date with these presents, and hereunto affixed, at..... own proper cost and expense, to do all the work and furnish all the materials necessary to construct and complete.....in accordance with and as described in the following specifications herein contained, and in full compliance with the terms, conditions, and stipulations of this agreement."

204. Mutual Agreements between a Company and Three Contractors.

"NOW THESE PRESENTS WITNESS, That the parties hereto, hereby mutually contract, undertake, and agree with each other, and that the said A B, C D, and E F, so far as the stipulations and provisions of these presents, and the works, matters, and things herein mentioned and referred to, are to be performed, observed, executed, or done by them, do hereby for themselves, and every two and each of them, covenant with the said.....Company, and the said..... ..... Company, so far as the said stipulations, provisions, matters, and things are to be performed, observed, executed, or done by it, hereby covenants with the said A B, C D, and E F, and separately with each two and one of them, in manner following, that is to say:".....

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205. Mutual Agreements and Undertakings—The Consideration.

"WITNESSETH, That the parties to these presents, each in consideration of the undertakings, promises, and agreements on the part of the other herein contained, have undertaken, promised, and agreed, and do hereby undertake, promise, and agree, the parties of the first part for themselves, their successors and assigns,* and the party of the second part for.....and.....heirs, executors, and administrators, as follows:"

206. Words Employed to Designate Parties Explained and Described.

Clause: "That whenever and wherever in this agreement the phrase 'party of the second part,' or the word 'contractor,' or a pronoun in place of either of them, is used, the same shall be taken and deemed to mean and intend the part....of the second part to this agreement.

"That whenever the word 'engineer' is used in these specifications or in this contract it refers to and designates the chief engineer of the....., acting either directly, or through the deputy chief engineer, or any assistant or division engineer having general charge of the work, or through any assistant or any inspector having immediate charge of a portion thereof, limited by the particular duties intrusted to him.

"That whenever the word.....is used in these specifications or in this contract it refers to and designates the parties of the first part to this agreement."

207. Words Employed Extended to the Personal Representatives of the Parties.

Clause: "That whenever the term 'the city' [or 'the company'] is used it shall include the Mayor and Council of the city [or the directors of such company,] their successors and assigns,* acting for and in behalf of the city [or the company and its stockholders].....the party of the first part to this contract; and the term 'the contractors' shall extend to the persons who are partners in the firm of..... and Company, or if the contractor be an individual it shall include his executors, administrators, heirs, and assigns."*

208. Undertaking of the Contractor — General Description of the Work—Subject-matter of Contract.

Clause: "The party of the second part will, at.....own cost and expense, and in strict conformity to the hereinafter-contained specifications, furnish all the materials (not herein agreed to be furnished by the part.... of the first part) and labor necessary or proper for the purpose; and in a good, substantial, and workmanlike manner excavate....., do all other excavation, build all masonry, and do all other work necessary to complete ..... and all its appurtenances, from point L to point K, along the line shown on the plan Sheet No....., in ....County, in the manner and under the conditions herein specified."

209. Subject-matter of the Contract.

Another clause: "The builder shall at his own cost erect, build, and completely finish, in a good, substantial, and workmanlike manner, a ....., and other buildings or structures upon a piece

*The word "assigns" should not be used if the assignment is prohibited, as in clauses Secs. 14 and 291-296.

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of ground belonging to the owner or company, situate, etc., and containing, etc., according to the plans, elevations, and specifications of works and drawings which have been respectively signed by the contractor, and by....., the engineer or architect of the owner; of which plans, specifications, and drawings the said builder shall have the custody during the progress of said work; but shall deliver them, or any of them, when required, to the said owner, or to his architect for the time being, at the said building, for his inspection and examination, and upon the final completion of said work shall deliver them up absolutely to the owner; and the builder hereby admits that the said specification, plans, and drawings are sufficient for their intended purpose, and that the work can be successfully executed in accordance therewith, without any additional or extra work other than such as is necessarily implied therein, or to be inferred therefrom, upon a fair and liberal construction." *

210. Provision that Contractor shall Furnish Everything.

Clause: "The contractor shall provide and be at the expense of all materials, labor, carriage, implements, tackle, machinery, scaffolding, and other matters, ways, means, and conveniences, and things of every description that may be requisite for the transfer of the materials, and for executing, constructing, carrying on, and completing the works."

Clause: "The contractor shall find all labor, services, agencies, tools, scaffolding, implements, moulds, models, utensils, machinery, cartage, and power of every kind and description necessary for the full, safe, expeditious, and proper performance and completion of the works, and also all materials, except those mentioned in the second schedule hereto, which will be provided by the company, but are to be placed, erected, and laid down, and otherwise made part of the works, by the contractors."†

211. Contractor to Use Improved Appliances.

Clause: "He shall provide and *use* such modern and improved appliances for the performance of all operations connected with the work embraced under this contract as will secure a satisfactory quality of work, and a rate of progress which in the opinion of the Engineer will secure the completion of the work within the time herein specified," etc.

212. Provision that Contractor shall Furnish Everything.

Clause (long form): "The contractor[s] shall at their own cost and charge provide all materials, engines, pumps, machinery, coffer-dams, caissons, dredgers, tug-boats, barges, diving appliances, hydraulic apparatus, compressed-air plant, grouting apparatus, shields, scaffoldings, strutting, shoring, moulds, templates, centers, tools, implements, tackle, special appliances, instruments, utensils, and plant of every sort, kind, quality, and description whatsoever; and also all the labor, workmanship, carriage, wages, sheds, coverings, matters and requisites whatsoever that may be necessary for the due and perfect completion of the several works described in the specification, or shown upon the drawings, or which may be implied from them separately or together, or from such additional drawings and directions as may from time to time be furnished by the engineer or resident engineer, or may be submitted to and

* *See* Secs. 236–248 *and* 249–251, *infra.* † *See* Secs. 260, 261, *infra.*

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approved by them respectively. All places wherein any materials are being made or obtained for the works, and the whole of the processes connected therewith, and all other operations of the contractors and any authorized subcontractor or tradesmen, shall be open to the inspection and control of the engineer and resident engineer, and of all persons authorized by them, at all times. The contractor[s] shall be held responsible for the care, protection, and safe keeping of any and all materials and work or parts of work until its final completion and acceptance."

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CHAPTER IX.

PLANS AND SPECIFICATIONS.

WHEN A PART OF CONTRACT. DISCREPANCIES OR CONFLICT BETWEEN THEM AND THE CONTRACT. INSUFFICIENT PLANS OR SPECIFICATIONS. CUSTODY OF PLANS AND SPECIFICATIONS.

213. Provision that Work and Materials shall Conform Strictly to Specifications and Plans, Which are Made a Part of the Contract.

Clause: "And it is further expressly agreed that all the work, labor and material to be done and furnished under this contract shall be done and furnished strictly pursuant and in conformity to the following specifications and plans, and the direction of the engineer as given from time to time during the progress of the work under the terms of this contract and the following specifications, which said specifications form part of this agreement."

213a. Specifications and Plans a Part of the Contract.

Clause: "It is further expressly agreed and understood that all the materials and work contemplated and described in this contract and in the specifications shall be done strictly pursuant to and in conformity with the following described specifications and general plans which are attached to, signed or initialed (or in strict conformity with the specifications and general plans on file in the office of the engineer, a copy of [both of] which has been [will be] furnished to the contractor), and in accordance with the detail drawings and directions which will be given from time to time during the progress of the work, which specifications, general plans, and detail drawings [and directions] are hereby made a part of this agreement, to be equally binding with the other terms of the contract."

Clause: "The work done and materials furnished shall be strictly pursuant to and in conformity with the following-described specifications and plans, which are attached to, signed, or initialed, and made a part of this agreement, and which drawings and specifications shall be equally binding with the contract."

SPECIFICATIONS.

.....

214. Provision that Specifications and Plans shall be a Part of the Contract.—Some such clause should be incorporated into a construction contract and is necessary to insure a complete contract. Very often many of

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the important stipulations and conditions of a contract are incorporated into the specifications as general conditions applicable to almost any work, and they should be made a part of the contract with certainty. The plans showing the extent and size of the work undertaken, the specifications describing it and the materials to be used, and the directions as to the performance of the contract are a necessary and important part of the contract. They are as binding as are the terms and covenants of the contract.[1]

If the specifications are attached to the contract and are expressly made a part of it, they together constitute the contract, and a guaranty contained in the specifications is binding upon the contractor.[2]

215. There Must be a Clear Reference in the Contract or Specifications, One to the Other, or They Must be Physically Joined.—If the parties have actually done what the clause recites as having been done, and have complied with the requirements stipulated, there can be no question that they are bound by the specifications and plans as part of the contract;[3] but frequently the specifications and plans are not attached, nor signed, nor described, nor even referred to in the contract, and these are the cases which provoke litigation.[3]

If there is nothing in the contract referring to or connecting it with other writings, drawings, maps, etc., and they are not attached nor annexed to it, nor signed, then they cannot be made a part of it, nor be introduced to explain, vary, modify, or change the contract. They cannot be connected with the contract by oral evidence.[4] *

As early as 1806 it was decided that when a contract is contained in two separate papers, in neither of which there is any reference to the other, the papers must be physically joined or fastened together in order to carry the signature of one over to the other; that to have the signature attach to the second paper it should have been literally made a part of the one signed. This was not a case of drawings and specifications, but of a memorandum of an auction sale by an auctioneer. The conditions of the sale were read in the presence of the party, and then laid upon the table under the paper upon which the names were subscribed, but not fastened to it. No reference was made in the paper signed to the paper lying underneath, and it was held that the underlying conditions of the sale could not be regarded as part of the memoranda of the bargain, nor received as the terms of the agreement. The drift of the argument and opinions was that there was no connection between the papers that was apparent, either externally or internally, by words of reference or by context, and that therefore parol evidence would have to

[1] Coey *v.* Lehman, 79 Ill. 173; Braggs *v.* Geddes, 93 Ill. 39.

[2] Lake View *v.* MacRitchie, 134 Ill. 203; *accord* Smith *v.* Flanders, 129 Mass. 322.

[3] Coey *v.* Lehman, 79 Ill. 173; Braggs *v.* Geddes, 93 Ill. 39.

[4] Fortiscue *v.* Crawford (S. C.), 10 S. E. Rep. 910; *but see* Nene Val. Drainage Comm'rs *v.* Dunkley, 4 Ch. D. 1.

* *See also* Chap. V, Secs. 122–131, *supra.*

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be resorted to to connect them, which was not allowable.[1] This is the law, and is supported by a great many cases.*

It is not required that the reference be made in the contract; it has been held that it might be made on the plans in the form of a memorandum, and signed by the parties at the same time the contract was executed. Such a memorandum has been held to be sufficient to incorporate it into the contract and to control the description in it.[2]

216. Contract may Consist of Two or More Written Instruments.—A contract may consist of two or more writings, but they must be connected by clear reference in one to the other, when parol evidence may be employed to identify the writing or drawing referred to.[3] Two instruments executed at the same time between the same parties relative to the same subject are to be taken together as forming the parts of one entire agreement if a clear reference is made in one to the other.[4] So far as referred to, the specifications become constructively a part of the contract.[5] In an action by a subcontractor against a contractor it was held that a replication or plea that work had not been completed according to the plans and specifications of the government architect was insufficient in that it did not aver that the work was not done according to the contract.[6] The second writing may be the consideration of the contract executed.[7] A warranty deed and a written contract executed the same day as parts of the same transaction, each being the consideration of the other, will be considered together as embodying the entire contract, and all parol negotiations, or precedent or concurrent verbal agreements, regarding the subject-matter will be merged therein.[8] The true meaning of such a contract is to be ascertained from a study of all the instruments and their effect upon one another.[9]

A letter written and signed by a painter, naming the kind and quality of materials to be used, and how they were to be applied, is a specification signed by the parties, and annexed to the contract it becomes a part thereof and is to be construed therewith.[10] If there are no plans and specifications which describe the work, the character of it may be shown by other evidence.[11]

[1] Hide *v.* Whitehouse, 7 East 558 [1806].

[2] Neue Val. Drainage Comm'rs *v.* Dunkley, 4 Ch. D. 1; *and see* Coey *v.* Lehman, 79 Ill. 173; Braggs *v.* Geddes, 93 Ill. 39.

[3] Alabama Ins. Co. *v.* Oliver, 2 So Rep. 445 [1887]; Centenary M. E. Ch. *v.* Cline, 116 Pa. St. 146; Donlin *v.* Daegling, 80 Ill. 608; Buckmaster *v.* Jacobs, 27 La. Ann. 626; Western *v.* Pollard, 16 B. Mon. (Ky.) 315.

[4] Woodward *v.* Jewell, 25 Fed. Rep 689 [1885]; *and see* Dechert *v.* Munic. Elec. Lt. Co. (Sup.), 41 N. Y. Supp. 692.

[5] New England I. Co. *v.* Gilbert, etc., R. Co., 91 N. Y. 153; Cook *v* Allen, 67 N. Y. 578; Tonnele *v.* Hall, 4 N. Y. 140; *and see* White *v.* McLaren, 151 Mass. 553; *and* Donnelly *v.* Adams (Cal.), 46 Pac. Rep. 916.

[6] United States *v.* Dixey (C. C.), 71 Fed. Rep 846.

[7] Miller *v.* Edgerton (Cal.), 15 Pac. Rep. 894 [1888].

[8] Carr *v.* Hays (Ind.), 11 N. E. Rep. 25 [1887].

[9] Howard *v.* Pensacola & A. R. Co., 5 So Rep. 856; *see also* Bolles *v.* Sachs (Minn.), 33 N. W. R p. 863 [1887].

[10] McGeragle *v.* Broenal (N. J.), 20 Atl. Rep. 857 [1890]; *and see* Bragg *v.* Geddes, 93 Ill. 39.

[11] Doane College *v.* Lanham, 26 Neb. 421.

* *See* Chap. V, Parol Evidence, Sec. 122 *et seq, supra.*

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When the contract and the plans and specifications all fail to determine the amount of work to be done, a writing which was furnished the contractor to estimate and bid upon, and by which he made his proposal, which was accepted, and which writing specified within limits the amount of work, is properly admitted in evidence as an accompanying specification.[1]

217. Use of Parol Evidence to Identify Instruments Referred To.—If there be a clear reference to certain plans and specifications they may be identified by parol evidence, and when identified they may be considered in connection with the contract to determine whether the contract is void for uncertainty.[2] Therefore when a contract provided that labor and materials shall be furnished "according to the drawings and specifications, which are to be regarded as the descriptive part of this agreement,"—describing parts of the work embraced, and everything shown on the plans and described in the specifications, prepared by Mr. ———, architect,—to identify the specifications and plans evidence had been admitted that they had been exhibited to the contractor before he entered into his contract, that he had used the same and no others in the construction of the edifice, that none other had been exhibited to or examined by him, that all the materials and labor furnished had been in accordance with them, and it was held proper, though it may not have been necessary.[3] *

218. Plans Exhibited to Contractor when Contract was Entered Into.—How far the mere exhibition of plans and specifications to a contractor, or the exhibition of maps and plans by a vendor of real estate to a purchaser, at the time of entering into a contract, become parts of the contract, is well worth inquiry. If the contract is silent on the subject of such plans or maps, and there is no reference in the plans themselves connecting the two together, then the plans and maps cannot be made a part of the contract.[4] This is so with respect to acts of parliament as well as contracts. Notices, plans, and sections deposited are not to be used afterwards in construing the act, except so far as they are referred to and incorporated into the act itself.[4] When they are so referred to and incorporated into the act, effect must be given to them according to the act.[5] However, if a plan or map is exhibited to a purchaser of property and shows certain division of the land by proposed roads, the vendor cannot afterwards divide up the land in an entirely different manner so as to attract the population of the place in another direction from what the original plan would have done.[6] Such an exhibition of a plan or map will not determine the width of a street so that it can-

[1] Monmouth Park Ass'n *v.* Warren (N. J.). 27 Atl. Rep 932.

[2] Bergin *v.* Williams, 138 Mass. 544 [1885].

[3] Fry's Specific Performance of Contracts, § 910, *and English cases cited.*

[4] North British Ry. Co. *v.* Tod. 12 Cl. & Fin. 722; Beardmer *v.* London & N. W. Ry., 1 Mac. & G. 112

[5] Peacock *v.* Penson, 11 Beav. 355, 361.

* *See* Sec. 215, *supra.*

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not afterwards be changed, even when the plan was referred to and used as a description of part of the property.[1]

When the terms of a contract required work to be done according to plans and specifications attached, and a dispute arose as to how a part of the work should be done, the builder has been allowed to put in evidence a plan that was exhibited to him at the time he made the contract to explain how that work was to be done, though it was not attached to the contract.[2]

219. Instruments Referred to as Signed or Attached, not Signed nor Attached.—When the contract refers to drawings and specifications as "made by Mr. ———, architect, and as being signed by the said parties and hereunto annexed," and in fact no specifications or drawings were signed or annexed, the specifications and drawings are not a part of the written contract; but parol evidence is competent to show what specifications were intended to hold or were actually agreed upon,[3] and that they are in legal effect incorporated into the contract.[4]

These decisions should never be made an excuse for not properly describing papers and drawings in the contract so that they may be promptly and certainly identified, without resorting to parol evidence. The plans and specification should be annexed or signed by the parties, so there can be no dispute as to authenticity, even though it does not seem to be necessary, as was held in the following case. Specifications were referred to as "verified by the signatures of the parties," and which were to be "taken as part of the contract," but were not in fact signed, the contractor having remarked when it was proposed to sign them that "it was not necessary." The specifications were read over to him at the time of signing the contract, and it was held that the specifications were a part of the contract by adoption, although they were not signed, and that if the work was not performed in accordance with them as stipulated in the contract, and there was never a substantial performance, the architect was justified in refusing his certificate.[5]

Where the specifications were not signed, and they were referred to only to show the kind and quality of work and materials, a clause therein that the work is to be "warranted tight, including the roof, for two years" was held not a continuing warranty, but a description of the quality of the roof.[6]

If the contract refer to "annexed" specifications, but none are in fact annexed, but a copy of certain specifications were produced by the engineer,

[1] Fry's Specific Performance of Contracts, § 912.

[2] Myer *v* Fruin (Tex.), 16 S. W. Rep. 868 [1891]; *and see* Cocheco Bank *v.* Berry, 52 Me. 293; Cook *v.* Allen, 67 N.Y. 578; New Eng. Iron Co. *v.* Gilbert El. R. Co., 91 N. Y. 153.

[3] Demarest *v.* Haide, 52 N. Y. Sup. Ct. 398 [1885]; Hoag *v* Hillemeier (N. Y.), 24 N. E. Rep 807 [1890]; *but see* Donnelly *v.* Adams (Cal.), 46 Pac. Rep. 916.

[4] Sutherland *v.* Morris, 45 Hun 260 [1887]; *see also* Millstone Granite Co. *v.* Dolan, 18 N. Y. Supp. 791 [1892]; *and* Phœnix I. Co. *v.* Richmond, 6 Mackey 180 [1887].

[5] Lemon *v.* Smith, 14 Daly 520 [1888]

[6] White *v.* McLaren, 151 Mass. 553; *see also* Goddard *v.* Barnard, 16 Gray 205; M. E. Parish *v.* Clarke, 74 Me. 110.

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which he testified had been furnished to the contractor, it was held that these specifications would hold.[1]

A Michigan case makes the plans and specifications referred to, and to be thereafter signed, but which were not in fact signed, subordinate to the contract, but admitted the unsigned specifications to show what kind of a front the building was to have, and as evidence of what had been agreed on. They were admitted in explanation of the contract, but not in contradiction of it.[2] It has been held that the specifications need not be signed by the parties if they were otherwise sufficiently identified.[3]

A bond conditioned that the contractor shall furnish all materials and labor "as specified and shown on plans furnished by" the architect may be read in the light of such plans, specifications, and contract, all having been executed at the same time. Such a bond requires no reformation to recover thereon for a breach of the contract.[4]

A contract between a principal contractor and a subcontractor which provides that the specifications annexed to the principal contract, their terms and conditions, shall be considered "as if hereto attached," and that the subcontractor should be subject to all the terms and restrictions of the principal contract, has been held to completely subject the subcontractor to all the provisions of the principal contract, with the same effect as if they had been literally and bodily incorporated into the subcontract.[5]

The specifications referred to must be followed, and should not be departed from, even with the consent of the superintendent.[6] Though the contract provide that work shall be done according to the plans and specifications, and such directions as the supervising engineer may give, yet the contractor is bound only by such directions as will insure the completion of the work according to the plans and specifications.[7] The owner may consent to variations from the specifications.[8] Another case is authority for the statement that when a contract refers to another paper for its terms, the effect is the same as if the words of the paper referred to were inserted in the contract.[9]

Papers referred to are frequently admitted as evidence to explain ambiguity, such as quantity sheets from which bids were prepared,[10] or plans,

[1] Galveston, H. & S. A. Ry. Co. *v.* Johnson (Tex.), 11 S. W. Rep. 1113; *semble*, Hoag *v.* Hillemeier (N. Y.), 24 N. E. Rep. 807 [1890]; Texas & St. L. Ry. Co. *v.* Rust, 19 Fed. Rep. 239 [1883]; *see also* Barber *v.* Chicago (Ill.), 38 N. E. Rep. 258; New England I. Co. *v.* Gilbert El. R. Co., 91 N. Y. 153; *and see* Schwiesau *v.* Mahon (Cal.), 42 Pac. Rep. 1065.

[2] Maxted *v.* Seymour, 56 Mich. 129.

[3] White *v.* McLaren (Mass.), 24 N. E. Rep. 911 [1890]. 151 Mass. 553.

[4] Watson *v.* O'Neill (Mont.), 35 Pac. Rep. 1064.

[5] Brown *v.* Decker, 142 Pa. St. 640 [1891]; Tonnele *v.* Hall, 4 N. Y. 140; *see also* Cook *v.* Allen, 67 N. Y. 578; N. E. Iron Co. *v.* Gilbert E. R. Co., 91 N. Y. 153; Adlard *v.* Muldoon, 45 Ill. 193; Coey *v.* Lehman, 79 Ill. 173.

[6] Adlard *v.* Muldoon, 45 Ill. 193; Fitzgerald *v* Moran, 141 N. Y. 419.

[7] Burke *v.* Kansas City, 34 Mo. App. 570.

[8] Beswick *v* Platt, 140 Pa. St. 28.

[9] Adams *v.* Hill, 16 Me. 215 [1839]; Forst *v.* Leonard (Ala.), 20 So. Rep. 587.

[10] Monmouth Park Ass'n *v.* Warren (N. J.), 27 Atl. Rep. 932 [1893].

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though not attached to contract,[1] nor referred to.[2] Specifications embraced in an advertisement for proposals to do work from which a contract results, are the basis of the contract, and cannot be excluded as evidence.[3] When an advertisement refers to plans and specifications as those at the department of public works, and the contractor, while making his bid, is shown, by an authorized agent in charge of the city office, plans called "tracings," and the contract executed refers to plans and specifications in the same office, it was held that the plans and specifications shown to him, *i. e.*, the tracings, were the plans and specifications forming part of his contract, and that the city was estopped from denying that they were not the ones adopted for the work.[4]

If the contractor undertakes to build in accordance with such plans and specifications as may be prepared or fixed by the engineer or architect, he will be held to his agreement notwithstanding that the plans and specifications prepared differ materially from those exhibited to the contractor when he made his bid, and also materially changed the value of the work.[5]

220. Plans and Specifications to be Registered with Contract.—The California courts have held that plans and specifications referred to in a contract were such an essential part of the contract as to require that they be filed for record under a statute which requires that all building contracts for a sum greater than one thousand dollars must be filed for record with the county recorder or the contract will not be enforceable, and that a neglect to record them with the contract was fatal to the validity of the contract, and that no recovery could be had by either party to the contract.[6] A defense that the plans and specifications referred to were not attached to or made a part of the contract, and therefore the contract was not filed in its entirety as required by statute, cannot be made use of for the first time on appeal.[7]

Under a lien law providing that a building shall not be liable to lien if the contract be filed, it was held not necessary to file the specifications with the contract where by the contract the contractor agreed to do all the work and furnish all the materials.[8] So, too, plans and specifications for an im-

[1] Myer *v.* Fruin (Tex.), 16 S. W. Rep. 868 [1891]; Millstone Granite Co. *v.* Dolan, 18 N. Y. Supp. 791.

[2] Whelan *v.* McCullough, 4 App. D. C. 58.

[3] Campbell Co. *v.* Youts y (Ky.), 12 S. W. Rep. 305 [1891]: *semble*, Whelan *v.* McCullough, 4 App. D. C. 58.

[4] City of Chicago *v.* Sexton, 107 Ill. 323, 115 Ill. 230 [1885]: *accord*, Myer *v.* Fruin (Tex.), 16 S. W. Rep. 868 [1891]: Millstone Granite Co. *v.* Dolan (Super. Ct.), 18 N. Y. Supp. 791.

[5] Harvey *v.* United States, 8 Ct. of Cl. 501; Cannon *v.* Wildman, 28 Conn. 472.

[6] Willamette S. M. Co. *v.* Los Angeles C. Co. (Cal.), 29 Pac. Rep. 629 [1892]; Schwiesau *v.* Mahon (Cal.), 42 Pac. Rep. 1065: *see, however*, Parks *v.* Tinnie (Tex.), 34 S. W. Rep. 676, where a failure to register was excused, because the owner would not surrender the only copy of the contract for registry.

[7] White *v.* Fresno Nat. Bank (Cal.), 32 Pac. Rep. 979.

[8] Freedman *v.* Sandknop (N. J.), 31 Atl. Rep. 232: *semble*, Mras *v.* Duff (Wash.), 39 Pac. Rep. 267: La Foucherie *v.* Knutzen (N. J.), 33 Atl. Rep. 203.

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provement of the streets of a municipal corporation need not be adopted by ordinance, but a resolution of the council is sufficient.[1]

221. Ordinances and Regulations Referred to in Contract.—A contract which recites that work shall be done and paid for "according to the ordinance and specifications" adopted by the common council, makes the ordinance a part of the contract, not only as to the manner in which the work shall be done, but also as to how it shall be paid for.[2] But when a contract provided that "B. & O. Specifications should govern," and the instrument referred to proved to be a regular form of construction contract, containing an agreement that the company might at any time suspend or annul the contract on giving notice, etc., it was held that this agreement was not incorporated into the contract, notwithstanding the fact that the contractor had five years previous signed such a contract and worked under it.[3]

222. Contract Annexed to Other Instruments Embodies Them.—Without doubt, if the plans and specifications are in any way attached or annexed to the contract and as a part and parcel of it, they will be incorporated into it, and if the contract provide that the work shall be done according to specifications which are annexed, the specifications will hold as any other part of the contract.[4] When so attached to a contract at the time of its execution, all previous and contemporaneous agreements as to changes in the specifications are merged in the contract, and cannot afterwards be shown in contradiction to the plans and specifications annexed.[5]

The determination of the question whether or not the plans and specifications are a part of the contract is for the judge, and it is error to leave it to the jury. The jury may determine facts concerning the execution of the contract, as to whether the specifications were or were not annexed to the contract, or exhibited or read to the contractor, but it is wrong to leave the construction of a written contract to a jury.[6] If there is a dispute as to which of two writings embodies the contract, both instruments may be submitted to the jury to determine that question.[7]

223. Reference to Specifications and Plans or to a Model.—To experienced contractors it will no doubt seem an odd question to raise as to whether a contract can be made to erect a structure according to certain definite written instructions contained in plans and specifications, when agreements are frequently made to build in accordance with printed regulations adopted by builders' associations and trades unions or after a model

[1] Santa Cruz Pav. Co. *v.* Heaton (Cal.), 38 Pac. Rep. 693; *and see* Bradford *v.* Pontiac (Ill. Sup.), 46 N. E. Rep. 794 [1897].

[2] State *v.* Michigan City (Ind.), 37 N. E. Rep. 1041; *see also* Gerner *v.* Church (N. h.), 62 N. W Rep. 51; *accord*, De Kay *v.* Bliss, 42 Hun 659; Mittnacht *v.* Wolf, 6 Pa. St. 44.

[3] Baltimore & O. R. Co. *v.* Stewart (Md.), 29 Atl. Rep. 964.

[4] Taylor *v.* Palmer, 31 Cal. 241; Smith *v.* Flanders, 129 Mass 322.

[5] Coey *v* Lehman, 79 Ill. 173; Taylor *v.* Fox, 16 Mo App. 527; McGuinness *v.* Shannon, 154 Mass. 86.

[6] Spence *v.* Board of Com'rs (Ind.), 18 N. E Rep. 513 [1889].

[7] Wagener *v.* Butler, 27 N. Y. Supp. 350, *affirming earlier cases.*

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designated.[1] If a builder may undertake to build a house exactly like another house in the neighborhood, he may equally as well contract to build a structure like unto certain plans and specifications which describe it. If models were as numerous or so easily changed as written instruments, without doubt it would be even so necessary to deposit duplicate models with both parties and to initial the parts thereof. As the model house is admissible evidence of the complete performance of the contract, so are the plans and specifications good evidence of that fact. There must always be a clear reference to the model or specifications, and they should be so described that they may be easily identified. The most convenient method of identification is that of signing or initialing each drawing and detached sheet, which is recommended in all cases.

224. Reference to Maps in Deeds and Other Forms of Conveyancing.— Where reference is made in a deed or devise to a map or plan which is a public record for description of the property, the map or plan will control.[2] Such map or plan is to be regarded as giving the true description of the land as much as if it were expressly recited and marked down in the deed itself.[3] The same is true if a reference is made to another deed for the description contained in it.[4] If the description in the deed and reference to the map lead to absurdity, it will be presumed that it was intended to confine the devisee or grantee to the dimensions there given.[5]

225. Provision that Contractor shall Not Take Advantage of any Errors or Omissions or Discrepancies Existing between or in the Plans and Specifications.

Clause: "It is hereby further expressly agreed and understood that in the event of anything reasonably necessary or proper to the due and complete performance of the works (of which the engineer shall be the sole judge) having been omitted to be shown in the drawings, or which is not described in the specification, through oversight or error, the contractors shall, notwithstanding, execute and provide all such omitted works and things, as if they had been severally shown and described, without any extra charge, and according to the directions of the engineer, and to his satisfaction, subject, however, to the provisions contained in sec.....chap....."

226. Provision that no Advantage shall be Taken of Errors, Omissions, or Discrepancies; and Engineer to Explain and Determine their True Meaning and Import.

Clause: "It is hereby further expressly agreed and understood that the specifications, drawings, and conditions as set forth are intended to coöperate and to agree, and that they are to be interpreted so that any work exhibited in the drawings and conditions and not mentioned in the specifications, or *vice versa*, are to be executed the same as if it

[1] *Model*, Meincke *v.* Falk, 61 Wis. 628 [1884]; Ricker *v.* Cutter, 8 Gray 248.
[2] Finelite *v.* Sinnott, 125 N. Y. 683.
[3] Vaunce *v.* Fore, 24 Cal. 436 [1864].
[4] Vaunce *v.* Fore, *supra; see also* Darma *v.* Horicin I. M. Co., 23 Wis. 691, *description in an award.*
[5] Finelite *v.* Sinnott, *supra.*

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were mentioned in the specifications and set forth in the drawings, according to the true meaning, spirit, and intention of the said drawings, conditions, and specifications, without any extra charges whatsoever;" "that if any discrepancies or variations appear between any of the drawings and the specifications, or between any of the several drawings in themselves, such discrepancies shall be interpreted, explained, and adjusted by the engineer; that any doubts or misunderstandings as to the meaning or import of these specifications, or any obscurity in the wording of them, shall be explained and decided by the engineer, who shall have the right to correct any errors or omissions in them when such correction is necessary for the proper fulfillment of their intention; the correction to date from the time that the engineer shall give notice thereof; and that all directions and explanations required, alluded to, or necessary to a full completion of the work shall be given by the engineer." *

227. Conflict between the Contract, Plans, and Specifications.—Generally if there be conflict between the several parts of a contract the court will make every effort to ascertain what was the intention of the parties, and the contract will be in accordance with that intention. If the intention of the parties is legal, it will govern. If not incompatible with some rule or maxim of the law the mutual intention will prevail always, and this is called the polar star in expounding all instruments. The entire contract will be considered, which includes the plans and specifications and all other writings referred to and made a part of the complete contract. All must be considered in determining the meaning of any and all of its parts. Every part will be given such a meaning as shall be consistent with all the rest and in keeping with the evident object and intention of the parties. As one sentence may modify the meaning of another sentence, so the true meaning of a paragraph may be interpreted in the light of other paragraphs. It is not supposed that people use language for idle purposes, and therefore effect will be given to every expression in the contract if possible. The contractor will be required to comply with the contract in every material particular, as called for by a fair, reasonable, and practicable construction of the contract, plans, and specifications taken together; and where there is conflict in these, they should be reconciled in a practical and workmanlike manner, so as to arrive at the fair and reasonable intention thereof.[1]

The court will, so far as possible, put itself in the position of the parties at the time the contract was executed, and consider the conditions and circumstances under which they assumed the contract obligations. The subject-matter, the knowledge that the parties had with regard thereto, the object in view, and the inducements which led them to enter into the contract may all be considered in determining the uncertain meaning of a contract. The conduct of the parties and the practical interpretation

[1] Linch *v.* Paris Lumber Co., 80 Tex. 23.

* *See* Sec. 402, *infra.*

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which they themselves have given to the terms of their contract will be given great, if not a controlling, influence if the meaning is capable of more than one interpretation, or the several parts are in conflict.*

Therefore when the contract and specifications did not agree with the working plans or the working model furnished, and the work was done under the direction of the engineer according to the plan, model, or sample furnished, the practical construction which the parties adopted, and according to which the work was done, will prevail over the literal meaning of the contract and specifications.[1]

However, this cannot be taken as a general rule, for in most cases words will be interpreted according to their literal meaning, except when it is proved that they have acquired an exact and technical meaning in trade or business, as by custom or usage.†

228. Contract Usually Prevails over Specifications.—In a construction contract it is the contract itself which is usually regarded as the instrument by which the obligation to perform the work or to furnish the materials is assumed, and there is a tendency to give greater weight to it than to the plans and specifications, which are chiefly descriptive of the work and the manner of its performance, and which are almost always subject to change or modification. When, therefore, the contract required cornices in twenty-five rooms, and the specifications required cornices in the halls and all rooms, and the owner selected twenty-five rooms to be corniced, it was held in an action for extra work for running cornices in the halls and storerooms that the contract rather than the specifications should govern as to the amount of cornicing to be done, and that testimony was admissible that the selection of rooms did not include the halls and storerooms.[2] When a building contract provides a mode of determining extras, and the specifications referred to by the contract, and which are made a part of it, provide a different and inconsistent mode of determining extras, the contract will prevail.[3] The time of completion has been determined by the contract when it was at variance with the specifications, the former requiring the work to be completed "without unnecessary delay as soon as ordered," and the latter "within three months from the date of the contract."[4] A guaranty as to capacity or service of works will not be controlled by specifications containing statements as to distance, dimensions, etc.[5]

[1] Dist. of Columbia *v.* Gallagher, 124 U. S. 505 [1888]; *semble* Saunders *v.* Clark, 20 Cal. 299.

[2] Tischler *v.* Apple (Fla.), 11 So. Rep. 273, 30 Fla. 132.

[3] Meyer *v.* Berlandi (Minn.), 54 N. W. Rep. 937, 53 Minn 59.

[4] Boteler *v.* Roy, 40 Mo. App. 234; *and see* Williams *v.* Fitzmaurice, 3 H. & N. 844.

[5] Eagle I. Wks. *v.* Guthrie Center (Iowa), 66 N. W. Rep. 81.

* As to what evidence is admissible to prove a contract *see* Chap. V, Sec. 123, *supra*, Parol Evidence.

† *See* Chap. XXI., Secs. 603–628, *infra*.

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When the plans and specifications do not agree there seems to be no sufficient reason for giving one more weight than the other. Both are prepared by the engineer, and each with the same care. It is confessed that frequently at the time of the execution of the contract changes are made in the specifications which may not be made upon the plans, because it may require drawing instruments, etc., to effect the same changes in a plan that are quickly made in the specifications with a writing-pen. One might reasonably expect that more weight would be given to the specifications, as signifying best the intention of the parties. When, therefore, the specifications fixed the size and character of columns for a structure, it was held that the contractor could not show that columns of a different size were more in accord with the plans.[1]

In cases of disagreement or apparent disagreement between the parts of a contract the court will adopt that construction that will conform to both instruments if it can discover such a construction. Therefore when there is a dispute between the parties as to the dimensions of work the court will adopt a construction that is consistent with both the plans and specifications. Where the specifications required all walls to be vaulted, and the plans showed them to be sixteen inches in width, without any vaultings or spaces, it was held that the walls were to be sixteen inches including the vault, and that parol evidence could not be admitted to explain the contract.[2] In another case where the specifications required all walls to be plastered with K. & Co.'s cement, under the direction of the superintendent of K. & Co., and in another place the specifications required that the cement and sand should be mixed in equal parts, effect was given to each requirement by holding that the superintendent's supervision applied to the laying of the cement plaster on the walls, and that the contractor was not justified in using a less proportion of cement in the mixture, even though the superintendent did assent to it.[3]

229. Provision that Engineer May Adopt that Interpretation and Construction Which is Most Favorable to the Work and Owner.

> Clause: "In case of repetitions, variations, or discrepancies in the terms of the contract, specifications, and drawings, the interpretation and determination of which are doubtful, it is distinctly understood that the engineer may adopt that interpretation or construction which shall secure in all cases the most substantial and complete performance of the work, and be most favorable to the city, company, or owner, and secure to it the most ample protection.*

230. Contract's Terms are Usually Construed Most Strongly Against the Party Preparing Them.—In the absence of an expressed intention to the contrary, a contract which is capable of two constructions, or language

[1] Linch *v.* Paris L & G. C (Tex.), 14 S. W. Rep. 701 [1890]; *and see* Williams *v.* Boehan (Super. Ct.), 17 N. Y. Supp. 484.

[2] Smith *v.* Flanders, 129 Mass. 322 [1880].

[3] Fitzgerald *v.* Moran, 19 N. Y. Supp. 958.

* *See* Chaps. XII and XIII, Secs. 335–417, *infra*.

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which is of doubtful or double meaning, will be construed most strongly and unfavorably against the party who used the language, or the maker of the instrument, or against that party that stipulates the payment of the debt, or the performance of the work. In other words, a construction contract will generally be interpreted most unfavorably to the owner or company having the work done if its meaning is not clear, and in favor of the contractor.[1] An exception has been made in some cases to this rule where the government is a party, the court maintaining that in the interpretation of public instruments it should adopt that construction which is most favorable to the government.[2]

231. Provision that Written Matter shall Prevail Over Printed Parts.

Clause: "Whenever and wherever the written parts of this contract, or these specifications or plans, do not agree, or are in apparent conflict with the printed terms or instructions, or with the scaled dimensions of the drawings [plans], the written terms or dimensions shall be preferred, and prevail in both matters of construction and estimates, provided, however, that nothing herein provided shall limit or destroy the power of the engineer to interpret such terms or dimensions in such manner as is most consistent with the needs and requirements of the work, and of that question the engineer shall be the sole judge."

232. Written Matters versus Printed Matters.—Where the written and printed portions of a contract are repugnant to each other, the rule is that the printed form must yield to the written clauses of the instrument, as the latter are presumed to be the deliberate expression of the real intent of the parties.[3] In case of conflict the written matter must prevail over printed matter in a contract.[4] Therefore it was held that a printed billhead could not be allowed to control, modify, or alter the terms of a contract clearly expressed in writing below it.[5] Of course it must be shown what words were written.[6] The type-written rider of an insurance policy will prevail over the printed parts thereof.[7]

Like any other parts of the contract, however, if they can be reconciled by any possible construction, the court will adopt that construction. The condition of the parties, and the circumstances surrounding them when they entered into the contract, will also be considered to make them agree. The whole object is to discover the intention of the parties. The printed parts of contracts are usually intended to apply to a number of different

[1] Norton *v.* Brophy, 56 Ill. App. 661; Gautz *v.* Dist. of Columbia, 18 Ct. of Cl. 569, and a word may be supplied, or even omitted; Norton *v.* Brophy, *supra*.

[2] Jackson *v.* Reeves, 3 Pai. (N. Y.) 293; Mohawk Bridge Co *v.* Utica & S. R. Co., 6 Pai. (N. Y.) 554; *but see contra* Garrison *v.* United States 7 Wall. 688, *and* Otis *v.* United States, 20 Ct. of Cl 315.

[3] Haws *v.* St. Paul F. & M. Ins. Co., 130 Pa. St 113 [1889]

[4] Hill *v* Miller, 76 N. Y. 32 [1879]; Murray *v.* Pillsbury (Minn.), 60 N. W. Rep. 844; Chadsey *v* Guion, 97 N. Y. 333 [1884]; Clark *v.* Woodruff, 83 N. Y. 518 [1881].

[5] Sturm *v.* Baker, 14 Sup. Ct. Rep. 99; Schenck *v.* Saunders, 13 Gray 37, *followed*.

[6] East Texas F. I. Co. *v.* Kempner (Tex.), 34 Rep. S. W. Rep. 393.

[7] Mascott *v.* Granite State F. Ins. Co (Vt.), 35 Atl. Rep. 75.

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jobs, and not to one exclusively, while the written parts are special statements and provisions inserted with special reference to the subject-matter of the contract under discussion. The written parts are the immediate language and terms of the parties themselves, while the printed words are a general formula adapted to similar occasions and jobs, and to other parties.[1]

To have the written part of a contract control the printed part it must be inconsistent or opposed to it. The fact that the provision for payments on a building on architects' certificates is contained in the printed part of the contract, and that the written part provides that the payments shall be made at fixed stages in the progress of the work, and at definite times after its completion, does not render the printed provision inoperative, since there is no inconsistency between it and the written part of the contract.[2] A special written addition to a printed form used in a contract is entitled to special weight in construing the contract, as it is presumed to have been separately and particularly considered by the parties, and to express their exact agreement on the subject of it.[3]

It is a question, therefore, if such a clause making the written parts of a contract prevail over the printed parts is not only unnecessary, but on the whole undesirable, as limiting the authority of the engineer to interpret the specifications, plans, and contract in conformity with and in a manner consistent with good work.

233. Punctuation.—Punctuation has little weight in determining the meaning of a contract. The want of punctuation marks will not be allowed to vitiate a contract, or destroy its meaning, any more than bad grammar or bad spelling. The court may supply them if necessary to make the whole instrument rational and self-consistent.[4]

234. Unauthorized Changes and Alterations in Plans and Specifications and Liability Therefor—Liability of Person Making the Changes.—Several interesting questions come up when changes or alterations have been made in the plans, specifications, or contract after they have been signed, and without the consent or knowledge of both parties. What changes amount to forgery, and whether changes by the architect or engineer can be attributed to the owner or company, and what is the effect of such material changes upon the contract itself and the rights and obligations of the parties, are some of the questions that present themselves.

Inducements to make such changes unfortunately exist at times, but the cases that have found their way into court are rare indeed. Mistakes made in drawing the plans or in making computations of dimensions and quantities, or the omission of necessary parts or details by the architect or engi-

[1] 11 Amer. & Eng. Ency. Law 516, *and cases cited.*

[2] Michaelis *v.* Wolf (Ill.), 26 N. E. Rep. 384 [1891].

[3] Dick *v.* Ireland, 130 Pa. St. 299 [1889].

[4] 11 Amer. & Eng. Ency Law 521, 522; Hawes *v.* Sternheim, 57 Ill. App. 126.

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neer or designer or his assistants are incentives for the author of the blunder to conceal or correct his mistakes in as artful and complete a manner as possible. One person may seek to shift his own mistakes on to the head and shoulders of others, and it is easy to understand why persons who are most likely to make such mistakes might be the very ones who would not have the moral courage to own them and take the consequences.

Such changes in a contract or in plans and specifications that were a part of a contract would no doubt amount to forgery, and subject the perpetrator to an action for damages or an indictment for deceit or even forgery under the laws of some states. The statutory laws of a state must determine what is necessary to make it a forgery, but without doubt the elements of forgery as generally defined would exist in such a case.

235. Responsibility for Unauthorized Changes by Engineer or Architect, between Owner and Contractor.—Ordinarily, when alterations in an instrument have been made by a third party or an agent or officer in whose custody it has been placed without express or implied authority, it will not avoid the contract, note, or bond, as the case may be.[1] A giving of the custody of an instrument, as a note, to another has been held not an implied authority to make alterations therein.[2] The same should hold of an act of an architect or engineer in making changes in the plans or specifications of work. Without some show of authority or knowledge, the owner or company should not be held responsible for such acts. It has been held that changes made in the plans and specifications after the contract was signed, and without the knowledge of either party, did not vitiate the contract.[3]

An English case seems inclined to a contrary view, and the sentiment is expressed that if the changes were for the benefit of the owner or company, he is as responsible for the alteration of the contract as if he had made it himself, in so far as the destruction of the contract itself or the contract obligations are concerned.[4]

When a contractor has undertaken to erect buildings on the owner's land under written conditions, which after being signed were kept on the owner's behalf by the architect, and one of the conditions made the architect's certificate a condition precedent to the right to payment, and the contractor had been paid for all the works for which the architect had certified and upon a *quantum meruit* in respect of works for which no certificate had been given, and it appeared that an erasure had been made in a material part of the contract, and the jury having found that the erasure had been made by the architect after the contract had been signed, the contractor contended that the contract was void and that he might sue on a *quantum meruit;* but he was non-suited, and the court held that notwithstanding the

[1] Amer. & Eng. Ency. Law 505, *and cases cited.*

[2] Coburn *v.* Webb, 56 Ind. 96; Lemay *v.* Williams, 32 Ark. 166.

[3] Consaul *v.* Sheldon, 35 Neb. 247 [1892].

[4] Pattinson *v.* Luckley, L R. 10 Exch. 330 [1875].

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erasure the conditions were either still the government document, or at least must be looked at to see what were the real terms of the contract, and that the contractor could not recover on a *quantum meruit*.[1]

The question was not what the owner could do against the contractor nor what the owner's rights were. It may be that if the contractor had done none of the work, and the owner had sought to enforce the contract after having spoiled the document, he would have been unable to have enforced the contract;[2] or had the contractor done the work badly, the owner could not have recovered damages in an action for bad building. But the question here was on what terms is the contractor to be paid? He is entitled to be paid on the terms actually agreed on. If he fails to show any agreement he is not entitled to be paid at all. In case of goods sold and delivered it is easy to show a contract from the retention of the goods, but that is not so where work is done upon real property. If the contractor shows the contract, he must show all its terms. The instrument under which the work was done, though altered in a material part, is still the governing document to determine the rights of the contractor. Therefore he is bound by the conditions which made the architect's certificate a condition precedent to recovery, and cannot recover, having been paid the full amount of such certificate. The act of the owner does not destroy the rights of the contractor; the general rule prevents the person who has made the alteration from setting up the contract for his own benefit. A *quantum meruit* would require the court to infer another contract, shutting out what it knew had occurred, and what was the real essence of the contract.[3]

A statute might determine the effect of such a material alteration in a contract. The alteration made was the erasing of a clause to the effect that extra work should not be required to be ordered in writing.

It has been held that the addition of a map or plan to the record or copy of a deed, for the purpose of making the claim of the grantee more specific, does not render the grant inoperative if there was no fraudulent intent or purpose to make it appear as part of the original deed.[3]

236. Provision that Contractor shall Guarantee Sufficiency of Plans and Specifications.

Clause: "The contractor[s] hereby further declare[s] and agree[s] that he [they] shall be responsible for the full performance and completion of this contract, and that by the execution hereof he [they] admit[s] that he [they] has [have] carefully studied and compared the said plans, elevations, sections, and the specifications and particulars before referred to, and admits, vouches, guarantees, or believes that they are sufficient for their intended purposes, and that they can be carried out and executed in full without any additional or extra work other than the

[1] Pattinson *v.* Luckley, L. R. 10 Exch. 330 [1875].

[2] Powell *v.* Davett, 15 East 29.

[3] Winnipisiogee Paper Co. *v.* New Hampshire Land Co. (C. C.), 59 Fed. Rep. 542.

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work set forth herein, or necessarily inferred to be done from the general nature and tendency of the plans and descriptions aforesaid."

237. Insufficient Plans and Specifications. Liability of Either Party to the Other Party.—In construction work cases frequently arise where the completion of the work according to the plans and specifications adopted becomes impracticable or even impossible, or where the structure fails or falls in consequence of the imperfect design or the lack of skill in adopting proper methods of construction. Such cases must be distinguished from failures due to the use of inferior materials or to the workmanship of the contractor or his mechanics. The failures referred to in this section are due to defects in the plans and specifications adopted, and result from lack of skill or want of attention on the part of the engineer or architect. As such failures are usually attended with delay and additional expense, the question as to who is responsible for the sufficiency and accuracy of the plans and specifications is an important one.

If the contractor has undertaken to guaranty the sufficiency of the plans and methods adopted for the erection and completion of a work, there is no doubt of his liability under such a guaranty; but as such a guaranty is not usually exacted of the contractor, the cases in the books are for the most part those arising under contracts, from which the clause given above has been omitted. A review of those cases will show the propriety of adopting such a clause on work involving new materials, new methods, and new processes.

If the failure is due to defective work or defective materials furnished by the contractor, if he has failed to do what he has agreed, or has furnished unskilled workmen or weak or worthless materials, or has put them together in an unworkmanlike manner, if he has neglected to drive the bolt home, or to protect his work against floods and storms, the loss will be the contractor's own loss, and this will be so even though the company have had inspectors upon the work and it has been under the direction and supervision of their engineer, who through incompetency and dishonesty has estimated and allowed it each month.[1]* If the contractor has been negligent or unskillful in the performance of his work, he cannot take shelter behind the plea that the plan is defective and that the structure would not have stood if it had been rightly done.[2] Insufficiency of plans will not excuse a contractor from doing his work in a proper manner nor from furnishing good, sound, and appropriate materials,[3] nor from completing his contract.[4]†

[1] Drhew *v.* Altoona, 121 Pa. St. 414; School Trustees *v.* Bennett, 3 Dutch 515; *see also* Charlock *v.* Freel, 50 Hun 395 [1888].

[2] *Accord*, Trustees *v.* Bradfield, 30 Geo. 1; *girder failed because it was poor material; semble*, Spence *v.* Bd. of Com'rs, 117 Ind. 573 [1888]; Waul *v.* Hardie, 17 Tex. 553; Hillyard *v.* Crabtree, 11 Tex. 268.

[3] Loundsberry *v.* Eastwick, 3 Phila. 371 [1859].

[4] Hooper *v.* Webb, 27 Minn. 485; *but see* Lambert *v.* Fuller, 88 Ill. 260.

* *See also* Secs. 674–680, *infra*.

† *See* Sec. 238, *infra*.

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238. Does Owner or Contractor Warrant Sufficiency of Plans?—An English case decided in 1874–6 is frequently cited as authority for the statement that the company does not warrant, and therefore is not responsible for, the sufficiency of plans adopted by it, but that the contractor must satisfy himself of their practicability before he enters into his contract. The facts of this case, briefly stated, are as follows: The City of London being about to erect a bridge had its engineer prepare plans and specifications descriptive of the bridge and the manner of erecting it. Part of the plan adopted consisted of the use of caissons in the place of coffer-dams, which caissons on account of the strong currents in the river proved impracticable and had to be abandoned, so that the work done in attempting to use them was wholly lost, and the foundations had to be built in a different manner, causing great delay and extra expense. On the faith of the accuracy and sufficiency of the plans adopted by the city for the purposes intended, and without any independent inquiry on his part to ascertain whether or not the work could be done in the manner specified, the contractor made proposals and entered into a contract for the execution and completion of the work [bridge] according to the plans and specifications. The city had issued an advertisement, inviting bids for the work according to the specifications and plans, and had referred to the engineer for further particulars, and by the terms of the agreement the contractor was required to obey the direction of the engineer. After the contractor had completed the works he sued the city to recover for the extra expense and loss of time incurred in completing the works according to the alterations rendered necessary by the insufficiency of the plans and specifications, not on a *quantum meruit*, but on the ground of an implied warranty by the city that the work could be executed in the manner described in the original plans and specifications. It was held, and affirmed on appeal in 1876, that the contractor could not sustain an action for damages upon such a warranty; that the contract did not contain any express warranty to the effect that the plans and specifications were correct and practicable, and that none could be implied from the act of the city in advertising for bids and accepting the proposal, even if there was a want of skill and care on the part of the city engineer. The lord chancellor in delivering the opinion argued that the contractor was as able to judge of the practicability of the plans as was the city or its engineer, and that he should have had them tested by his own engineer. The appellate court held that if the contractor had any remedy under the circumstances it was upon a *quantum meruit*.[1] The lower court expressed an opinion that the contractor should have thrown up the contract when he found that the work was impracticable; that having gone on with the work under the altered conditions and without any new agreement he was estopped at that late day from making a claim for extra compensation.[2]

[1] Thorn *v* Mayor of London, 1 App. Cas. 120 [1876]; Hooper *v.* Webb. 27 Minn. 485.

[2] Thorn *v.* Mayor of London, L. R. 9 Ex. 163 [1874].

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The Albany Law Journal, in commenting upon the case at the time, said: "The case is unique in its character, and will doubtless form a precedent, the general rule being that where alterations are ordered to be made they are to be paid for as extras."[1]

The case was distinguished from others in a later New York decision,[2] on the ground that the contractor was by his contract bound absolutely and unconditionally to complete the bridge for a certain sum and in a certain time, and that having performed his contract he could not recover additional compensation on the theory that the city warranted the sufficiency of the plans.

The case is an important one and is quoted in the books. It should not be cited as authority for the statement that the contractor *is* responsible for the sufficiency of the plans he is using, or that the owner or architect *is not* responsible for the plans that they furnish. It is authority only for the statement that the owner by inviting proposals to do certain work according to certain plans and specifications does not warrant that the plans are correct or practicable, and in the light of other decisions it must be regarded as somewhat doubtful authority of that proposition.

239. Failure of Structure after Completion Due to Insufficient Plans.— In Wisconsin a different rule has been held. A state board of commissioners, under the authority of an act of legislature, had procured and adopted plans and specifications, and entered into a contract with contractors who were to furnish all the materials, and do all the work according to plans and specifications, and under the direction and to the entire satisfaction of the architect. The architect was authorized to vary from such plans, the value of such alterations to be added or deducted from the contract price, and any doubt as to the quality of the materials or workmanship or as to allowances for extras was to be determined and adjusted solely by the architect. Under this contract it was held that the state warranted the plans to be efficient and suitable, and that when a contractor had in good faith, according to the plans and specifications and under the direction of the architect, erected a large portion of the structure, and the materials and work had been accepted, it fell owing to defects and insufficiency of the plans, the state was liable to the contractor for the expense of restoring the portion of the structure which collapsed.[3]

It has been frequently held that if the contractor has built in strict accordance with the plans and specifications furnished by the owner and in

[1] Citing Aiken *v.* Blood, 12 Ala. 221; Dubois *v* D. & H C. Co., 4 Wend. 285; Hayward *v.* Leonard, 7 Pick. 181; Wheeden *v.* Fiske, 50 N. H 125; *and see also* Marsh *v.* Richards, 29 Mo. 99; De Boom *v.* Priestly, 1 Col. 206; McClelland *v.* Linder, 18 Ill., 58; McCormick *v.* Connolly, 2 Bay. 401; *and see* Sharpe *v.* San Paulo R. Co., L. R. 8 Ch. 597; Wade *v.* Haycock, 25 Pa. St. 382; and Scrivner *v.* Pask, 18 C. B. (N. S.) 785.

[2] Byron *v.* Mayor, 54 N Y. Super. Ct. 411 [1887].

[3] Bentley *v.* State (Wis.), 41 N. W. Rep. 388 [1889]. 73 Wis. 416; *and see* United States *v.* Behan, 110 U S. 338 [1884]; *but see* Hooper *v.* Webb, 27 Minn. 485.

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a workmanlike manner he is not liable for the failure of the structure by reason of defective plans,[1] or that the machine would not work when built.[2] It was so held when the walls of a building settled and cracked because the footing-stones were too small, the fault being with the specifications and plans and chargeable to the architect.[3] Defective specifications furnished by owner's engineer have been held to excuse delay on the part of contractor which delay was occasioned by such defects.[4] Likewise when an arch fell because it would not sustain the load imposed upon it, the contractor being bound to follow strictly the specifications and plans, which were so defective that it was impossible to construct a stable arch in accordance with them, the court held that by the terms of his contract he was *not* bound to build a safe and stable arch notwithstanding the defects in the plans and specifications; that it was enough to exonorate him from blame if the contractor showed that the plans and specifications which he was compelled to follow were defective in themselves;[5] that there was no covenant or warranty by the contractor that the arch when completed should be safe and fit for the purposes for which it was intended.[6] In this case the contractor was prevented from completing the structure by an act of the city, one of the parties, and the contractor was allowed to recover for only what he had actually done up to the time he was required to quit.[7]

In these cases it is well to consider the difficulty of proving that the failure of a structure is due entirely to inherent defects in the plans and specifications, and the greater difficulty of determining in many cases whether a failure is due to neglect on the part of the contractor or to defective plans. The English court in deciding that the owner does not warrant the sufficiency of the plans seems to have foreseen the opportunity that it would afford contractors to escape the consequences of unskillful work and inferior materials by pleading that the plans were defective and it was not therefore their fault. The court said: "If it is held that there is an implied warranty that the work *can* be done according to the plans and specifications the consequences would be most alarming. The consequences would go to every person who having employed an architect to prepare plans for a house afterwards enters into a contract to have it built according to those plans, and they might arise in any case in which work is invited to be done according to plans and specifications."[8]

240. Contracts for Completed Structures Distinguished from Agreements for Work and Materials.—The American courts have distinguished

[1] Beswick *v.* Platt (Pa.), 21 Atl. Rep. 806 [1891].

[2] Curwen *v.* Quill (Mass.), 43 N. E. Rep. 203

[3] McLeod *v.* Genius (Neb.), 47 N. W. Rep. 473 [1890]; *see also* Drew *v.* Altoona, 121 Pa. St. 414; *but see* School Trustees *v.* Bennett, 3 Dutch. 515.

[4] Malone *v.* Wood (Pa.), 18 Atl. Rep. 984.

[5] Byron *v.* The Mayor, 54 N. Y. Super. Ct. 411 [1887].

[6] Byron *v.* The Mayor, *supra.*

[7] Byron *v.* The Mayor, *supra.*

[8] Lord Chancellor in Thorn *v.* Mayor London, *supra*, p. 218.

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those cases in which the contractor is merely to build according to certain plans and specifications from those cases in which he is not only to build according to the plans and specifications, but is also to completely finish and deliver up a structure, ready for use as it were.[1] So where a building was to be built according to very detailed plans and specifications, and owing to the latent condition of the soil the foundations sunk, the court held that a stipulation in the contract by which the contractor undertook "to completely finish and fit for use and occupation" the buildings was a covenant by which he was bound.[2]

To the same effect is a recent case in which the contractor was to construct a well for a certain sum, according to specifications which called for the use in the work of a curb of a certain shape, to be made of timber and planking of a prescribed size and quantity. It was held that the contractor could not recover, in addition to the contract price, compensation for work and materials lost by the caving in of the well before completion, notwithstanding it was due to the inadequacy of the curb prescribed in the specifications.[3]

It is fairly well settled that when a contractor has undertaken to construct works in accordance with plans and specifications furnished by the owner, and he has faithfully executed the work according to such plans and specifications, and in a skillful and workmanlike manner, he is not liable if it fall, fail, or proves worthless.[4]

241. Contractor will be Held to His Guaranty of Sufficiency of Plans and Specifications—If the contractor is to build a structure or make a machine from plans and models furnished by the owner, and, after examining the plans and models he guarantees that the structure will answer its purpose or that the machine will work, he will not be relieved from his liability on the guaranty because the plans furnished him were defective, for he should have ascertained that fact before making the contract.[5] But a contract to erect a blast-furnace, and that all the work shall be "done in good and workmanlike manner, and of suitable material, and *each part* shall be adequate in design, strength, and capacity, and workmanship for the purposes intended, the work to be examined by the owner's superintendent bi-weekly, and finally accepted if to his satisfaction," was held not a

[1] Byron *v.* Mayor, 54 N. Y. Super. Ct. 411 [1887].

[2] Dermott *v.* Jones, 2 Wall. 1; *see also* School Trustees *v.* Bennett, 3 Dutcher, 515; *and see* Daegling *v.* Schwartz, 80 Ill. 320.

[3] Leavitt *v.* Dover (N. H.), 32 Atl. Rep. 156

[4] Byron *v.* Mayor, 54 N. Y. Super Ct. 411; Burke *v.* Dunbar, 128 Mass. 499; MacRitchie *v.* Lake View, 30 Ill. App. 393; Schwartz *v.* Saunders, 46 Ill. 18; Clark *v.* Pope, 70 Ill. 128; Loundsberry *v.* Eastwick, 3 Phila. (Pa.) 371; Wade *v.* Haycock, 25 Pa. St. 382; Graves *v.* Caruthers, Meigs (Tenn.) 58; Beswick *v.* Platt, 140 Pa. St. 28; Dargling *v.* Gilmore, 49 Ill. 248; Rohrman *v.* Steese, 9 Phila. 185 *owner interfered and caused defects. Oother cases cited supra et infra.*

[5] Giles *v.* San Antonio F. Co. (Tex.), 24 S. W. Rep. 546.

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guaranty that the *plant as a whole* should be adequate in design, strength, capacity, and workmanship for the purpose intended.

Under a contract with a city to construct a newly-designed apparatus for filtering water, to stand certain tests, the risk that the apparatus will stand the tests and demands made upon it is upon the contractor.[1]

A guarantee clause is not to be construed so as to make a contractor liable for the failure of work to remain in good repair when the plan or design was defective, and the work was done in certain respects according to the express directions of the supervising engineer.[2]

242. Contract to do Work according to Plans and Specifications Implies an Understanding of Them.—A contract to erect a structure after certain plans and specifications implies an understanding of them on the part of the contractor; and the law will not allow him to escape liability on the ground that he exercised ordinary care and skill to understand and carry them out, but that he failed to comprehend them.[3] He should apply to the engineer or architect to explain the plans and for necessary directions with regard thereto, for if he relies upon his own judgment and makes a mistake he must bear the consequences. Therefore when contractors departed from the working plans, which are a part of their contract, without the consent of the owner, or of his engineer or architect properly authorized, they become guarantors of the strength and safety of the structure, for an express contract admits of no departure from its terms unless by consent of the parties.[4] If, however, material deviations from the plans are made with consent of the owner, the contractor is under no responsibility for its subsequent destruction, whether caused by its own inherent weakness, due to the mode of construction, or from the violence of storms. The structure in this case had been occupied, and to all appearances accepted, until it was blown down.[5]

A contract to complete unfinished work according to the plans and specifications adopted under a prior contract with another contractor does not put the second contractor in the shoes of the former. He is neither responsible for the sufficiency of the plans nor for the work done before he took the job.[6] Likewise a contract to *finish* a house does not bind the builder to remedy defects in its foundations.[7] A post contractor under a clause of his contract that as the building progresses he will protect the finished work from injury, is not obliged to protect the work done by the first contractor

[1] Sheffield & B. C. I. & Ry. Co. *v.* Gordon, 14 Sup. Ct. Rep. 343.

[2] Shoenberger *v.* City of Elgin (Ill. Sup.) 45 N. E. Rep. 434, *affirming* 59 Ill. App. 384.

[3] MacRitchie *v.* Lake View, 30 Ill. App. 393; *and see* MacKnight F. Stone Co. *v.* New York (Sup.), 43 N. Y. Supp. 139.

[4] *See* Waul *v.* Hardie, 17 Tex. 553; Sherman *v.* Bates, 15 Neb. 18; Smith *v.* Bristol, 33 Iowa 24.

[5] Clark *v.* Pope *et al.*, 70 Ill. 129 [1873]; *and see* Ellis *v.* Hamlen, 3 Taunt. 52.

[6] Clark *v.* Pope, *supra*.

[7] Philadelphia Hyd. Wks. *v.* Schenck, 86 Pa. St. 334 [1876].

[8] Banks *v.* Moors, 120 Mass. 459; *accord*, Seymour *v.* Long Dock Co., 5 C. E. Gr. (N. J.) 396.

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from injury from frost between the time the contract was made and when the architect permitted him to commence the work.[1]

243. Insufficiency of Plans—Liability to Third Parties Injured.—If defective plans and specifications have been adopted by the owner and injury to adjoining property-owners or to strangers results by their use, and not in consequence of poor materials or workmanship furnished by the contractor, the owner is liable for the injuries resulting.[2] It was so held when specifications required that a new building should be anchored to an old one and that a girder should rest upon the same party wall, which fell in consequence of the extra loading.[3] The court held that there was a duty imposed upon the owner to exercise all reasonable care and caution in providing suitable plans and specifications.[4] The contractor has been held not to be liable to third persons for injuries caused by the falling of a structure by reason of defective plans furnished by owner's architect unless he had knowledge that the plans were defective or insufficient, and the structure therefore unsafe.[5] The *architect*, however, is liable to his employer for damages sustained from defects in the architect's plans, and he may have a counter-claim against the architect when sued for the plans and services as superintendent.[6] *

244. Injuries Resulting from Negligence of Both Parties.—If injury result from the negligence of the contractor as well as from the use of defective plans, both the owner and contractor are liable, and it seems that prosecuting the work under the direction and control of an architect is equivalent to working according to specifications adopted.[7] † If it is impossible to determine what proportion each contributed to the injury, either party is, it seems, responsible for the whole of the damage resulting, and this was so held although the act of one alone might not have caused the entire injury, and even though without fault on his part the same damages would have resulted from the act of the other.[8] If the plans and specifications are in themselves sufficient to secure a safe construction, but the work is insufficiently done by independent contractors, then the latter are liable.[9] If

[1] Preston *v.* Syracuse, 92 Hun 301.

[2] Boswell *v.* Laird, 8 Cal. 469 [1858].

[3] Lancaster *v.* Conn. Mut. L. Ins. Co., 92 Mo 460; s. c., 5 S. W. Rep. 23 [1887]; Wilkinson *v.* Detroit Steel & Spng Wks., 73 Mich. 405; Giles *v.* Diamond State Iron Co. (Del.), 8 Atl. Rep 368 [1887]; *and see* Lockwood *v.* New York, 2 Hilt. (N. Y.) 66; Corbin *v.* American Mills Co., 27 Conn. 274; Brown *v.* Acrington Cotton Co., 8 H. & C. 511; Goldschmid *v.* New York (Sup.), 43 N. Y. Supp. 447.

[4] *Citing also* Horner *v.* Nicholson, 56 Mo. 220; Morgan *v.* Bowman 22 Mo 538.

[5] Daegling *v.* Gilmore, 49 Ill. 248 [1868]; Lockwood *v.* New York, 2 Hilt. (N. Y.) 66; *but see* De Baker *v.* Southern Cal. Ry. Co. (Cal.), 39 Pac. Rep. 610; Lottman *v.* Barnett, 62 Mo. 159 Wegner *v.* Penn'a Ry. Co., 55 Pa. St 460.

[6] Niver *v.* Nash (Wash.), 35 Pac. Rep. 380.

[7] Camp *v.* Church Wardens, 7 La. Ann. 322; *see also* Faren *v* Sellers (La.), 3 So. Rep 363 [1888].

[8] Slater *v.* Mercereau. 64 N. Y. 138 [1876]; Newman *v.* Fowler, 8 Vr. (N. J.) 89.

[9] Lancaster *v.* Conn. Mut. Life Ins. Co. (Mo.), 36 Alb. L. J. 176; *see* Ryder *v.* Kinsey (Minn.), 64 N. W. Rep. 94, *veneer wall not anchored to main wall.*

* *See* Secs. 839–842, *infra.*

† *See* Sec. 641, *infra.*

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the owner has employed competent architects and superintendents to erect a structure, he is not liable to a workman for injuries from an accident during its erection if the accident is not due to inherent weakness of the materials furnished,[1] or to violation of building laws with knowledge thereof.[2]

245. Liability of the State, County, or Municipal Corporations for the Adoption of Insufficient Plans and Specifications.—The question of liability to third persons for injuries resulting from defective plans is one that arises most frequently in city administration. Sewers, drains, and culverts prove inadequate, reservoirs burst, and bridges fail, and not infrequently because the size or capacity is too small or the plan is defective.

Of public organizations, such as cities,[3] towns, counties,[4] and the state, the law requires that reasonable care, judgment, and skill shall be exercised in the selection of a plan and in the construction of works according to that plan.

246. Public Officers are Required to Secure the Services of Engineers and Architects on Questions of Design and Construction.—It requires that the council, selectmen, board of supervisors, or owner[5] shall exercise reasonable care in securing the services of skilled engineers and architects to prepare plans and specifications for works, and that they shall use ordinary care in seeing to it that such engineer or architect employs his skill in the performance of the duties required of him.[6] It is negligence for such officers of a city to act upon their own judgment in matters that require the knowledge and skill of an expert, no matter how much they deliberate; and it has been held that such questions as the size of a sewer[7] or a culvert,[8] or the strength of a bridge,[9] the plan of a sidewalk,[10] and similar questions in engineering and architecture, were questions that required the services of an expert in those professions. When a skillful engineer has been selected, and he, acting in good faith, adopts a plan that proves insufficient for the purposes intended, then no negligence attaches to the city, town, or county, although there may have been an oversight or an error in judgment, and it is not liable for injuries that result.[11]

[1] Walton *v.* Bryn Mawr H. Co. (Pa.), 28 Atl. Rep. 438; *but see* Campbell *v.* Lunsford (Ala.), 3 So. Rep. 522 [1888], *contra*, where the owner was held liable for injuries resulting from the negligent performance of the work, although the work was under the direction and supervision of an architect.

[2] Pitcher *v.* Lennon (Sup.), 38 N. Y. Supp. 1007; *and see* Bradfield *v.* Trustees, 30 Geo. 1.

[3] Terre Haute *v.* Hudnut, 13 N. E. Rep. 686; Van Pelt *v* Davenport, 42 Iowa 308.

[4] Ferguson *v.* Davis Co., 57 Iowa 601 [1881].

[5] Giles *v.* Diamond State Iron Co. (Del.), 8 Atl. Rep. 368 [1887].

[6] Terre Haute *v.* Hudnut (Ind.), 13 N. E. Rep. 686 [1887].

[7] Terre Haute *v.* Hudnut, *supra*.

[8] Van Pelt *v.* Dave port, *supra;* Los Angeles C. A. Ass'n *v.* Los Angeles (Cal.), 73 Pac. Rep 375.

[9] Ferguson *v.* Davis Co., *supra*.

[10] Urquhart *v.* Ogdensburg, 91 N. Y. 67 [1883].

[11] Terre Haute *v.* Hudnut, *supra;* Van Pelt *v.* Davenport, 42 Iowa 308 [1875]; Ferguson *v.* Davis Co., 57 Iowa 601 [1881]; Diamond Match Co *v.* New Haven (Conn.), 13 Atl. Rep. 409 [1888]; *see also* Mansfield C. & C Co *v.* McEnery, 91 Pa. St. 185 [1879]; H. & T. C. Ry. Co. *v* Fowler, 56 Tex. 452 [1882], *and cases cited; many cases collected* 15 Amer. & Eng Ency.

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A city, town, or county must act through the agency of others, and to hold it responsible for the consequences of the mistakes of a competent employee after the honest exercise of his best judgment "would require it at its peril to secure what is impossible, absolute perfection in its servants and agents."[1] What is required of the city is that it shall not be negligent in the exercise of reasonable care and skill in the exercise of its duties, and negligence has been defined as the failure to exercise ordinary care. Ordinary care requires that a person or persons who represent an organization should not, unless proficient, undertake those things which require a special knowledge and training. They cannot carelessly and negligently adopt an insufficient plan of a structure and escape liability for damages resulting from the insufficiency of such plan.[2] To relieve the county, town, or city from such liability it must employ a competent engineer to prepare a plan of the works to be undertaken; and if he has recommended a plan as sufficient for the purpose, and the authorities vested with the power of selection adopt the same plan under the belief that it is strong and safe for the purposes for which it was designed, then they have exercised proper care and skill with reference to the work, and the city, town, or county is not liable for damages resulting from the use of the plan.[3]

247. Selection of Plans for Public Work Sometimes Held a Judicial Act. —There are cases to the effect that the adoption and approval of the plan of a public work is a judicial act for which the city is not responsible, and that negligence is not to be predicated upon the plan itself.[4] The bulk of the authority is to the effect that it is negligence to adopt a plan of a public improvement without taking competent professional advice with regard to it.[5] These latter decisions are based upon the ground that an undertaking to exercise judgment without skill in a matter which require skill, is not a mere error of judgment, but it is *negligence*,[6] which is sound sense.

Law 1149; Magarity *v.* Wilmington (Del), 5 Houston 530 [1879].

[1] Van Pelt *v* Davenport, 42 Iowa 308.

[2] Ferguson *v.* Davis Co., 57 Iowa 601 [1881]

[3] Ferguson *v.* Davis, *supra*; Diamond Match Co. *v* New Haven (Conn.), 13 Atl. Rep. 409 [1888]; De Baker *v.* Southern Cal Ry. Co. (Cal.), 39 Pac. Rep. 610; *and see* Railroad Co. *v.* Halloran, 53 Tex. 46; 2 Thompson on Negligence 985, 1008; Pierce on Railroads 370 and 379, *citing numerous authorities in notes;* Shearman & Redfield on Neg., § 445.

[4] Toolan *v* Lansing, 37 Mich. 152, 38 Mich. 315; Urquhart *v.* Ogdensburg, 91 N. Y., 67 [1883]; Collins *v.* Philadelphia, 93 Pa. St. 272; Detroit *v.* Beekman, 34 Mich. 125 [1876]; Johnson *v.* Dist. of Col. (U. S. Sup. Ct.) 22 Reptr. 7 [1886]; Foster *v* St. Louis, 71 Mo. 157 [1879].

These cases maintain that the elections and adoption of a general plan or system of works is the exercise of judgment and discretion which is not reviewable by a court, and that the city is not liable for damages arising from a defective plan adopted, but only for damages resulting from negligent execution of work in compliance with such plan. The construction and repair of public works are simply ministerial duties, for the negligent or improper performance of which the city is liable.

[5] 15 Amer. & Eng. Ency. Law 1149, *where many cases are cited.* A surveyor who is not a civil engineer is not competent to recommend a plan for a culvert. Rochester W. L Co. *v.* Rochester, 3 N. Y. 463 [1850]; *but see* Mills *v.* Brooklyn, 32 N. Y. 499; *and* Johnston *v* Dist. of Colum. (U. S Sup. Ct.), 22 Reptr. 7 [1886]; *which cases criticise* Rochester White Ld. Co. *v.* Rochester, 3 N. Y. 463.

[6] Terre Haute *v.* Hudnut, 13 N. E. Rep. 686.

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248. Liability of City, Town, County, or State for want of Care or Skill of Public Officer.—The city, town, county, or state are not responsible for the mistake or the want of care or skill of the city, town, or county surveyor, "whether appointed and removable by it or elected by the people, when he performs duties (though the performance thereof may be regulated by ordinance) for or between individuals, as, for example, fixing the boundary between their lots."[1] *

A city has been held liable for injuries caused by the fall of a bridge, owing to the negligence and want of skill of the city engineer.[2]

249. Provision that Engineer Shall Have the Custody of Plans.

Clause: "It is hereby mutually agreed that until the contract shall have been completely performed, the architect shall have the custody of the plans, elevations, sections, specifications, and schedule of prices, and of this contract, on behalf of all parties concerned; and when the contract shall have been performed he shall deliver the same to the owner or company."

250. Provision that Specifications and Drawings Shall be Kept at Works.

Clause: "The engineer or architect for the time being shall furnish copies of the specifications and contract drawings for the use of the contractor, and the detail drawings when provided by the architect shall be kept on the works, where the contractor may copy or refer to them, and they shall not be removed therefrom.

"Complete copies of the drawings and specifications, signed by the architect, shall be furnished by him to the contractor for his own use, and the same or copies thereof shall be kept constantly on the works by the contractor, by which instructions can be given by the architect."

251. Provision that Contractor Shall Have Custody of Plans.

Clause: "The contractors shall preserve and keep all plans, drawings, writings, papers, specifications, and documents which may have been delivered to them, or for their use; and the engineer and his assistants and the clerk of works shall have full access thereto, at all times, and for all purposes, and the same shall be kept at or near the site of the works, and the said contractor shall return said plans, drawings, etc., to the custody of the engineer at the time of the delivery up of the works to the owner or city, and before they receive the installments payable thereon."

The latter part of this stipulation is unsatisfactory to a contractor, as it takes evidence away from contractor, unless he goes to the expense of making copies of all plans and drawings. Nowadays specification and plans are usually printed or duplicated by photographic processes, so that contractor is provided with a copy which he is permitted to keep.

[1] 2 Dillon's Munic. Corp'ns. (3d ed.), § 978, *and cases cited;* Aldcorn *v.* Philadelphia, 44 Pa. St. 348 [1863]; *see also* McCarty *v.* Bauer, 3 Kans. 237 [1865].

[2] Dayton *v.* Pease, 4 Ohio St. 80 [1854]; *and see* Sayler *v.* Harrisburg, 87 Pa. St. 216 [1878]; 2 Dillon's Munic. Corp'ns (3d ed.), § 978 [1881]; Rochester W. Ld. Co *v.* Rochester, 3 Comst. (N. Y.) 463 [1850]; Kobs *v.* Minneapolis, 22 Minn. 159 [1875].

* *See also* Secs. 36, 179, *supra*, and 850–859, *infra*.

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252. Property Rights in Plans as between Engineer or Architect and Owner.*

253. Provision that Work Shall be Done in a Workmanlike Manner. †

Clause: "The parties hereby further agree that all materials used throughout the herein-described works shall be the best of their respective kinds, and new and unused when put into the work; and that the whole shall be done throughout in the best, most workmanlike, and substantial manner, and everything done and furnished necessary to complete the work according to the particulars contained in or implied by the specifications, plans, and bill of quantities herein referred to, and according to such other additional drawings, explanations, and directions as the Engineer may give or approve."

254. Another Clause:

"The works under this contract, and every addition, alteration, or deviation directed to be executed under this contract, or that may be necessary or proper to the complete and perfect performance thereof, shall be executed by the contractors in the best and most substantial and workmanlike manner, with materials of the best and most approved quality of their respective kinds, according to the specification, drawings, and the bill of quantities herein referred to, or to such other additional particulars, explanations, and drawings as may be given or approved by the engineer, and to his full and entire satisfaction, according to the instructions and directions from time to time given him."

255. Another Clause:

"Every part of the work shall be executed as directed by the specifications, in the most sound, workmanlike, and substantial manner, and all materials used in the construction of the building shall be new and the best of their respective kinds, except where otherwise distinctly directed or allowed by the specifications."

256. An Undertaking to Construct a Piece of Works Is an Undertaking to Do it Well and in a Workmanlike Manner.—These clauses are frequently inserted in a construction contract, their purpose being to avoid any question as to the quality of the work required by the terms of the contract, or any claims on the part of the contractor that it was mutually understood that the work and materials were to be of an inferior class. In the absence of any express agreement as to the manner of constructing a thing the law requires it to be made or built in a workmanlike manner with good materials, and that it shall be suitable for the purpose intended.[1]

If, however, the contractor follow the directions of the owner in making for him an experimental article, from a pattern furnished, he cannot be denied payment because the article is not as fit for the uses contemplated as the pattern furnished.[2]

[1] Gill Man'fg Co. *v.* Hurd, 18 Fed. Rep. 673, [1883]; Lucas *v.* Goodwin, 3 Bing. N. Cas. 737; Pearce *v.* Tucker, 3 F. & F. 136; Wade *v* Haycock, 25 Pa. St. 382; Smith & Nelson *v.* Bristol, 33 Iowa 24.

[2] Fish *v.* Chicago Stamping Co., 58 Ill.

* *See* Sec. 815, *infra*, in regard to ownership of plans, drawings, and designs, and p'ans consigned to common carrier which were delayed or lost; *and* Secs. 816–822, *infra*, in regard to incorporeal property rights in original designs.

† *See* Secs. 840 and 835, *infra*.

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Any workman who contracts to do a piece of work thereby impliedly warrants that he is reasonably skillful and will bring sufficient skill and dexterity to its performance to complete it in a just and workmanlike manner.[1] Anybody who undertakes to construct a piece of work impliedly warrants that he is reasonably skillful in his profession, trade, or calling, and that the materials he employs shall be suitable for the purposes for which they are used.[2] A builder may be held liable for the construction of a chimney that is not capable of carrying off the smoke for which it was designed.[3] The fact that the price to be paid is grossly inadequate does not change the rule,[4] nor does the fact that the owner has seen the work done and has benefited thereby enable the contractor to recover the price agreed upon.[5]

The rule does not seem to be applied so strictly when one contracts to furnish materials, for it has been held that where the owner had a chance, before making a purchase, to inspect the lumber bought, that there was no implied warranty on plaintiff's part that it was merchantable for the purpose intended for it by defendant.[6]*

A mechanic who undertakes to do a job in a workmanlike manner, as well as any other mechanic could do, cannot recover for his labor if the thing when completed does not answer the end for which it was designed.[7]

257. An Agreement to Perform Work in a Workmanlike Manner Must be Faithfully Executed or No Recovery Can be Had.—If a contractor has expressly agreed to execute a job [construction of box-cars] in a plain and workmanlike manner, and to the satisfaction of the engineer, or in a manner to be determined by the engineer, in order to recover for what he has done he is bound to show by such person appointed by the parties for that purpose, that so far as he has progressed he has executed the work in a plain and workmanlike manner as required.[8]

In an action to recover the price of work and labor to be done in a faithful and workmanlike manner, the owner may show that it was not so done

App. 663; City of Elgin *v.* Shoenberger, 59 Ill. App. 384.

[1] Leflore *v.* Justice, 9 Miss. 381 [1843]; *semble* Dale *v.* See, 51 N. J. Law 378 [1889]; Somerby *v.* Tappan, 1 Wright (Ohio) 570 [1834]; Harmer *v.* Cornelius, 5 C. B. (N. S.) 236 [1858].

[2] Springfield C. A. *v.* Smith, 32 Ill. 252 [1863]; *accord* Johnson *v.* Freeman (Pa.), 28 Atl. Rep 780; Van Hovenburgh *v.* Lindsey, 1 Alb. L. J. 122

[3] Somerby *v.* Tappan, *supra*. *A drain*, Hattin *v.* Chase, 88 Me. 237; *see also* Fuller *v.* Brown (N. H.), 34 Atl. Rep. 463.

[4] Smith *v.* Bristol, 33 Iowa 24; Williams *v.* Keech, 4 Hill (N. Y.) 168.

[5] Smith *v.* Bristol, *supra*.

[6] T. B. Scott L. Co. *v* Hafner-Lothman Mfg. Co. (Wis.), 65 N. W. Rep. 513; *semble* Omaha C. C. & L. Co. *v.* Fay (Neb.), 55 N. W. Rep. 211; *and see* Wis. Red Brick Co. *v.* Hood (Minn.), 69 N. W. Rep. 1091; Collins *v* Money, 4 Miss. 11; McLane *v* De Leyer, 56 N. Y. 619.

[7] Leflore *v.* Justice, *supra;* Wade *v* Haycock, 25 Pa. St. 382; Springfield C. A. *v.* Smith, 32 Ill. 252 [1863]; I. B & W. Ry. Co *v.* Adamson, 114 Ind. 282 [1887]; Kellog Bridge Co. *v.* Hamilton, 110 U. S. 108; Florida R. Co. *v* Smith, 21 Wall (U. S.) 255; *and see* Hunt *v.* Penna. R. Co., 51 Pa. St. 475.

[8] Ennis *v.* O'Connor (Md.), 3 H. & J., 163 [1810].

* *See* Sec. 277*a*, *infra*.

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to reduce the amount of the contractor's recovery.[1] He is entitled to damages equal to the difference between the value of the structure as they were made and as they should have been made.[2]

If a person be employed with the understanding that the work is to be done in a workmanlike manner and the work be not done so, the contract may be terminated without regard to the intention of the contractor.[3] The fact that the work is a fair average job for the class of structure will not excuse the contractor from furnishing what he agreed to furnish.[4]*

An agreement to erect a structure in a workmanlike manner has been held to require that it be constructed so that when used by persons of ordinary prudence in the usual manner, it would not be liable to destruction, as a furnace by fire.[5] It has been held wrong for a court to instruct a jury that an undertaking to do a plain, substantial, and workmanlike job was not an undertaking to do a perfect job, for the reason that it took from the jury a question of fact which it was their province to determine and not that of the court. It was further held that an agreement to do a thing in a plain, substantial, and workmanlike manner would imply that it should be perfectly done for the character of the job contemplated, and that an imperfect execution of the work would not be a performance of the contract.[6] Such an implication cannot be overcome by a custom or usage which allows the use of inferior materials and the unskillful execution of the work. It has been held an error to give an instruction to a jury, that "if a man, in a given section of country contracts to build a house in a workmanlike manner, that means a house built in a workmanlike manner, construed according to the customs and usages of the section of country in which the contract is made," for a custom that justifies the erection of a house with the floors not level, the windows not vertical nor at equal heights from the floor, intended to be on the same level, that bricks in the outer wall had to be removed, and that one room had so many holes in the wall that daylight could be seen through it in many places was unreasonable.[7]

When a contractor agrees to erect a building in a certain manner he must comply with his agreements, and no plea of lack of skill of himself or any of his workmen or subcontractors will constitute a defense for a failure to

[1] Grant *v.* Button (N. Y.), 14 John's Rep. 377 [1817]; Hellman *v.* Schneider, 75 Ill. 422 [1874].

[2] Central Trust Co. *v.* Arctic Ice Co. (Md.), 26 Atl. Rep. 493; *and see* Wheaton *v.* Lund (Minn.), 63 N. W. Rep. 251; *and* Van Buskirk *v.* Murden, 22 Ill. 446; Grounsell *v.* Lamb, 1 M. & W. 352; Farnsworth *v* Garrard 1 Campb. 38; Trustees *v.* Bradfield, 30 Geo. 1.

[3] Feinberg *v.* Weiher (Com. Pl.), 19 N. Y. Supp. 215.

[4] Golden Gate Lumber Co. *v.* Sahrbacher (Cal.), 38 Pac. Rep. 635.

[5] Uhlig *v.* Barnum (Neb.), 61 N. W. Rep. 749.

[6] Smith *v.* Clark, 58 Mo. 145 [1874]. When a petition alleges that work was to be of first-class workmanship and material, evidence that it was to be of the same kind as was furnished to another company is inadmissible. Madison *v.* Danville Min. Co., 2 Mo. App. Rep'r. 1234.

[7] Anderson *v.* Whittaker (Ala.), 11 So Rep. 919; *but see* Graham *v.* Trimmer, 6 Kan. 231.

* *See* Secs. 467-8 and 701, *infra*.

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comply with the contract.[1] Incapacity of the contractor, arising from the ignorance and dissipation of himself and his workmen to do the work properly will justify the owner in terminating the contract.[2] Work to be paid for when "completed and found to be in good working order" was held to require more than that the work should be in good working order at the moment of its completion.[3] A contract to make a cellar "water-tight" is not carried out where after the work is completed water leaks in and the contractor puts under the floor an automatic instrument which, while at work, keeps the cellar dry.[4]

Subcontractors are not liable to the owner in an action for negligent and unskillful doing of their work by which the owner is injured.[5]

258. Provision that Work shall be Performed and Completed According to the True Spirit, Meaning, and Intent of the Plans and Specifications.

> Clause: "And the work shall be performed and completed according to the true spirit, meaning, and intent thereof and to the full satisfaction of the engineer or architect and to the satisfaction of the owner."

The first part of this stipulation has been regarded as an express mention of an incidental power, inserted from motives of extreme caution and necessarily incident to the authority usually given to the engineer or architect to determine the proper construction and meaning of the plans and specifications, or even of the contract itself, and that his determination should be final and conclusive. Such an express provision has been regarded as adding nothing to the force of a contract in that particular in the presence of such stipulations.[6]*

259. Work to be Completed to the Satisfaction of the Owner.—The addition of the last stipulation, that the work shall "be to the satisfaction of the owner," seems to be wholly unnecessary and without force. It has been held to have no reference to the quality of the workmanship and materials; that in the absence of fraud, mistake, or unfair dealing on the part of the engineer or architect, that his acceptance of the work as satisfactory binds the owner.[7] It has been regarded as mere surplusage, the architect being probably for this purpose the agent of the owner or the arbitrator between him and the contractor.[8] Such a condition makes the payment dependent upon the will and pleasure of the owner and is repugnant to the debt itself. It will either destroy the debt or the condition will be void.[9]

[1] Sh arman *v.* Bates, 15 Neb. 18; *and see* Pearce *v.* Tucker, 3 F. & F. 136.
[2] Rector *v.* McDermott (Ark.), 18 S. W. Rep. 334 [1890].
[3] Edison Elec Co. *v.* Can Pac. Nav. Co. (Wash.), 36 Pac. Rep. 260.
[4] MacKnight F. Stone Co *v.* New York (Sup.), 43 N. Y. Supp. 139.
[5] Bissell *v.* Roden, 34 Mo. 63 [1863].
[6] Hudson *v.* McCartney, 33 Wis. 331.
[7] Tetz *v.* Butterfield, 54 Wis. 242 [1882].
[8] Sanders *v.* Hutchinson, 26 Ill. 633 [1887].
[9] *But see* Gray *v.* Central R. Co., 11 Hun (N. Y.) 70, *contra.*

* *See* Chaps. XII and XIII, Secs 385–417, *infra.*

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Such provisions are frequently inserted in construction contracts, and they may either be declared void or construed to mean to the reasonable satisfaction of the owner.[1] Whether the work has been done to his reasonable satisfaction would then become a question for the jury.*

[1] Langdell's Summary of Contracts 1005.

* *See* Chap. XII, Secs. 335–347, *and* Chap. XIII, Secs. 406–411, *infra*.

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CHAPTER X.

THE OWNERSHIP, DISPOSAL, INSPECTION, ACCEPTANCE, OR REJECTION OF MATERIALS OF CONSTRUCTION.

PROVISIONS THAT CONTRACTOR SHALL REPLACE MATERIALS REJECTED; THAT HE SHALL PROVIDE FACILITIES FOR WEIGHING, TESTING, AND INSPECTING MATERIALS; THAT HE SHALL FURNISH OFFICES, FOREMEN, AND ATTENDANTS; THAT HE SHALL NOT ASSIGN OR SUBLET WORK; THAT LINES AND LEVELS GIVEN BY ENGINEER SHALL BE PRESERVED; AND DEFINING AND LIMITING HIS RIGHTS TO POSSESSION OF THE WORKS.

260. Provision that Contractor Shall Provide and Protect Materials and Appliances.

Clause: "The contractor or builder shall, at his own proper cost and charge, provide and protect all manner of materials and labor, and everything of every sort which may be necessary for the proper execution of work included in this contract, according to the true intent and meaning of the drawings and specifications, whether the same may or may not be particularly described therein, provided the same are reasonably and obviously to be inferred therefrom."*

261. Provision that Owner Shall Provide Materials.

Clause: "The said works shall be erected wholly with materials provided for that purpose by the owner. The builder shall be accountable for all materials which shall be delivered at the place where the same are intended to be used, and he shall be charged with the respective quantities and articles so delivered, and credited with so much thereof as shall be actually used upon and about said buildings, together with a reasonable allowance for waste in using the same; and in case there shall be any balance or deficiency in materials, then the builder shall be accountable for and charged with all such balance or deficiency, at and after the rates and prices respectively at which the said materials were purchased."

262. Ownership and Use of Old Materials—Provision that Materials Shall Remain Property of Owner.

Clause: "The contractor shall reserve, set aside, pile up, and properly store for the use of the company or owner, free of cost, all bricks, gravel, sand, surplus earth, or other materials found on the line about or in the works, and not required for filling in or other purposes connected therewith, and to remove and deposit the same where directed by the engineer, within a distance not exceeding half a mile, and no materials

* *See* Secs 208-212, *supra*, and 671-680, *infra*.

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shall be otherwise disposed of, or carted off the works, without the order in writing of the engineer, the same materials being and remaining the property of the company or owner."

263. Provision that Contractor may Take Materials at a Valuation.

Clause: "The contractor shall take down and remove all structures, walls, trees, timber, ... now upon the grounds to be occupied or required for the works, but he shall use all such materials arising from the pulling down of the old structures or works on the same grounds as shall be fit and proper to be used therein, and as shall be approved by the engineer or architect [for the time being]; and all such old materials shall be charged to said builder, and shall be paid for by him at a valuation to be made by said engineer or architect [or at a fair valuation to be ascertained in the usual manner]."

264. Provision that Materials Shall Become the Property of Contractor.

Clause: "It is also agreed and understood that the whole of the materials which at present form a portion of the old structure of the..... and of the temporary....., so far as concerns those portions which are the property of the corporation or owner, and which are herein described as being removed, shall at the time stated for their removal become the property of the contractor, and he shall, immediately after their demolition, remove them from the site of the contract works, unless otherwise ordered by the engineer."

265. Property in Materials is Determined by the Intention of the Parties.—There is a popular belief among contractors and builders that when they have undertaken works by contract which require the razing, demolition, and removal of old structures, or the removal of materials from the ground, or old ruins, that those structures or materials belong to the contractor or builder. The source of this belief is probably that it is to their interests and profit to make such claim, and their chief argument is that nothing being said or agreed to the contrary, it will be taken for granted that the contractor was to have the materials. The ownership of materials under such a contract is one of intention, to be gathered from the contract as a whole, and from the customs and usages in vogue in the locality. It has been held that a contract to excavate for the erection of a building does not imply a transfer to the contractor of the title to materials of value removed in the performance of the contract.[1]

If nothing whatever is contained in the contract as to the old structures standing on the land, and no reference is made therein to the materials of such structures, there is some authority that they become the property of the contractor when he has removed them;[2] but it must be a matter of intention gathered from the contract, and the circumstances and conduct of the

[1] Jones *v.* Wick (Com. Pl. N. Y.). 30 N. Y. Supp. 924; *but see* Cooper *v.* Kane, 19 Wend. (N. Y.) 386.

[2] Morgan *v.* Stevens, 6 Abb. N. Cas. (N. Y.) 356.

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parties. The property in old materials has been held not to pass to a tenant who has made alterations in the building he occupies.[1]

To remove any doubts as to the intention of the parties it is good practice to insert in the contract saving clauses similar to those which precede. Such a stipulation enables a contractor to estimate the value of the materials which the job will certainly supply, and if by the contract he be permitted to use them in the new structure he can reduce his price for the work by so much as they are reasonably worth.[2]

266. Ownership of Materials in Public Way.—In connection with work upon streets and public ways the question frequently arises as to who owns the materials of the street or way, and what disposition may be made of them as regards their use, sale, and appropriation. When the fee of a street is in the abutting owners, the public have only a right of way over it, with the powers and privileges incident to that right. The owner of the fee retains for all purposes, not interfering with that right of way, his exclusive right in all mines, quarries, springs of water, timber, and earth for all purposes. Every case must turn upon what is incident to the construction and maintenance of the right of way.[3] The value of stone taken from the limits of a highway has been recovered;[4] and a city that contracted for and authorized the quarrying and disposal of stone from a ledge in a street and below the grade thereof, for unauthorized purposes, has been held liable to the owner of the soil for the value of the stone as it lay in the ledge.[5]

As before stated, the purposes authorized are those incident to the construction, maintenance, and proper use of a public street. It has, therefore, been held that the authorities of a city or town can take [remove] the earth and soil of a road so far as its removal is necessary to the proper construction and repair of the street.[6] A village incorporated by act of legislature with powers to keep all its streets and alleys in repair, and make such ordinances in relation thereto as may be necessary and expedient, may make ordinances imposing a penalty upon persons removing soil from its streets. Owners of the fee of streets were held to have no right to remove, or to authorize the removal, of gravel or dirt contrary to such an ordinance, without being liable to the penalty.[7] When it was necessary to excavate gravel in order to bring the street down to grade it has been held that the gravel might be removed to other parts of the street or road to fill up to grade;[8] but only as the process of construction and repair of the street required.[9]

[1] Agate *v.* Lowenbeim, 57 N. Y. 604.
[2] *See* Bonnett *v.* Glattfeldt, 120 Ill. 168.
[3] Jackson *v.* Hathaway, 15 Johns. 452; 9 Am. & Eng. Ency. Law 875; *and see* 3 So. Rep. 23 [1888].
[4] Higgins *v.* Reynolds, 31 N. Y. 156.
[5] Valiski *v.* City of Minneapolis (Minn.), 41 N. W. Rep. 1050 [1889]; *and see* Becker *v.* Philadelphia (Pa.), 16 Atl. Rep. 625.
[6] Robert *v.* Sadler (N. Y.), 10 N. E. Rep. 428 [1887].
[7] Palatine *v.* Krueger (Ill.), 12 N. E. Rep. 75 [1887]; *reversing* Krüger *v.* Town of Palestine, 20 Bradw. 420 [1885]
[8] Niagara Falls Susp. Bdge. *v.* Bachman, 4 Lansing 423; *and see* Anderson *v.* Bement (Ind.), 41 N. E. Rep. 547; *accord*, Bundy *v.* Catto, 61 Ill. App. 209.
[9] Rich *v.* City of Minneapolis, 37 Alb. Law Jour. 58.

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The Minnesota courts have held that a city may authorize the excavation and removal of stone and earth when it is necessary to the use and improvement of the street, unembarrassed by claims of abutting owners, and that the city may dispose of the materials which they are required to remove without having to account to the owner. That the city could authorize the excavation of rock necessary to the construction of a sewer, and could allow the contractor to appropriate such stone in part compensation for his work, without accounting to the abutting owner.[1] The Minnesota cases do not represent the universal law. There are cases directly contrary, which hold that stone excavated by a contractor in the construction of a sewer cannot be used by him, nor can the city have credit against the contractor for the stone removed, for they belong to the abutting owner.[2]

In the Minnesota case, which held that the city might authorize the removal and disposal of materials necessary to the use and improvement of a street,[3] there is little doubt but that the abutting owners could have stepped forth and appropriated the stone as fast as it was blasted, and that they could have it piled upon their own lots and could have defied the city authorities and contractors to molest them.[4] Of course the abutters cannot prevent the town or city from improving the streets, but when materials are to be removed, given away, or sold, it is the abutter's privilege to take what rightfully belongs to him. If he neglects to do so he should not complain that the city has employed them for use upon its streets. It has been held that the owner of the fee in a highway may take away sand from within its limits if it does not injure the right of way and travel.[5]

It is well settled that public streets and ways cannot be lawfully appropriated or given away for private uses,[6] nor can the materials composing them.[7] The city or town cannot authorize the contractor to excavate the entire width of the street and take the stone in compensation for his work, even if he did refill the space excavated, to the original grade.[8] The act of digging materials, as gravel, from the bed of the highway below grade for use on the surface, with the intention of filling up the pit so excavated with other and less valuable materials, is in violation of the abutter's rights, for which he may maintain an action against the contractor.[9]

The unrestricted meaning of the word "street" has been held to include the sidewalks.[10]

[1] Valiski *v.* City of Minneapolis (Minn.), 41 N. W. Rep. 1050; *but see* Rich *v.* City of Minneapolis, 37 Alb. Law Jour. 58 [1887], *and cases cited.*

[2] Fisher *v.* City of R., 6 Lansing 225.

[3] *Accord* Bundy *v.* Catto, 61 Ill. App. 209.

[4] Kruger *v.* Town of Palestine, 20 Bradwell 420 [1885].

[5] Williams *v.* Kenney, 14 Barb. 631; *see also* Dunniston *v.* Clark, 125 Mass. 216; City of New Haven *v.* Sargent, 38 Conn. 50; Bissell *v.* Collins, 28 Mich. 277.

[6] Chicago General Ry. Co. *v.* Chicago City Ry. Co., 62 Ill. App. 502.

[7] Varnum *v.* Highgate (Vt.), 26 Atl. Rep. 628.

[8] Valiski *v.* City of Minneapolis (Minn.), 41 N. W. Rep. 1050.

[9] Robert *v.* Sadler (N. Y.), 10 N. E. Rep. 428 [1887]; *accord* 24 Mich. 514.

[10] Wiles *v.* Hoss, 114 Ind. 371 [1887].

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267. Title to Materials and Plant Delivered upon the Works.—Provision that work and materials shall become property of owner:

Clause: "From the commencement to the completion of every part of the works, the same, and all materials and things upon or near the premises, whether placed on and incorporated into the works or not, shall be deemed to be, and shall become the property, of the said owner; but he shall not be responsible, charged, nor chargeable for anything lost, stolen, damaged, destroyed, or removed from the building, or that shall fail in any way whatever; and the care of the same, and everything connected therewith or appertaining thereto, shall be with the contractor[s], who shall protect and preserve, entire and uninjured, the whole of the said works and materials; and if any injury or disfigurement shall be done thereto by fire, or by the inclemency of the weather, or by accident of any description, or by the workmen employed, or by any other means whatsoever, then, and in every such case, the builders shall completely repair or replace the same, as the case may be, at their own cost, so that on the completion of the works every part thereof may be perfect and in a clean state."

268. Provision that Plant shall Be Property of Owner during Progress of Works.

Clause: "The plant, tools, machinery, and materials provided by the contractors shall, in all cases, from the time at which they or any of them may be brought upon the works and lands taken by or in behalf of, or used permanently or temporarily by or in behalf of the owner or company, and during the construction and until the completion of the said works, become and continue the property of the company; and the contractors are hereby prohibited from removing the same, or any part thereof, during the progress of the works without the consent in writing of the engineer."[1]

269. Provision that Materials Delivered upon Works shall Attach to and Belong to Premises.

Clause: "And it is further hereby expressly agreed that all materials which shall be brought upon the premises by or for the said contractor for the purpose of erecting the structures hereinbefore described and the subject-matter of this contract shall be considered as immediately attached to and belonging to the premises, and that no part thereof shall be removed therefrom without the express consent of the owner," etc.

270. Materials and Tools to Become Property of Owner, but the Contractor Is to Be and Remain Responsible for their Safekeeping.

Clause: "All materials, scaffolding, tools, implements, machinery, and effects whatsoever which may from time to time during the progress of the work be in, upon, or about the said premises shall be deemed to be the absolute property of the owner; but the contractor shall nevertheless be solely responsible for the loss or destruction thereof, and for all damage which may happen thereto by fire, tempest,

[1] Is is better to have the clause in this form, rather than to make the plant and materials become the property of the company when the contractor shall have failed or be in default. *See* Garrett *v.* Salisbury Rail. Co., L. R. 2 Eq. 358.

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or any other cause whatsoever, and the builder shall likewise be liable to make good all damage which may happen to the said work from any cause whatever during the progress thereof."

271. Ownership of Materials and Tools when No Clause is Used.—When the contract is one to furnish materials and to build and deliver a completed structure, and it contains no such stipulations as are given, materials brought upon the premises to be used in the construction of works by the contractor remain the property of the contractor who has purchased them and has had them delivered. Such materials are subject to the contractor's debts, and should not be included in the engineer's estimate of what is due to the contractor unless it is expressly provided that they are and shall be the property of the owner or company.[1] Blinds that have been fitted to the windows of a house and then taken off to be painted have been held to be the property of the contractor, and while in his hands were liable to be taken for his debts.[2] It is immaterial that the contract provides that as the work goes on estimates of it shall be made by the engineer, which estimates may, if he so decide, include acceptable materials delivered, and that a per cent. of such estimates are to be paid at once and the residue upon completion of the structure, and that such estimates had been made and did include certain materials, and such percentage of their value had been paid to the contractor, for it is insufficient to show a sale of the materials and to pass the title to them.[3]

When a contract for street-work provided for monthly payments, "on estimates made by the engineer of materials furnished on the ground, and work done, 20 per cent. being reserved until the final estimate is made," it was held that the city was bound to pay, monthly, 80 per cent. of the value of material furnished on the ground, and the work done, and that by "material on the ground" was meant all such suitable material in reasonable quantities as the contractor procured and placed in the city at a suitable point, to be used as needed.[4]* This decision, considered with those immediately preceding, illustrate the necessity of clauses defining the intention of the parties in regard to the ownership of materials delivered.

Until wrought into the structure the materials furnished remain the property of the contractor or materialman, even though they have prior thereto been inspected by the engineer and included in his monthly estimates. It was so held of ties delivered upon the line of a railroad for the track.[5]

[1] City of Wheeling *v.* Baer (W. Va.), 15 S. E. Rep. 979; Chandler *v.* DeGraff, 22 Minn. 471 [1876]; Johnson *v.* Hunt, 11 Wend. (N. Y.) 137.

[2] Manchester Mills *v.* Rundlett, 23 N. H. 271; Tripp *v.* Armitage, 4 M. & W. 687; Wilkins *v.* Bromhead, 6 M. & G. 963; *Ex parte* Marrable, 1 Glyn & J. 402.

[3] City of Wheeling *v.* Baer (W. Va.), 15 S. E. Rep. 979.

[4] City of Key West *v.* Baer (C. C. A.), 66 Fed. Rep. 440, Pardee, circuit judge, dissenting; Smith *v.* Molleson (Sup.), 26 N. Y. Supp. 653.

[5] Chandler *v.* DeGraff, 22 Minn. 471 [1876]; *see also* Andrews *v.* Durant, 11 N.

* *See* Sec. 676, *infra*.

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A contrary rule was maintained in the English court of appeals, which held that the title to materials delivered upon the line of a railroad for use in its construction passed to the company when they were inspected and certified by the engineer, even though they were not fixed, and that the contractor could not remove them or otherwise dispose of them. The contract was for the construction of a railroad, it being provided that, once a month, the company's engineer should certify the amount payable to the contractor in respect to the value of the materials delivered, such certificates to be paid seven days after their presentation.[1] The court made the test one of *intention* of the parties, and held that the manifest *intention* was that the title to materials should pass when the engineer certified to his acceptance thereof. The materials delivered were bricks, iron girders, etc., for a structure.

The fundamental principle in all cases of sale is to ascertain the intention of the parties. That ascertained, it will hold, and rules are generally held subordinate to it. The circumstances of each case must be determined.[2] If the contractor act as the agent of the owner in the purchase of materials, or if the materials are furnished upon the credit of the building, the title to them will be in the owner. If the stuff be furnished on the credit of the owner, the contractor may be considered the agent of the owner, and such materials cannot be sold under an execution as the property of the contractor.[3]

272. If it be the Intention of the Parties to Pass Title upon Delivery, it Will be So Held.—If the intention to have the title pass when the materials are delivered be made clear and unmistakable, it should be so held.[4]

Therefore when a contract for the construction of a ship for the United States government provided that the materials, when delivered and receipted for, should become the property of the government, the court declared that it would not enforce any arbitrary rule of construction in determining the question whether the title remained in the builder, or whether the property, in so much of her as on the payment of an installment is completed, passed to the government, but that the court would carry into effect the intent of the parties, to be gathered from the terms of the contract and the circumstances attending the transaction.[5]

When a contract provides that "all materials when brought upon the ground for the erection of the structure, shall be considered as immediately attaching to and belonging to the premises," the English courts have held that it gives to the owner an equitable interest in the materials, by virtue

Y. 35; Tompkins *v.* Dudley, 25 N. Y. 272; Adams *v.* Nichols, 19 Pick. 275; School Dist. *v.* Dauchy, 25 Conn. 530.

[1] Banbury & C. D. Ry. Co. *v.* Daniel, 54 L. J. (N. S.) Ch. D. 265 [1884].

[2] Allis *v.* Voigt, 90 Mich. 125.

[3] White *v.* Miller, 18 Pa. St. 152; *see also* Steele *v.* McBurney (Iowa), 65 N. W. Rep. 332; Ladd *v.* Grand Isle (Vt.), 31 Atl. Rep. 34. For other cases of materials delivered on the line of a railroad *see* Hutchinson *v.* Gt T. R Co., 59 N. H. 487; *also* 71 N. Y. 296, 11 Hun 597, 75 N. Y. 454.

[4] Blackburn on Sales 196.

[5] Clarkson *v.* Stevens, 106 U. S. 505 [1882].

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of which he could hold them against an execution against the builder, and that would disentitle the sheriff from seizing them.[1]

If the contract provide that a mill erected upon property shall be and remain the sole property of the contractor until certain liens or encumbrances are removed by the owner, the builder can remove the mill when the land has been sold under an execution of judgment of such lien or encumbrance.[2]

273. English and American Decisions Compared.—By the English bill of sale act, an agreement in an ordinary building contract that all building materials brought by the builder upon the land of the owner shall become his property is not a bill of sale.[3] The English courts do not regard with favor such agreements which operate against trustees, receivers, and judgment creditors.[4] A clause providing that the contractor's materials shall be forfeited to the owner on his becoming insolvent or bankrupt is void under the English law, being contrary to the policy of the bankruptcy law.[5]

In England it has been held that a stipulation that if the contractor becomes insolvent or fails in the due performance of his contract, the company may enter and use his plant and materials and construct the works on their own account, does not, on such insolvency or failure, vest the plant and materials in the company unless actual damages or loss has been occasioned by the noncompletion of the works.[6] Under such a clause the company has been held to be entitled to retain what it has seized, the seizure being a protected transaction within the bankruptcy act of 1869, § 94.[7] It seems that the owner may stipulate for a lien upon the contractor's plant, with a right to use the tools and materials in the completion of the work, according to and in fulfillment of the contract.[8]

In America the property in a ship, during construction, follows the keel. It has therefore been held that if an owner repair his vessel with the materials of another man, the property in the materials is in the owner; but if a contractor builds the vessel from the keel with another's materials the whole will belong to the owner of the materials.[9]

In the case of an executory contract to build a vessel, to be paid for in installments as the work progresses, the title to the vessel remains in the builder until the work is completed and delivered.[10] If it has been expressly

[1] Brown *v.* Bateman, L. R. 2 C. P. 272 [1867]; Reeves *v.* Barlow, 12 Q. B. Div. 436; Blake *v.* Izard, 16 W. R. 108; *and see* Emden's Law of Building Contracts 202-3, *giving the English law;* and many cases in 29 Amer. & Eng. Ency. Law 950-955.

[2] Yater *v.* Mullen, 24 Ind. 277; Gates Iron Wks. *v* Cohen (Colo. App.), 43 Pac. Rep. 667; *see also* Vaughn *v.* McFadyen (Mich.), 68 N. W. Rep. 135.

[3] Reeves *v.* Barlow, L. R. 12 Q. B. D. 436 [1884]; *several cases cited and distinguished.*

[4] Collyer *v.* Isaacs, L. R. 19 Ch. D. 342.

[5] Jay *v.* Harrison, L. R. 14 Ch. D. 19 [1880]; *Ex parte* MacKay, L. R. 8 Ch. 643; *Ex parte* Williams, L. R. 7 Ch. D. 138.

[6] Garrett *v.* Salisbury & D. Ry. Co., L. R. 2 Eq. 358.

[7] *In re* Waugh, 4 Ch. Div. 524.

[8] Hawthorne *v.* Newcastle, etc., R. Co., 3 Q. B. 734, *note;* Garrett *v.* Salisbury, etc., Ry. Co., L. R. 2 Eq. 358; *In re* Winter, 8 Ch. D. 225; *and see* Hunt *v.* So. Eastern R. Co., 45 L. J. C. P. Div. 87.

[9] Coursin's Appeal, 79 Pa. St. 220 [1876].

[10] Elliott *v.* Edwards, 35 N. J. Law 265 [1871].

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agreed between the builder and the employer that when an installment was paid, the vessel so far as constructed was to become the property of the employer, then the burden is on the latter to show that his title vested before the lien of creditors attached.[1]

If, however, the contractor is to be paid for the "materials furnished," he can demand payment not only for materials delivered and inspected and received, but also for such as he has procured or prepared to be furnished.[2] *

In the United States the operation of the lien laws in protecting materialmen and mechanics and securing to them their claims against contractors by attaching to the structure, has rendered the use of these clauses less frequent, as they are primarily to protect the owner against such claims; but when the works are extensive, requiring special plants or appliances, or the materials are such as cannot be obtained in the open market, or money is to be advanced as materials are delivered, inspected, and accepted, the clauses should be employed.

274. Provision that Contractors shall Remove Temporary Structures and Dispose of Waste Materials.

> Clause: "Upon the completion of the works the contractor further agrees to remove all temporary structures; fill up all holes and trenches; level all mounds or heaps of earth that may have been built, dug, raised or made by him in the execution of the works or incident thereto, and to remove and clear away all surplus or waste materials or rubbish of whatever kinds remaining on, in, or round about the works, and to deposit such refuse materials at such places on or near the works as the engineer may designate, or if so required to remove it entirely from the premises of the owner to such proper place as the contractor may provide, and the engineer shall be sole judge of what is or is not waste material or rubbish. The works and premises to be left and delivered up to the owner in a clean, neat, tidy, and workmanlike manner, clear of all rubbish and litter of whatever description."

275. Contractor Required to Dispose of Waste Materials.—The above clause is an essential provision of every contract requiring temporary structures or making waste materials, and one that will save the owner or company considerable expense to clean up, after a job is finished. There can be no question as to its propriety and construction or as to its legality and effect. The clause will be found a valuable one in works of excavation, grubbing, and removing of old structures. It prevents any misunderstandings as to what is or is not refuse, or any question as to who is to pay for the carting and final disposal of such rubbish as nobody wants about their premises. In cities where such stuff may have to be hauled to great distances this becomes an important item of expense.

In the absence of such a clause, the trouble that arises will perhaps be

[1] Elliott *v.* Edwards, 35 N. J. Law 265 [1871].

[2] Dickinson *v.* Gray (Ky). 8 S. W. Rep. 876; *and* 9 S. W. Rep. 281 [1888].

* *See* Sec. 272. *supra.*

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best illustrated by a few cases. If the contract provide that the earth and waste material shall be deposited "where ordered by the engineer," it becomes the duty of the engineer to provide a convenient place, and if he fail to do so, then the contractor is entitled to damages which he suffers in disposing of them.[1]

When the contract simply provided that the materials dredged should "be deposited inshore, so as not to interfere with the work," it was held that it was not the duty of the company or owner to provide such shore as a place of disposal for dredged material, and that the contractor was not justified in abandoning his contract because the shore inspector prevented him from depositing such materials thereon.[2]

Under a contract to remove a large quantity of rock which lay on the margin of a navigable stream, where to blast this rock into the stream was much less expensive than to remove to a greater distanced, it was held that the contractors could not obstruct navigation by blasting rock into the stream, but that they were bound by their contract to remove the rock without committing a nuisance.[3]

If the contract is silent as to where the contractor shall put the earth, and the parties have themselves given a practical construction to it, they will be bound by that interpretation.[4]

If a contractor deposits earth and rubbish upon an adjoining or abutting lot, or in the street, the contractor, if he be an independent contractor, and not a servant, is liable for the trespass, and not the city or owner.[5] In fact the owner is not liable for any negligent or unlawful acts on or in regard to adjoining estates by the contractor, when the work which the contractor has been employed to do is not a nuisance, or the natural result of such work will not be an injury to such estates.[6]

It is the duty of the contractor, as well as the city, to ascertain, before entering upon a contract, the right of the city to rest its structures (as a street embankment) on abutting premises without the consent of the owner.[7] A village has been held liable for damage to abutting property by the deposit of earth thereon in the construction of a sidewalk supported by a sloping embankment.[8] *

[1] Phila Wil. & Bal. R. Co. *v.* Sebre Howard, 13 How. Repts 307.

[2] Cronin *v.* Tebo (N. Y.), 39 N. E. Rep. 314. It should be stated that the owner promised and did subsequently provide a place inshore to dump in. S. C., 24 N. Y. Supp. 644.

[3] Tenn. & C. R. Co. *v.* Danforth (Ala.), 13 So. Rep 51.

[4] Chicago N. Gt. E. Ry. Co. *v.* Vosburgh, 45 Ill 311 [1867].

[5] Fuller *v.* City of Grand Rapids (Mich.), 63 N. W. Rep 530; Kinser *v.* Dewitt (Ind. App.), 34 N. E. Rep. 1014; Alabama Mid. R Co. *v.* Martin (Ala.), 14 So. Rep 401; City of Buffalo *v.* Clement, 19 N. Y. Supp. 846 *semble* Maira *v.* Manuf. R. Est. Ass'n, 89 N. Y. 498 [1882].

[6] *Cases* 14 Amer. & Eng. Ency. Law, 840; Ketchum *v.* Newman (N. Y. App.), 36 N. E. Rep. 197, shoring up a building on adjoining estate; *and see* St. L & C. Ry. Co. *v.* Drennan, 26 Ill. App. 268 [1887].

[7] Mathewson *v.* Grand Rapids (Mich.), 50 N W. Rep. 651.

[8] Carll *v.* Village of Northport (Sup.), 42 N. Y. Supp. 576.

* *See* Sec. 638, *infra*.

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In England and Ireland the superintendent and the engineer who has charge of work and directs it have been held liable for trespass committed by the workmen in prosecuting the work.[1]*

A city is not liable to a sewer contractor for delay caused by the act of the inspector of work and materials, appointed by it under the contract, in rejecting materials which should have been accepted.[2] The contractor must bear the expense of such delay.[3]

276. Provision for the Inspection and Rejection of Inferior Materials and Work.

Clause: "The said part....of the second part hereby agree....that all materials and workmanship, of whatever description, shall be subject to the inspection and rejection of the engineer, and that the entire work shall be done to his satisfaction and approval. That the engineer may appoint such assistants as he may deem necessary to inspect the materials to be furnished and the work to be done under this agreement, and to see that the same strictly correspond with the specifications herein set forth, that any unfaithful or imperfect work or materials that may be discovered before the final payment for the work shall be corrected immediately, on the requisition of the engineer, notwithstanding that it may have been overlooked by the proper inspector and estimated, and it is hereby expressly agreed that the inspection of the work shall not relieve the contractor[s] of any of his [their] obligations to perform sound and reliable work as hereinafter [hereinbefore] described and explained." †

In condemning or rejecting materials, work, or parts, the engineer must be specific in his charges, and in ordering certain parts to be replaced or renewed he must describe those parts and their defects, so that the contractor can remedy them. A notice to the contractor that certain parts of machinery were "worthless and dangerous, not fit for use, liable to cause damage, their construction in direct violation of the contract," without other specification of the nature of the alleged defects, was held insufficient to require the contractor to replace such parts of the machinery or to defeat his right to recover therefor.[4]

When the quality of materials are objected to and the contractor had agreed with the owner that if it did not prove to be the quality contracted for, he need not pay for it, and it proved inferior, the owner is entitled to have deducted from the contract price of the entire work the reasonable value of the quality required by the specifications, and not merely the value of the inferior materials actually used.[5]

An engineer should take pains to carefully inspect and test materials

[1] Wilson *v.* Peto, 6 Moore 47; Monks *v.* Dillon, 10 L. R. Ir. 349, 12 L. R. Ir. 321.

[2] Montgomery *v* City of New York (N. Y. App.), 45 N. E. Rep. 550, *affirming* 29 N. Y. Supp. 687.

[3] White *v.* School District (Pa.), 28 Atl. Rep. 136; *and see* Board *v.* O'Connor (Ind.), 35 N. E. Rep. 1006.

[4] Gubbins *v.* Lautenschlager (C. C.), 74 Fed. Rep. 160.

[5] Wheaton *v.* Lund (Minn.), 63 N. W. Rep. 251.

* *See* Sec. 842, *infra.*

† *See* Sec. 415, *infra.*

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before approving and accepting them, for it seems that when he has once given his approval he cannot withdraw it.'*

The contractor should secure the engineer's or architect's approval before using materials subject to his acceptance, or he uses them at his peril.'†

277. Provision that Condemned Materials shall be Removed and Replaced.

Clause: "It is further agreed that if the work, or any part thereof, or any materials, found or brought on the ground for use in the work, or selected for the same, shall be condemned and rejected by the engineer as unsuitable, defective, or not in conformity with the specifications, the contractor shall forthwith remove such materials from the work, and rebuild, or otherwise remedy, such work, as may be directed by the engineer."

277a. Defective Materials Purchased and Used.—Contractors and owners in purchasing materials, or in specifying them in a contract, should insist that they shall be of a certain brand or of a quality described, and it is a good practice to require a warranty that they shall be of the quality and character specified. The manufacturer or materialman should also be informed as to the purpose for which materials are wanted, and what is required of them in the matter of tests and service. If these precautions are not taken, no complaints can be made that the materials supplied by the dealer or contractor are defective or do not meet the tests required.

When paving-stones are furnished according to dimensions set forth in specifications, there is no implied warranty that they are suitable for a particular work if the supply man were not advised as to what such work required.[3] This is true where the purchaser had a chance to inspect the materials before making the purchase.[4]‡

Likewise, when a contractor was to build abutments, and a certain kind of stone was specified, and the stone agreed upon was used, and after the completion of the work it was discovered to be defective, but it did not appear whether the defect was owing to the quality of the stone or to the poor workmanship, it was held that the plaintiffs were entitled to recover the contract price, unless it was shown that the defect was in the workmanship.[5] The same was held when the sand to be used was designated.[6] If

[1] Jones *v.* Gilchrist (Tex.), 27 S. W. Rep. 890.

[2] Higgins *v.* Lee, 16 Ill 495 [1855].

[3] Talbot Pav. Co. *v.* Gorman (Mich.), 61 N. W. Rep. 655; American W. W. *v.* Rivers, 36 Fed. Rep. 880 [1888]; Brooks & F. Co. *v.* Patterson (Mich.), 63 N. W. Rep. 436; *and see* Steffen *v.* St. Louis (Mo.), 36 S. W. Rep. 31, *where the engineer required stone to be screened.*

[4] T. B. Scott L. Co. *v.* Hafner-Lothman M. Co. (Wis.), 65 N. W. Rep. 513; Omaha C. C. & L. Co. *v.* Fay (Neb.), 55 N. W. Rep. 211.

[5] Vanderwerker *v.* Vt. Central R. R. Co., 27 Vt. 130.

[6] McLane *v.* De Leyer, 56 N. Y. 619.

* *See* Secs. 388 and 390, *infra.*

† *See* Sec. 414, *end*, *infra.*

‡ *See* Sec. 257, *supra.*

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the contractor has given the owner notice of the poor quality of the materials he is using, and the work is carried on under the eyes of the owner, he cannot refuse to pay for the work, it seems, because the structure (a stone wall in this case), is so much affected by the weather as to prove worthless.[1]

A contractor's right to recover the contract price was held not defeated by the fact that the bricks purchased by him, in good faith, and used in the building, were made of inferior clay, the defect not being discoverable by careful inspection, nor until developed by exposure to the weather after the building was completed.[2]

If, however, materials are not of a stipulated quality, the purchaser is not confined to a rescission of the contract, and a recovery of the money paid for freight and customs duties, and for storage, but may recover also damages as for a breach of the contract.[3]

The manufacturer or supply man is liable to the purchaser only.[4]

278. Provision that Condemned Materials and Work shall be Replaced by Contractor. If he Neglects or Refuses to Make them Good, Owner may Repair and Charge to Contractor.

Clause: "It is further agreed that if any materials be brought upon the works, or on the land or property of the company or owner, or to the places where any operations have been or are being carried out in connection with the works, or should there be any of the workmanship which, in the judgment of the engineer or his assistants, or the inspectors authorized by them, shall be of an inferior quality or description and improper to be used in the works, or are unfit for the several purposes to which they are applied or intended to be applied, or are not in accordance with the specifications or the said drawings, instructions, or directions, or this contract, respectively, the said materials shall be removed and the workmanship amended forthwith, or within such period or periods as the said engineers or inspectors may direct. If the contractor neglect or refuse to comply with these conditions, any or either the engineers or assistants, or other persons authorized by them, on behalf of the company or owner, and by their agents, servants, and workmen, may remove the materials and workmanship so objected to, or any part thereof, and replace the same with such other materials and workmanship as shall be satisfactory to him or them, and the company or owner may, on the certificate of the engineer, deduct the expense thereby incurred, or to which he [it] may be put or be liable, or which may be incident thereto, from the amount of any money which may be or may become due or owing to the contractor, or to recover the same by action at law or otherwise from the contractor, as he [it] may determine. And the contractor shall also forthwith pay to the board the sum of $..... per day for every day subsequent to the period or periods above specified during which the materials or

[1] Collins *v.* Money, 4 Miss. 11; *and see* Henderson Bridge Co. *v.* O Connor, 11 S. W. Rep. 18 [1889]; Higgins *v.* Lee, 16 Ill. 495 [1855].

[2] Wisconsin R P Brick Co. *v.* Hood (Minn.), 69 N. W. Rep. 1091; Badger *v.* Kerber, 61 Ill. 328.

[3] Taylor *v.* Saxe (N. Y. App.), 31 N. E. Rep. 258.

[4] Winterbottom *v.* Wright, 10 M. & W. 109; Losee *v.* Clute, 51 N. Y. 494.

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workmanship, or any part of them, shall not have been removed, such sum of $..... a day to be deemed liquidated damages, and not a penalty."

279. Provision that Contractor shall Provide Facilities for Inspection.

Clause: "It is further agreed that the contractor shall at all times provide for the engineer and his authorized agents and assistants convenient means of access to all parts of the work during its entire progress, so that he shall have full liberty from time to time, and at all times, to inspect, examine, and test the materials and workmanship furnished; and he shall be afforded every reasonable facility for ascertaining that the stock and materials employed and the workmanship furnished are in accordance with the requirements and intention of this contract and specifications."[1]

280. Provision that Works shall be Pulled Down and Opened Up for Examination and Inspection.

Clause: "If either the engineer or his assistant, or other authorized officer, shall require it for his more perfect satisfaction, the contractor shall at any time during the continuance of this contract, pull down or unship any part of the works, and make such openings, and to such extent, through any part of the said works as the engineer or officers may direct, and which the contractor shall make good again to his satisfaction. If the works be found faulty in any respect the whole of the expenses thereby incurred shall be defrayed by the contractor, but if otherwise, by the company or owner."

281. Provision that Contractors shall Guard against Defective Foundations and Unfavorable Conditions.

Clause: "It being agreed and understood that the same conditions and damages above mentioned (Sec. 278) shall apply, in the event of the contractor(s) refusing, at.....own expense, to pull down, amend, and reconstruct any work.....may have erected upon an insecure or insufficient foundation, or shall not have sufficiently secured and protected the same against immediate and future injury, whether arising or to arise from weight, pressure, action of water, or otherwise, on being required so to do, by either the engineer or his assistants."[2]*

282. Provision that Inspection and Approval of Engineer shall not Preclude the Subsequent Rejection of Inferior Materials.

Clause: "It is distinctly understood and agreed that the inspection and approval of materials by said engineer or inspector shall not in any wise subject the company to pay for the said materials or any portion thereof, unless employed or used in the said work, nor shall the same prevent the rejection afterwards of any portion thereof which may turn out to be unsound or unfit to be used in the work; nor shall such inspection be considered as any waiver or objection to the work on account of the unsoundness or imperfection of the material used."

The subject of this stipulation is taken up and carefully considered in succeeding sections, to which the reader is referred.†

[1] As to what facilities for inspection a contractor is expected or required to furnish, *see* Morris *v.* Brown, 111 N. Y. 318 [1888], *and cases cited.*

[2] *See* Clark's Architect, etc., Before the Law 332–4.

* *See* Secs. 674, 678, *infra.* † *See* Secs. 381–388, 390–396, 461–468, 482–490, *infra.*

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283. Provision against the Sale or Use of Ardent Spirits.

Clause: "And the said contractor or builder further promises and agrees not to give or sell or allow to be given or sold by any agent or agents in his employ, any beer, liquors, or other ardent spirits, on or near the works or line of works, or allow any to be brought or used on the works by his employees or any other persons."

284. Provision that Contractor shall Provide and Maintain Suitable Offices for Engineers.

Clause: "The contractor shall construct and provide, at or near the sites to be occupied by the contract works, and at his own entire expense, proper working offices for the engineer and his staff, with all requisite fittings, stores, firings, lighting, etc., so as to make them habitable for working purposes at all times and under all circumstances, the same offices to be fitted up as directed by and to the full approval of the engineer. The contractor shall also provide proper attendances for such offices, which shall be always at the sole disposition and the entire use of the engineer, and shall be kept for that purpose throughout the whole period that any of these contract works are under execution.

"The contractor shall also provide the necessary laborers to attend the same offices, and an approved boat, hand-car, inspection car, horse and carriage, with qualified boatmen, sectionmen, operatives, or coachmen, to be always in attendance on the engineer and his assistants, for inspection, measuring, and levelling, and such other assistance as may from time to time be required."

285. Provision that Contractor shall Provide Closets and Lavatories.

Clause: "The contractor further undertakes and agrees to provide, erect, and maintain, at or near the works, suitable and lawful outhouses or closets for the use of his employees and workmen, and to provide a separate closet and lavatory for the use of the engineers, clerks of works, and inspectors, which shall be provided with a door, lock, and key, that it may be kept exclusively for their own separate use."

286. Provision that Contractors shall Make Tests, Borings, and Soundings.

Clause: "The contractors shall, at their expense, sink such trial holes and dig such trenches as the engineer may consider necessary for ascertaining the strata or nature of the ground, and the exact position and levels of existing sewers, pipes, foundations, etc.

"Every part of the works and all the materials to be used therein shall be subjected to such tests from time to time during the execution of the works as the engineer may direct, at the expense of the contractor."

287. Provision that Contractor Shall Weigh and Test Materials, and shall Provide Weighing and Testing Apparatus for that Purpose.

Clause: "The contractor shall weigh, without extra charge, any materials and parts and portions of iron work or other materials that the engineer may require to be weighed, and he shall provide on the works approved testing and weighing machines for that purpose. One testing-machine shall be provided that will test iron or other specimens up to.....tons tensile stress, and another capable," etc., etc.

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288. Provision that Contractor shall Have and Keep a Foreman or Representative on the Works, who shall Receive and Obey Instructions of Engineer.

Clause: "Whenever the contractor is not present on any part of the work where it may be desired to give directions,—orders, or instructions will be given by the engineer in charge, and shall be received and obeyed by a competent superintendent or foreman who may have charge of the particular work in reference to which the orders are given, and such superintendent, agent, or foreman shall be considered as acting in the contractor's place, and all orders or instructions given to such agent or other persons by the said officer in charge shall be as binding on the contractor as though given to himself in person."

289. Provision that Contractor shall Not Assign nor Sublet Work.*

Clause: "The contractor shall not sublet any portion of the works, but must construct and carry on the same with his own men and under his own supervision. This clause, however, does not apply to the furnishing of material for the different parts of the work, for which the principal contractor will be held strictly responsible, and no excuse for the quality of the material or for the non-delivery in good time by the sub-contractor as affecting the progress of the work will be entertained."

290. Provision for Liquidated Damages to be Assessed for Assigning or Subletting Work.

Clause: "The contractor shall not assign or make over this contract to any other person, nor underlet it, nor make a sub-contract with any workman or workmen for the execution of any part of the cast-iron, wrought-iron, steel, or other metal work, timber, brickwork, groundwork, masonry, or any other work appertaining to this contract, but shall employ his own workmen for the labor thereof, who shall be paid by him in wages by the day. And in case the contractor assigns or makes over this contract, or underlets or makes a sub-contract contrary to this agreement, he shall, for each offense, pay to the board the sum of $500, which shall be deemed liquidated and ascertained damages, and may be recovered by action, or deducted by the board from any sum or sums due or to become due to the contractor under this contract or otherwise howsoever." †

291. Provision that Contractor shall Not Assign or Sublet Work, without Permission.

Clause: "The party of the second part agrees that he will give his personal attention constantly to the faithful prosecution of the said work; that he will not assign or sublet the aforesaid work, or any part thereof, without the previous written consent of said engineer, owner, or commissioner of public works indorsed on this agreement, but will keep the same under his own control; that he will not assign, by power of attorney or otherwise, any of the moneys payable under this agreement, unless by and with the like consent signified in like manner; that

*If this clause is used, then the word "assigns" should not be used in clauses Secs. 4 and 207, *supra*.

†*See* Secs. 13–16, Chap. I, *supra*.

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no right under this contract, nor to any money to become due hereunder, shall be asserted against the parties of the first part or against any department, bureau, officer, or officers of the company or city, by reason of any so-called assignment, in law or equity, of this contract or any part thereof, or of any money due or to grow due hereunder, unless such assignment shall be authorized by the written consent of the said officer or commissioner indorsed hereon; that no person other than the party signing this agreement as the party of the second part hereto now has any claim hereunder; that no claim shall be made excepting under this specified clause, or under paragraphs.....and.....of this agreement by any person whomsoever, and that the said party of the second part will punctually pay the workmen who shall be employed on the aforesaid work in cash current, not in what is denominated as 'store pay.'" *

292. Provision that Contractor shall Not Assign or Sublet.

Clause: "And it is further agreed by the said contractor or party of the second part that he will give his personal attention and supervision to the work; that he will not sublet any portion of the work or assign any part of his contract without consent of said party of the first part."

293. Clause Forbidding Assignment or Subcontracting is Binding on Assignor and Assignee.†—An assignment of a construction contract in express violation of such a provision, forbidding it, is void, and a party claiming under such an assignment is entitled to no relief in equity.[1] If the contract provide that no part of it shall be assigned without the express consent, in writing, of the owner or engineer, then no interest whatever can be transferred without such consent.[2]

A provision that the contractor shall not assign any of the moneys payable under his contract under the penalty of forfeiture, etc., is for the benefit of the owner alone, to protect him against dereliction or insolvency of the contractor. If, however, an installment of money not yet due under the contract be assigned to a materialman and notice be given to the owner with his exception, subsequent creditors of the contractor can derive no advantage therefrom.[3]

294. The Provision may be Waived.—The provision may be waived by the owner; and to show such a waiver it has been held enough to prove that the engineer, whose written consent was required in case of assignment or subcontracting, knew that subcontractors were at work, that he had directed and given estimates of their work, and that the president of the company knew of and permitted the contractors to continue the work without objection.[4] If there has been a subletting of a portion of the work previous to

[1] Grigg *v.* Landis, 19 N. J. Eq. 350 [1868].

[2] Burck *v.* Taylor, 14 Sup. Ct. Rep. 696; Hobbs *v.* McLean, 117 U. S. 567, *distinguished.*

[3] Barnett *v.* Mayor, 31 N. J. Eq. 341, [1879].

[4] Danforth *v.* Tenn. & C. R. Co. (Ala.), 11 So. Rep. 60; Launman *v.* Young, 31 Pa. St 306; *and see* Barnett *v.* Mayor, 31 N. J. Eq. 341 [1879].

* *See* Sec 144, *supra.*

† *See* Secs. 13-16, *supra.*

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the execution of the contract, which had been acquiesced in by all the parties, it will not work a forfeiture under such a stipulation.[1]

295. What does Not Amount to an Assignment.—An agreement between a contractor and his surety, by which the latter is to furnish the money and have one-half of the profits, does not amount to a transfer or assignment of the contract, so that a stipulation in the contract that the assignment of the contract shall annul it, will operate.[2]

Nor does a letter to the contractor's attorneys authorizing them to receive the money due him from the company and to pay it over to his bankers, to whom he is indebted, upon which the attorneys wrote to the bankers promising them the money when they received it, operate as an equitable assignment. Such an authority may be revoked at any time before it has been executed.[3]

296. A Contract is Assignable unless it is Expressly Prohibited, or It is a Contract for Personal Services.—If there is no express prohibition against the assignment of a construction contract, any contract which is not a contract for the personal skill, taste, or professional ability of a person may be assigned.* A contract between a city and a corporation, its successors and assigns, for erecting and furnishing water to a city is assignable by the corporation.[4]

297. Provision that Engineer shall Lay Out Works, and Contractor shall Preserve his Lines and Levels.

Clause: "Previous to the commencement of the work the engineer will give the lines and levels for the same, and the contractor shall thereafter carry out and maintain the works in every particular, according to such lines and levels, as laid out by the engineer in charge thereof, according to the drawings herein specified, or according to such other approved drawings as may be supplied, and to such directions as he may receive from time to time, and he shall be held responsible for the correctness of the same throughout the whole term of this contract until the works are completed and accepted."

298. Provision that Contractor shall Provide Such Labor and Structures as Engineer may Require to Assist in Staking Out Work.

Clause: "The contractor shall provide such men as the engineer in charge thereof may require to assist him in setting out the works, and he shall furnish, free of charge, such temporary structures at and about the work as may be necessary for maintaining points and lines given by the engineer for the building of the work, and will furnish said engineer such facilities and materials for giving said points and lines and levels as he may require; and the engineer's marks and stakes shall be carefully preserved and protected by the contractor."

[1] Launman *v.* Young, 31 Pa. St. 306.

[2] Bowe *v.* United States, 42 Fed. Rep 761 [1890].

[3] Rodick *v.* Gandell, 1 De G. M. & G. 763; *see also* Morrell *v.* Wooten, 16 Beav. 197.

[4] Carlyle W. L. & P. Co. *v.* Carlyle (Ill.), 29 N. E. Rep. 556 [1892]; *accord*, Wentworth *v.* Cock, 10 A. & E. 45; Robson *v.* Drummond, 2 B. & Ad. 308.

* *See* Assigns, under Parties, Chap I., Secs 13–16, *supra*.

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299. Provision that Contractors shall Determine the Lines and Levels for the Work and be Responsible for the Accuracy and Correctness Thereof.

Clause: "The contractor hereby agrees to set out and keep correct the works in every particular, according to the drawings herein specified, or such other drawings as may be supplied, or the directions that he may receive from time to time, and to be responsible for the correctness of the same throughout the whole term of this contract; and he shall be responsible for the correctness of the position, levels, and dimensions of the several works according to the drawings and written instructions of the engineer notwithstanding the contractors may have been assisted by the engineer or assistant engineer in setting out the same; and if at any time during the progress of the works any error shall appear or arise therein, the contractors, on being required so to do by the engineer, shall remove and amend the work to his satisfaction. The levels shown upon the plans and sections are supposed to be correct, but the contractors must verify the same, as well as all other particulars of the contract on the ground, should they think fit so to do, and they will be held responsible for the consequences of any error contained therein or omission therefrom."

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CHAPTER XI.

COMMENCEMENT AND COMPLETION OF WORK.

TIME FIXED AND CALCULATED. DELAY IN COMPLETION AND DAMAGES ASSESSED. LIQUIDATED DAMAGES AND PENALTIES. DEFECTIVE WORK AND REPAIRS.

300. Provision Fixing Time When Work shall be Commenced and When Completed.

Clause: "On the execution of this contract, complete and full possession of the said premises, so far as may be necessary for the execution of the said work, but not so as to constitute a tenancy, shall be given to the contractor, who shall forthwith commence the said work [or who shall commence said work on or before the .... day of ....], and actively prosecute the same; and the said work shall in all respects be completed within .... calendar months from the time when such possession shall be given. Provided that in case any delay shall rise from fire, tempest, frost, or other inevitable cause or accident, or from any strike in the building trade, or by the default of the owner in paying in due course any moneys due and payable to the contractor under this contract, then such further time shall be allowed for the completion thereof as the said engineer or architect shall in writing certify to be reasonable."

301. Provision that Possession of Site shall be Given with Order to Begin Work, but Delay to Give Possession shall Not Vitiate Contract.

Clause: "The board, city or owner will, with the engineer's written order to commence the works, give to the contractor .. the use of so much of the site of the works as may, in the opinion of the engineer, be required in order to enable the contractor .. to commence and continue the execution of the works, and will, from time to time, as the works proceed, give the contractor .. the use of such further portions of such site as the engineer may, from time to time, consider proper in that behalf; but the non-delivery in manner aforesaid of the use of such site, or any part thereof, shall not vitiate or affect this contract, nor any provision therein, or in this specification contained, nor entitle the contractor .. to any increased allowance in respect of money, time, or otherwise, unless (and then only to the extent to which) the engineer may grant .... any extension of time under the provision for that purpose hereinafter contained."

302. Provision that Owner Retains Possession and Control of His Property.

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Clause: "The party of the first part expressly reserve to themselves the right to occupy for their own purposes of whatever kind at any time and for so long a time as the engineer may by notice in writing to the contractors require, any portion or portions of the site of the works, whether the works to be executed thereon be commenced or are in progress or completed, and to employ thereon agents and workmen other than the contractors in the execution of matters not the subject of this contract, and the contractors shall not obstruct such agents and workmen, but without extra charge, and without relief from any liabilities or responsibilites incurred under this contract, shall allow and provide them unmolested access thereto, and such facilities as in the judgment of the engineer may by him be reasonably demanded."

303. Provision that Work shall be Carried On as Directed.

Clause: "The said contractor(s) further agrees that the work to be done under this contract and these specifications shall be commenced within ..... days (or ..... weeks) after the execution of this contract, or after written notice to do so shall have been given by the owner, company, or city, or his (its) engineer or architect, and that the work shall be carried on at such points and in such order of precedence and at such times and seasons as may from time to time be directed by the engineer or architect, and with such force and in such manner as to secure its completion within the time hereinafter specified, the time of beginning, rate of progress and time of completion being essential conditions of this contract.* The said contractor further agrees that he shall have no claim for damages upon the owner or company for any delay or expense to which the contractor may be subjected by the failure of other contractors to comply with the terms of their contracts."

304. Provision that Work Shall be Carried On as Directed by Written Orders of Engineer.

Clause: "And it is further agreed that the work shall be commenced and carried on at such points and in such order of precedence, and at such times and seasons, and with such force and in such manner as may from time to time be directed by the engineer; but no part of such works shall be undertaken without his written orders. And the time for completion, mentioned elsewhere herein, shall be computed from the date of the first of such orders. The contractor shall not enter upon, under, across, or through any house, building, shed, yard, area, roadway, ground, garden, or any other private property, for the purpose of carrying on the works, until authorized so to do in writing by the engineer. And he shall give due and sufficient notice to all companies, such as railway, gas, or water, etc., of his intention to enter upon their premises or interfere with their works."[1]

[1] Under such a clause the contractor cannot require that the whole work shall be laid out so as to work on all parts at once. Henderson B'dge Co. *v.* O'Connors, 11 S. W. Rep. 15 [1889]. When work was to be done "under the direction" and "to the satisfaction" of an engineer and whose certificate was to entitle the contractor to payment, it was held that the engineer had power to stop the work. Devlin *v.* 2nd Ave. R. Co., 44 Barb. (N. Y.) 81.

*See Secs. 309–314 and Chap. XIII, *infra*.

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305. Period of Performance Fixed and Working Days Defined.

Clause: "The party of the second part will commence the work herein agreed to be performed by him within .... days from the day of the date hereof, and will carry on the same in such order and at such times and seasons, and with such force as shall from time to time be directed or prescribed by the said engineer, and will execute all work, in every respect, in a thorough and workmanlike manner, and will fully perform and complete all the work which he has herein agreed to perform on or before the expiration of .... days from the date hereof; but in the computation of time, the length of time (expressed in days and parts of a day), during which the work has been delayed in consequence of the condition of the weather, or by any act or omission of the parties of the first part (all of which shall be determined by the engineer, who shall certify to the same in writing), and also Sundays and holidays, on which no work is done, shall be excluded."

306. Work to be Prosecuted Day and Night.

Clause: "The work, unless otherwise authorized by the engineer, shall proceed continuously day and night, and generally the works shall, without extra charge, be carried on day and night without intermission, should there be any cause whatsoever which in the judgment of the engineer shall require it, but no work shall be carried on in the night without the knowledge and sanction of the engineer."

307. Time of Completion Fixed, but May be Extended by Engineer for Certain Causes.

Clause: "The contractor shall complete and deliver up to the board the whole of the works comprising the new bridge and approaches, and steamboat pier, and shall complete the removal of the temporary footbridge, the fenders, booms, and all other temporary works, within a period of .... years from the date of the engineer's order to commence the same, the whole of the works to be delivered up complete in every respect, in a clean and perfect condition. Provided always, that if by reason of the non-possession of any site or sites required for the purposes of the undertakings, or by reason of any additions to or enlargements of the works (which additions or enlargements the engineer is hereby authorized to make), or for any other just cause arising with the said board, or with either the engineer or his assistants, or in consequence of any unusual inclemency of the weather, or general or local strikes, or combination of workmen, or for want or deficiency of any orders, drawings, or directions, or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes, or differences, whatsoever and howsoever occasioned, the contractor shall, in the opinion of the engineer, have been unduly delayed or impeded in the completion of his contract, it shall be lawful for the engineer, if he shall so think fit, to grant from time to time, and at any time or times, by writing under his hand, such extension of time, either prospectively or retrospectively, and to assign such other day or days for, or as for completion, as to him may seem reasonable, without thereby prejudicing or in any manner affecting the validity of the contract, or the sufficiency of the tender, or the adequacy of the sums or prices therein mentioned; and any and every such extension of time shall be deemed to be in full

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compensation and satisfaction for, and in respect of any and every actual and probable loss or injury sustained or sustainable by the contractor in the premises, and shall in like manner exonerate him from any claim or demand on the part of the board, for and in respect of the delay occasioned by the cause or causes in respect of which any and every such extension of time shall have been made, but no further or otherwise, nor for or in respect of any delay continued beyond the time mentioned in such writing or writings respectively."

Clause: "If in the opinion of the engineer the contractor is obstructed or delayed in the prosecution or completion of the work by the neglect, delay, or default of any other contractor, or by any damage which may happen thereto by fire or by the unusual action of the elements, or by the abandonment of the work by employees in a general strike, then the contractor shall be entitled to such an extension of the time hereinafter or hereinbefore specified for the completion of the work as the engineer or architect shall in writing certify; provided, however, the claim is made by the contractor at the time and in writing." [1]

308. Time for Completion.

Clause: "The said contractor hereby agrees to complete all the work called for under this agreement, in all parts and requirements, on or before ....., 189.., provided, however, that the.....board shall have the right, at its discretion, to extend the time for said completion of the work."

309. Time of Completion Should be Clearly Stated.—If care be taken in drafting these clauses to express clearly the intention of the parties that the work shall or must be completed by a certain day or date, or within a certain period, there can be no doubt but that the clause is binding. There are many circumstances that arise, such as delay in securing the site or in procuring the right of way, or in furnishing certain materials, but these topics are fully treated in the sections on Liquidated Damages,* Breach of Contract,† and Impossible Contracts,‡ to which the reader is referred. If the time for completion of works is not specified then the contract must be performed within a reasonable time.[2] §

310. Time Limit. Calculation of Period Named.—The calculation of the number of days reserved to either party to commence or complete work, or to give notices, is important when penalties are forfeited, large bonuses are promised, or certain rights or privileges are to be exercised within a specified time. Generally when it is required that notice shall be given a certain number of days prior to a certain act, or that some thing, as work, shall be done within a certain number of days, the holidays and Sundays intervening

[1] Clark's Architect, etc. B fore the Law.
[2] *Cases*, 29 Amer. & Eng. Ency. Law 917, *note; and see* Frame *v.* The Ella, 48 Fed. Rep. 569.

* *See* Secs. 311–326, Chap. XI, *infra.* † *See* Secs. 438–442, 681–704, 723–727, *infra.*
‡ *See* Secs. 669–680, *infra.*
§ *See* Sec. 310, *infra.* As regards the Extension of Time, *see also* Secs. 130, *supra*, 572, 574, 724–725, *infra.*

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are to be reckoned and counted days.'* This is the general rule in the absence of proof of a custom to the contrary.

If the contractor require a certain number of working days to get ready to begin work, or to complete a job, he should stipulate for a certain number of days, exclusive of holidays, or specify a certain number of "working days." Whether or not the term "working days" would include rainy days or stormy days on work that required fair weather may be doubted. The determination of such a question would depend upon what was the evident intention of the parties, to be ascertained by the jury, from all the facts and circumstances of the case.

In reckoning the number of days named in the contract for completion of work, the day on which the contract was entered into is not reckoned. And if the day of performance falls on Sunday or a legal holiday, it may be performed or completed on Monday or the day following.[2] This rule seems to be well established in New York and Massachusetts in all contracts upon which days of grace are not allowed.[3] If the third day is Sunday, when three days of grace are allowed, as on bills and notes, the payment must be made on Saturday. A contract to be completed Nov. 31, was held to require the work to be completed on Nov. 30.[4] The day on which a claim comes due is excluded in computing the period of limitations.[5]

When the time of completion of a contract is not named, the courts require that it shall be performed within a reasonable time;[6] and the same is held when the contract requires the completion of the work "as soon as possible,"[7] or "at once and without delay."[8]

A reasonable time under a clause to complete "as soon as possible" or with "all possible dispatch" would probably be a shorter length of time than when nothing was said to indicate that any haste was desired. Therefore, under a contract which required a gas pipe line to be tested "with reasonable promptness," a delay of several months after completion before testing was held unreasonable.[9]

A contract to be performed "directly" is not one to be performed within a reasonable time, nor is it to be performed instantly.[10] "Forthwith" is usually held to mean immediately, and they require performance "with all

[1] Gordon *v.* People (Ill.), 39 N E Rep. 560; Taylor *v.* Palmer, 31 Cal 241 [1866]; Van Leer *v.* Kansas Y. H. B. Wks. (Kan. Sup.). 43 Pac. Rep. 1134.

[2] Hammond *v.* Ins. Co., 10 Gray 306.

[3] Stebbins *v.* Leowalf, 3 Cush. 137; Salter *v.* Burt, 20 Wend. 205; *Ex parte* Dodge, 7 Cow. 147; Alderman *v.* Phelps, 15 Mass. 225.

[4] Bean *v.* Kinnear, 23 Ont. Rep. 313.

[5] Geistweidt *v.* Mann (Tex.), 37 S. W. Rep. 372.

[6] Skinner *v.* Bedell's Adm'r, 32 Ala. 44; Pope *v.* Terre Haute C. & Mfg. Co. (N.Y.), 13 N. E. Rep. 592 [1887]; Brodeck *v.* Farnum (Wash.), 40 Pac. Rep. 189; Fowler *v.* Deakman, 84 Ill. 130; Lloyd's Law of B'ld'gs 60.

[7] Florence Gas, etc., Co. *v.* Hanby (Ala.), 13 So. Rep. 348 [1893].

[8] Sharpe *v* Johnson, 60 Barb. 144 [1871]; "as soon as practicable," *see* Reedy *v.* Smith, 42 Cal. 245.

[9] Tasker *v.* Crane Co. (C. C.), 5 Fed Rep. 449.

[10] Duncan *v.* Topham, 8 C. B. 225.

* In regard to Sunday *see* Sec. 59, *infra*.

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reasonable dispatch," "with reasonable and proper diligence," "with all reasonable celerity." They are stronger terms than the expression "within a reasonable time," and imply prompt, vigorous action.[1] What is a reasonable time is a question of law to be decided by the court,[2] unless it depends upon particular facts which are determined by the jury.[3] The nature of the contract will determine it.[4]

In determining what would be a reasonable time it has been held that regard must be had to the capacity of the manufacturer's plant, though the other party was unaware of its capacity; and such question is not to be determined from the time in which manufacturers in general would have performed the contract.[5]

A promise *to try to complete* a contract by a certain date does not make time of the essence of the contract so as to give the owner a counterclaim for expenses and losses due to the failure of the contractor to complete the work by the date named.[6] Work to be completed by a certain time must be finished before that time.[7]

Materials bought and no time specified for the payment of the price must be paid for on delivery,[8] which is regarded as a reasonable time.[9]

311. Time Made Essence of Contract.* Liquidated Damages Fixed for Delay in Completion of Work.

Clause: "Time shall be especially considered as the essence of this contract on the part of the contractor[s],[10] and in case the contractor[s] shall fail in the due performance of the works to be executed under this contract by and at the time or times herein mentioned or referred to, or at other than the day or days to which the period of completion may have been extended, ... may be liable to pay to the board, as and for liquidated damages, and not as penalty, the sum of $.....for each and every ..... which may elapse between the appointed and actual time of completion and delivery hereinbefore mentioned or provided for, which sum is hereby agreed upon, fixed, and determined as the damage which will be suffered by such failure to complete within the time named; and the owner or city may deduct the same from any moneys in their hands due or to become due to the contractor[s]; and such payments or deduction shall not in any degree release the contractor[s] from the further obligations and penalties in respect of the fulfilment of the entire contract, nor any right which the board might

[1] *See cases*, 8 Amer. & Eng. Ency. Law 572-3; Anderson *v.* Goff (Cal.), 13 Pac. Rep. 73 [1887].

[2] Ellis *v.* Paige, 1 Pick. 43.

[3] Howe *v.* Huntington, 15 Me. 350, *and cases cited;* Murrell *v.* Whitney, etc., 32 Ala. 55.

[4] Griffin *v.* Ogletree (Ala.), 21 So. Rep. 488

[5] Smith *v.* Spratt Mach. Co. (S. C.), 24 S E Rep. 376; Pope, J., dissenting.

[6] Gubbins *v.* Lautenschlager (C. C.), 74 Fed. Rep. 160.

[7] Rankin *v.* Woodworth, 3 P. & W. (Pa.) 48; *see also* Emden's Law of Building, etc., 166.

[8] Brady *v.* Anderson, 24 Ill. 112.

[9] Palmer *v.* Breen, 24 N. W. Rep. 322.

[10] Time may be made of essence of contract, and the parties may expressly agree that nothing shall be paid for the works unless they are completed by a time named. Westerman *v.* Means, 12 Pa. St. 97; Kent *v.* Humphreys, 13 Ill. 573; Hudson *v.* Temple, 29 Beav. 536; Liddle *v.* Sims, 2 Smedes & M. 596.

* *See* Sec. 326, *infra.*

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have to claim, sue for, and recover compensation and damages for non-performance of this contract at the time hereby stipulated."*

312. Contractor shall be Liable for Superintendence and Inspection and a Sum Named as Liquidated Damages for Delay in Completing Work.

Clause: "Should the contractor not complete the work herein contracted for at the period agreed upon as above mentioned, the contractor shall be liable for and shall cause to be paid to the corporation all salaries or wages which shall become due to the person or persons superintending the work on behalf of the said corporation, from the above-named period for completion until the same shall actually be completed and accepted, and shall also pay to the said corporation as liquidated damages (over and above such salaries and wages) the amount of.....dollars per day for each, etc., ...and the engineer for and on behalf of the said corporation or owner may deduct such salaries, wages, and damages from any moneys payable to the contractor in respect of this or any other contract."

313. Periods for Completing Several Stages of the Work Named and Liquidated Damages Fixed for Each.

Clause: "The contractor is to finish each of the above works that may be awarded to him within the period marked opposite the same in the following list, counting from the date of the order to commence the same, and to pay the sums marked opposite each as liquidation damages for each and every day that any part of the said work shall remain unfinished after that time. But in the event of delay to the works by reason of strikes or combinations on the part of the workmen employed, or by any act of the board, the engineer will allow such additional time as he may deem fair and reasonable."

Works.	Time Within which Work is to be Completed.	Daily Penalty for Non-completion in Time.
Masonry of abutments and piers, ready for the reception of the superstructure.....	.....	.....
Steel superstructure and deck ready for traffic.....	.....	.....
Etc., etc.		

314. Liquidated Damages for Noncompletion, Delay, or Other Breach.

Clause: "And it is further expressly agreed that in case the said contractor.... shall fail to fully and entirely, and in strict conformity to the provisions and the conditions of this agreement, perform and complete the said work, and each and every part and appurtenance thereof, within the time hereinbefore limited for such performance and completion, the said part..... of the second part shall and will pay to the said part.... of the first part the sum of..... dollars ($.....) for each and every day that the said part of.. the second part shall delay the full completion and delivery of the work and premises to the said company or its authorized agents, which said sum of..... dollars ($.....) per day is hereby agreed upon, fixed, and determined by the parties hereto as the damages which the said company will suffer by such delay and default, and not by way of

* *See* Sec. 321, *infra*.

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penalty. And the said party.... of the first part may deduct or retain the said sum of ..... dollars ($.....) per day out of or from any moneys that may be due or become due under this agreement."

Clause: "And it is further agreed and understood that no extra allowance of time shall be allowed for the performance and completion of any extra works, alterations, or additions required or ordered as hereinbefore [or hereinafter] provided by the terms of this contract, but that such extra work, alterations, and additions shall be completed as if they had been comprised in the original work and within the period limited for the completion of the same, unless an extension of time be allowed and agreed upon in writing, signed and countersigned by the parties [or their engineer] as part of this contract."

315. Recovery of Damages Stated May Depend upon Whether It Is a Penalty.—When the contract fixes a certain sum as damages for its breach or delay, the question whether the amount can be recovered at law depends upon whether the court construes the sum stipulated to be "liquidated damages" or a "penalty." If the sum stipulated is regarded as "liquidated damages," it is the measure of damages and the jury are confined to it; but if the court hold it to be a penalty, the actual damage suffered will be regarded and not the amount named in the instrument.[1] Whether or not it is a penalty is a question of construction for the court.[2] Forfeitures are regarded by courts with little favor, and will seldom be upheld if intended to operate as penalties.[3] The tendency and preference of the law is to consider a sum payable for breach of a contract as a penalty over which it has control rather than liquidated damages;[4] and no more than actual damages can be recovered.[5] Courts generally treat a fixed sum designated as damages in a contract as a penalty, and inquire into the damages actually suffered.[6]

316. A Penalty Cannot be Concealed Behind the Words "Liquidated Damages."—This inclination of the court renders it necessary to so draw the contract as to make the forfeiture stipulated come under the court's classification of liquidating damages. In deciding this question the court will consider the whole nature and object of the agreement[7] rather than the precise words of the contract. It will seek to gather the intention of the parties as expressed in all the provisions of the contract;[8] it will look at the subject of the contract, its surroundings, and conditions; it will inquire into the work, its character, importance, and the difficulty of ascertaining the actual damages,[9] the magnitude of the sum stipulated as compared with

[1] Lowe *v.* Beers, 4 Burr. 2228; Harrison *v.* Wright, 13 East. 343; 5 Amer. & Eng. Ency. Law 24.

[2] Foley *v.* McKeegan, 4 Iowa 1; Wallis *v.* Smith, L. R. 21 Ch. D. 223.

[3] Applegate *v.* Jacoby, 9 Dana 206; Hahn *v.* Horstman, 12 Bush. (Ky.), 249; Home Life Ins. *v.* Pierce, 75 Ill. 426; Eva *v.* McMahon, 77 Cal. 467; Elizabethtown & P. M. Co. *v.* Geoghegan, 9 Bush. (Ky.) 56; Elliott *v.* Railroad Co., 99 U. S. 573 [1878]; Cheney *v.* Bilby (C. C. A.), 74 Fed. Rep. 52.

[4] Lansing *v.* Dodd, 45 N. J. Law 525.

[5] Schofield *v* Thompkins, 95 Ill. 190.

[6] Hooper *v.* S. M R. Co., 69 Ala. 536; Farrar *v.* Beeman, 63 Texas 175.

[7] Pierce *v.* Jung, 10 Wis 30; Pennypacker *v.* Jones, 106 Pa. St. 237; Vetter *v.* Hudson, 57 T xas 604; Henry *v.* Davis, 123 Mass. 345.

[8] Streeper *v.* Williams (Pa.), 12 Wright 454.

[9] Patent Brick Co. *v.* Moore, 75 Cal. 205

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the whole cost or value of the work, as well as the probable damages consequent to delay or a breach,[1] and if from a consideration of all these questions the court is of the opinion that the sum stipulated is a penalty, it will be so construed whatever be the language employed. A real "penalty" cannot be successfully concealed behind the words "liquidated damages."[2] On the other hand, a sum denominated a "penalty" or a "forfeiture" may be held to be liquidated damages if, under all the circumstances, such appears to have been the intention.[3] Its nature is not to be determined by the terms used by the parties, but from a consideration of the agreement and surrounding circumstances.[4]

317. The Damages Recovered or Withheld Must be Commensurate with the Injury Suffered.—It cannot be doubted that the general leaning of the courts is that such agreements for damages shall be considered penalties, so that a party may retain only such damages as he can show in justice and fairness he is entitled to. The general rule of law is that the remedy shall be commensurate with the injury sustained,[5] and the sum named will be the measure of damages only when it appears that it will no more than compensate the loss sustained.[6]

If the default of the contractor resulted in mere nominal damages to the owner no liability for the damages specified will be created.[7] It is quite certain that unless the contract makes it appear that the stipulation was intended as a provision for liquidating, the sum will be deemed a penalty and will not be taken as liquidated damages.[8]

The intention expressed is not all controlling,[9] for in some cases the subject-matter and surroundings of the contract will control the intention, when equity absolutely demands it. Thus a sum expressly stipulated as liquidated damages will be relieved from, if it is obviously to secure payment of another sum capable of being compensated,[10] as a large sum of money in default of payment of a smaller sum.[11] Cases of this kind are where the

[1] Mathews *v.* Sharp, 99 Pa. St. 560.

[2] Pollock's Contracts 467; Noyes *v.* Phillips, 60 N. Y. 408; Sainter *v.* Ferguson, 7 C. B. 716; Sanford *v.* 1st Nat'l Bank (Iowa), 63 N. W. Rep 459; Moore *v.* Platte Co., 8 Mo. 467; Basye *v.* Ambrose, 28 Mo. 39; Fitzpatrick *v.* Cottingham, 14 Wis. 219; Dullaghan *v.* Fitch, 42 Wis. 679; Foley *v.* McKeegan, 4 Iowa 1; Perkins *v.* Lyman, 11 Mass. 76; Graham *v* Bickman, 4 Dall. 149; Story's Eq. Jur. § 1318; *see also* Lloyd's Law of Building, pp. 98, 101; Gillilan *v.* Rollins (Neb.), 59 N. W. Rep. 893; *see also* 18 Cent. Law Jour. 143 [1884].

[3] Pollock's Contracts 467; Noyes *v.* Phillips, 60 N. Y. 408; Sainter *v.* Ferguson, 7 C. B. 716.

[4] Wolf *v.* Des Moines, etc., R., 64 Iowa 380; *see also* 5 Amer. & Eng. Ency. Law 24-26.

[5] Shreve *v.* Breton, 51 Pa. St. 175; Schofield *v.* Thompkins, 95 Ill. 190; Kemble *v.* Farren, 6 Bing. 148.

[6] Gillilan *v.* Rollins (Neb.), 59 N. W. Rep. 893; Jaquith *v.* Hudson, 5 Mich. 123; Noyes *v.* Phillips, 60 N. Y. 408; Lindsay *v.* Rockwall Co. (Tex.), 30 S. W. Rep. 380, *certified check accompanying a bid; and see* Slowman *v.* Walter, 1 Bro. Ch. 418.

[7] Hathaway *v.* Lynn (Wis.), 43 N. W. Rep. 956; *see* Happer *v.* Thomas, Com. Pl. 5 Pa. Dist. Rep. 182.

[8] Dill *v.* Lawrence (Ind.), 10 N. E. Rep. 573; Richmond *v.* Robinson, 12 Mich. 193.

[9] Wolf *v.* D. M. & Ft. D. R., 64 Iowa 380, *and cases cited;* Astley *v.* Weldon, 2 Bos. & P. 350.

[10] Streeper *v.* Williams, 48 Pa. St. 450; Merrill *v.* Merrill, 15 Mass. 488.

[11] Kimball & Co. *v.* Doggett, 62 Ill. App. 528.

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damages for delay or breach can be computed with certainty. If the damages can be readily ascertained by a jury, a sum named as damages will be held merely a penalty.[1] If the default of the contractor has caused no damages or injury, then there can be no recovery of any sum, either liquidated damages or penalty.[2] The law aims to award "either such damages as fairly and reasonably may be considered as arising naturally, that is, according to the usual course of things from such breach itself, or such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was made, as the probable result of the breach of it."[3]

The civil code of California forbids contract clauses for liquidated damages, unless from the nature of the case it is impracticable to fix the actual damages suffered.[4] If, on the other hand, other damages are suffered by the owner in excess of those named as liquidated damages, the owner may recover them.[5]

If there are several covenants, and the damages for the non-performance of some of them are ascertainable by a jury, while the damages for the non-performance of others are not measurable by any exact pecuniary standard, a sum named as damages for the breach of any of the covenants or stipulations is merely a penalty to secure the performance of the entire contract, and is not liquidated damages to be recovered for the breach of a single stipulation.[6]

Contracts, the damages from the breach of which may be determined, include those for the payment of money, and contracts of sale where the market price affords a standard by which to estimate damages.[7] Thus in an agreement to forfeit ten per cent. (10 %) retained as security for the completion of the contract to furnish ties to a railroad company, it was held to be a penalty, and that the contractor was not debarred by the terms of the contract from recovering for the ties actually delivered less the damage actually sustained.[8] In such cases the difference between the market price for which they could have been obtained and the price to be paid is the damage sustained.[9]

The retention of a percentage of the estimates until the completion of the work is not in the nature of stipulated damages or of a condition precedent

[1] Trower *v.* Elder, 77 Ill. 453 [1875]; Brennan *v.* Clark (Md.), 45 N. W. Rep. 472 [1890]; Patent Brick Co. *v.* Moore, 70 Cal. 205; Lucas *v.* Snyder, 2 G. Gr. (Ia.) 590; Heatwole *v.* Gorrell (Kans.), 12 Pac. Rep. 135 [1887]; Scoville *v.* Tompkins, 95 Ill. 190; McGee *v.* Lavell, L. R. 9 C. P. 115; *semble*, Gillilan *v.* Rollins (Neb.) 59 N. W. Rep. 893; Lord *v.* Gladdiss, 9 Iowa 265; Nowlin *v.* Pyne, 40 Ia. 166; Wilcus *v.* Kling, 87 Ill. 107; Gulf, etc., Ry. Co. *v.* Ward (Tex.), 34 W. Rep. 328.

[2] Appeal of McCullough (Pa.), 18 Atl. Rep. 1080.

[3] Hadley *v.* Baxendale, 9 Ex. 441.

[4] Easton *v.* Cressey (Cal.) 34 Pac. Rep. 622.

[5] Pengra *v.* Wheeler (Oreg.) 34 Pac. Rep. 354.

[6] Trower *v.* Elder, 77 Ill. 453 [1875]; *In re* Newman, L. R. 4 Ch. D. 724; Shreve *v.* Brereton, 51 Pa. St. 175 [1865]; Light, etc., Co. *v.* Jackson (Miss.), 19 So. Rep. 771.

[7] London *v.* Taxing District, 104 U. S. 771.

[8] Jemmison *v.* Gray, 29 Ia. 537, *Iowa cases cited.*

[9] Tyler Car. & L. Co. *v.* Wettermark (Tex.), 34 S. W. Rep. 807.

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requiring performance of the contract in every particular. In the absence of an express stipulation to that effect, it is a mere retention to answer damages suffered.[1]

318. Stipulation is Good when Damages Suffered Cannot be Ascertained.—With whatever degree of disfavor courts regard stipulations for fixed sums as damages for breach of contracts in general, engineering contracts form an exception to the above rules. Not from any relaxation of the principle to control and inquire into everything pertaining to a case within its jurisdiction, but from its incompetence to ascertain the actual damages suffered.[2] The peculiarity of engineering work, and the great importance of having all parts of the work progress towards completion at the same rate of speed, renders it impossible to estimate with any degree of accuracy the damages sustained by the failure of a contractor to keep and perform the material stipulations of an engineering contract. The damages cannot be measured by the loss of tolls, fares, or revenues receivable upon completion of the structure or work. The delay may hinder the progress of other parts of the undertaking; it may cause delays in other or subsequent work, and their cost doubled by less favorable conditions of weather, seasons, the market, and labor. Such an undertaking would be burdensome and impracticable for the court or jury, and they are compelled to accept the parties' own figures, without attempting to determine the actual damage.[3]

It may be said generally that where, independently of the stipulation, the damages are wholly uncertain and incapable or very difficult of being ascertained, except by mere conjecture, they will be considered as liquidating if they are so denominated in the contract.[4] If the amount is not out of all proportion, it will be treated as liquidated damages.[5]

Whenever from the nature of the contract the damages cannot be calculated with any degree of certainty, or there are peculiar circumstances contemplated by the contract, the stipulated sum should be held to be liquidated damages.[6] It has therefore been held that a contract for foundations,[7] or to build a bridge for a city,[8] or to build a street-railway for a

[1] Danville Bridge Co. *v.* Pomeroy, 15 Pa. St. 151 [1850].

[2] Applegate *v.* Jacoby, 9 Dana 206; Home Life Insurance Co *v.* Pierce, 75 Ill. 426; Elizabethtown & P. R. R. Co. *v.* Geoghegan, 9 Bush (Ky.) 56, *and cases cited;* Indianola *v.* G. W. T. & P. Ry., 56 Tex. 594 [1882]; Bancroft *v.* Scribner (C. C. A.), 72 Fed. Rep. 988; Stover *v.* Spielman, 1 Pa. Super. Ct. 526; Kemble *v.* Farren, 6 Bing. 147; Camp *v.* Pollock (Neb.), 64 N. W. Rep. 231; Wallis *v.* Smith, L. R 21 Ch. D 243; Crux *v.* Aldred, 14 W. R. 656; Hall *v.* Crowley, 5 Allen 304; Malone *v.* Philadelphia (Pa.), 23 Atl. Rep. 628 [1892].

[3] Elizabethtown & P. R. R. Co. *v.* Geoghegan, 9 Bush (Ky.) 56; Wolf *v.* Des Moines & Ft. D. Ry., 64 Iowa 380; 5 Amer. & Eng. Ency. Law 25; Fessman *v.* Seeley (Tex.) 80 S. W. Rep. 268, where a pupil had been expelled from school and the courts held the tuition, etc., paid was forfeited.

[4] Lennon *v.* Smith, 14 Daly 520 [1888]; Sedgwick on Measure of Damages, p 422.

[5] Ward *v.* H. R. B. Co., 125 N. Y. 230 [1891]; Elizabethtown R. Co. *v.* Geoghehan, 9 Bush (Ky.) 56.

[6] 5 Amer. & Eng. Ency. Law, 24, 25, *and cases cited;* Hulff *v.* O'Connor (Tex.), 37 S. W. Rep. 238; Lennon *v.* Smith, 14 Daly 520 [1888], *and cases cited.*

[7] Lincoln *v.* Little Rock G. Co. (Ark.), 19 S. W. Rep. 1056.

[8] Malone *v.* Philadelphia (Pa.), 23 Atl. Rep. 628.

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town,[1] or to erect a building or a residence,[2] or to furnish a theater for an entertainment,[3] were instances in which the sum specified as liquidated damages for breach of contract would be so held. In fact, a contract for *any* architectural or engineering construction of importance would come under the same class.[4]

If the parties bind themselves in a specified sum "not as penalty but as stipulated damages," and if by the whole agreement it appears that they did not intend the entire sum should be paid for any breach however minute, it is a penalty merely, and if the sum specified will in some instances be too large and in some too small for breaches of the acts provided for, it is to be considered a penalty. If however the injury provided against is altogether uncertain, the sum is to be esteemed liquidated damages.[5]

The insertion of a clause for liquidated damages for failure to perform a contract has been held not to prevent a decree for specific performance of the contract.[6]

A sum denominated a penalty or forfeiture will be considered liquidated damages where it is fixed upon by the parties as the measure of the damages, because the nature of the case, the uncertainty of the proof, have induced them to make the damages a subject of previous adjustment.[7] The forfeitures usually provided in contracts for construction of railroads, bridges, or other engineering works come under this class, and are commonly regarded as liquidated damages.[8]

This is not however a universal rule, and it is held to the contrary whenever the damages can be determined. The exception is sometimes made in regard to buildings,[9] and an exception has been made in case of grading a park.[10] It has been held an error to refuse the admission of evidence of the measure of damages offered by the contractor.[11]

The difficulty of fixing or estimating the actual damage caused by the delay or breach must be shown to the satisfaction of the court by evidence,

[1] Nilson *v.* Jonesboro (Ark.), 20 S. W. Rep. 1093; O'Donnell *v.* Rosenberg, 14 Abb. Pr. (N. S.) 59; Mills *v.* Paul (Tex.), 30 S. W. Rep. 558.

[2] Collier *v.* Betterton (Tex.), 29 S. W. Rep. 467.

[3] Mawson *v.* Leavitt (City Ct.), 37 N. Y. Supp. 1138.

[4] Reichenbach *v.* Sage (Wash.), 43 Pac. Rep. 354, *a building;* Manistee I. W. Co. *v.* Shores L. Co. (Wis.) 65 N. W. Rep. 863, *a boat;* Easton *v.* Penna. Canal Co., 13 Ohio 79; Wolfe *v.* Des Moines R. Co., 68 Iowa 380.

[5] Shreve *v.* Brereton, 51 Pa. St. 175 [1865]; Trower *v.* Elder, 77 Ill. 453 [1875].

[6] Lyman *v.* Gedney, 114 Ill. 388.

[7] Streeper *v.* Williams, 48 Pa. St. 450; 1 Suth. Dam. 512, 520; Cothrel *v.* Talmadge, 9 N. Y. 577; O'Donnell *v.* Rosenberg, 14 Abb. Pr. (N. S.) 59; Pettis *v.* Bloomer, 21 How. Pr. 317; Farnham *v.* Ross, 2 Hall. 187; Ward *v.* H. R. B. Co., 125 N. Y. 230 [1891] and *cases c ted;* Carter *v.* Laudry, 3 Pugslev & B. (N. B.) 516 [1880]; Indianola *v.* G. W. T. & P. Ry., 56 Tex. 594 [1882]; Nilson *v.* Jonesboro (Ark.), 20 S. W. Rep 1093.

[8] Ranger *v.* Great Western Ry., 27 E. L. & E. 61; Easton *v.* Penna. & O. C. Co., 13 Ohio 79; Hennessay *v.* Farrell, 4 Cushing 267; Pierce on American Railroads 377; Pierce *v.* Jung, 10 Wis. 30; Dwinell *v.* Brown, 54 Me. 468; Jackson *v.* Cleveland, 19 Wis. 400.

[9] Cockran *v.* Peoples Ry. Co. (Mo.), 21 S. W Rep. 6.

[10] Monmouth Park *v.* Warren (N. J.), 27 Atl. Rep. 932.

[11] Dietert *v.* Friday (Tex.), 22 S. W. Rep. 291.

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to bring a case under this exception and entitle an owner or company to recover the account stipulated for as liquidated damages.[1]

A contract of employment between a waiter and the proprietors of a hotel which stipulates that if the waiter leave their service without giving three days notice he shall forfeit all moneys owing him, provides for a penalty, and not for liquidated damages.[2] A stipulation in a contract entered into by a cotton-mill and one of its operatives, earning between 50 cents and $1.00 per day, by which she forfeits $10 of her wages if she shall leave without giving two weeks' notice, is a stipulation for liquidated damages, and not for a penalty, and is neither unreasonable nor oppressive; it being certain that the cotton-mill will suffer damages from the unexpected quitting of its operatives, and there being no certain standard by which the actual damages can be ascertained.[3] It seems that $10 may be regarded as liquidated damages because it is reasonable, but a forfeiture of all that is due one is held *not* liquidated damages. So a provision that the contractor shall pay the wages of the owner's superintendent during any delay from his failure to complete the work in the time specified is for liquidated damages, and not for a penalty.[4]

319. To Evade the Provision Contractor must Show Damages Actually Suffered, or that the Sums Stipulated are Unreasonable or Exorbitant.— It is incumbent upon the contractor to show what damages the company suffered if he claims the stipulation is for a penalty,[5] but for the owner to recover a sum stipulated as liquidated damages no proof of the actual damages suffered need be furnished.[6] It seems to be necessary, however, to ask for the construction of the contract provision as to liquidated damages, when the owner sues on the contractor's bond for completion, or he will have to prove the damages he has sustained.[7]

In any case it is submitted that if the amount stipulated as damages be so exorbitant that to enforce its payment would be to inflict a penalty on the party in default, instead of making good the injury sustained by reason of the breach, it will not be enforced.[8] Or if the stipulated sum is so great that it is apparent that the provision was inserted "to terrorize" the contractor to accomplish a timely execution, it will be held a penalty, and the actual damage must be proved.[9]

[1] Patent Brick Co. *v.* Moore. 70 Cal. 205; Faunce *v.* Burke, 16 Pa. St. 469; Geiger *v.* West Md. R. Co., 41 Md. 4.

[2] Schmieler *v.* Kingsley (Com. Pl.), 26 N. Y. Supp. 31.

[3] Tennessee Manuf'g Co. *v.* James (Tenn.), 18 S. W. Rep. 262.

[4] O'Brien *v.* Anniston Pipe Works (Ala.), 9 So. Rep. 415 [1891].

[5] DeGraff V. & Co. *v.* Wickham (Ia.), 52 N. W. Rep. 503; s. c., 57 N. W. Rep. 420; Mills *v.* Paul (Tex.), 30 S. W. Rep. 558.

[6] Sanford *v.* First Nat'l Bank (Ia.), 63 N. W. Rep. 459; *but see* Wilens *v.* Kling, 87 Ill. 107, *and see* Note 1, *supra*.

[7] De Mattos *v.* Jordon (Wash.), 46 Pac. Rep. 402; *and see* Wilens *v.* Kling, 87 Ill. 107.

[8] Elizabethtown & P. R. R. Co. *v.* Geoghegan, 9 Bush (Ky.) 56; Merrill *v.* Merrill, 15 Mass. 488; Kemble *v.* Farren, 6 Bing. 141.

[9] Bradstreet *v.* Baker, 14 R. I. 546; Schofield *v.* Tompkins, 95 Ill. 190; Ward *v.* H. R. B. Co., 125 N. Y. 230 [1891]; Bagley *v.* Peddie, 5 Sandf. (N. Y.) 192; Contee *v.* Dawson, 2 Bland. 264.

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A recent decision of the New York Court of Appeals makes a discrimination as to the purpose of these liquidated damages, which should be considered in drafting contracts. If the payment of liquidated damages is reserved for the breach of the contract, it is good ; but if it is a means to dissolve the contract, then the sum named as liquidated damages cannot be recovered. The contract in question, which was declared to be a means of dissolving the contract, reserved to the company the right to terminate the contract at any time by formal notice in writing and upon payment to the contractor for all labor performed and the further sum of $3000 as liquidated damages. It was held that the contractor could not recover the $3000, although the company had suspended the work.[1] If the contractor had shown that he had suffered damages to the extent of $3000, he might have recovered it, we should say, not upon the contract clause, but as damages resulting from the breach. The discrimination made by the court is not one that the average laymen will appreciate, for in the case where the contractor is to pay a certain sum for failure to perform his part of the contract, if he deliberately declines to complete it he must pay the liquidated damages. The reason of the decision is probably to be found in the refusal of courts to allow liquidated damages at any time unless it be apparent when the contract was made that there would be damages approximating the sum named or that the circumstances were such that it would be impossible to estimate them. The court probably regarded the $3000 in this case as a penalty disguised under the name of liquidated damages.

320. Matters to be Considered in Determining the Amount of Liquidated Damages.—From the foregoing it must be concluded that a clause stipulating for an exorbitant or unreasonable forfeiture on account of delay or breach is little better than no provision at all. In deciding what amount shall be required it is suggested that the engineer shall make a careful estimate of what the probable damages of delay or nonperformance would be, and let that be the sum stipulated. Fortified with such an estimate, a contractor could not hesitate to agree to such a sum, nor could a court deny that it was liquidated damages.[2] Of the many items of such an estimate to be considered, the following are ennumerated, viz., cost of completion, including superintendence; loss of traffic, tolls, and revenues; interest of capital rendered idle and non-accumulative ; delaying of other work ; probable increase in market prices of materials and labor ; subsequent unfavorable conditions for the successful prosecution of the work, such as cold, hot, or rainy weather, unhealthy seasons ; possibility of labor strikes, riots ; damages from weather, water and fire ; and in fact every condition and circumstance and risk that a contractor must consider in making his bid for the contract.

[1] Curran *v.* Del. & O. Ry. Co., 34 N. E. Rep. 201.

[2] Tingley *v.* Cutler, 7 Conn. 391 ; Gannon *v.* Howe, 14 Me. 250; Chamberlain *v.* Bagley, 11 N. H. 234; Story's Eq. Juris. § 1318 ; Bridges *v.* Hyatt, 2 Abb. Pr. 449 ; Reilly *v.* Jones, 1 Bing. 302; Lowe *v.* Peers, 4 Burrows 2228 ; Astley *v.* Weldon, 2 Bos. & P. 335.

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Such an estimate could be but approximate at most, but the fact of there having been such an estimate, however rough, if submitted to a contractor and agreed to by him as the damages which would be suffered in consequence of delay or breach, would be conclusive, and must be the measure of damages in case of delay or breach. The estimate should include all and be sufficient to cover all probable expenses and damages, for it has been held that when an amount is stipulated the contractor will not be held for damages in excess of the amount stipulated, "if he was delayed by causes beyond his control and had acted in good faith."[1]

A provision in a contract to build a railroad bridge that in case of noncompletion of the bridge or neglect to provide a crossing for trains by a given date the sum of $1000 per week should be deducted from the contract price of the bridge for the time its completion or provision for crossing trains is delayed beyond the date, is a stipulation for liquidated damages. In such a case if the contractors act in good faith and the delay results from causes beyond their control, they will not be liable for damages in excess of the stipulated amount, $1000.[2]

321. Difficult Construction, Casualties, etc., No Excuse to Relieve from Liquidated Damages.—The fact that the conditions are changed and the work has became more onerous will not excuse the contractor from a full performance within the time limit. Delay of the work by high waters, sickness of hands, and sunken logs encountered in sinking piers does not excuse the contractor from performance of his contract. He assumed those risks when he executed the contract without a provision exempting him from the consequences of such casualties.[3] The fact that the contractor met one or more strata of flint rock is no defense to a claim for liquidated damages, though at the making of the contract the employer honestly expressed an opinion that the material to be encountered was limestone rock;[4] but when delay was caused by the contractor having unavoidably blasted more rock than required by the width of the cut while doing the work in a careful and skillful manner, no liquidated damages should be charged.[5] Inability of the contractor to obtain a certain kind of stone required has been held no excuse unless the impossibility existed when the contract was made,[6] and the death of the contractor has been held *not* a good excuse.[6]*

[1] T. & St. L. Ry. Co. *v.* Rust, 19 Fed. Rep. 239; Welsh *v.* McDonald (Va.), 8 S. E. Rep. 711 [1888].

[2] Texas & St. L. Ry. Co. *v.* Rust, *supra*. *Accord*, Welsh *v.* McDonald, *supra*.

[3] Texas & St. L. Ry. Co. *v.* Rust, 19 Fed. Rep. 239 [1883]; Jones *v.* St. John's Col., L. R. 6 Q. B. 115; Oakden *v.* Pike, 34 L. J. Ch. 620; Kent *v.* Humphreys, 13 Ill. 573; Cochran *v.* People's Ry. Co. (Mo. Sup.), 33 S. W. Rep. 177.

[4] Fruin *v.* Crystal Ry. Co. (Mo.), 14 S. W. Rep. 557 [1886].

[5] Wright *v.* Meyer (Tex.), 25 S. W. Rep 1122.

[6] McDaniel's Appeal (Pa.), 12 Atl. Rep. 154 [1888]; *but see* Cannon *v.* Widman, 28 Conn. 490.

* *See also* Secs. 320–326, 573, 585, 674–680, and 689, *infra*.

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322. Damages Should be Denominated "Liquidated Damages."—In drafting a contract it is of importance that the stipulation should be for liquidated damages. It should definitely state:

> "That the percentage retained from the estimate of the engineer or the said sum of.....dollars [$.....] is a sum reserved to insure the completion of the work, and is hereby agreed upon, fixed, and determined by the parties hereto as the expense and damage which the said company will suffer by such delay and default, and not by way of penalty."

It should further provide "That the said company may deduct or retain the sum of.....[$.....] for each and every day the full completion and delivery of the work and premises to the said company or its authorized agents is delayed."

It is submitted that a court would not construe such a clause in any other light than of liquidated damages however much they may dislike forfeitures. If the amount be reasonable, the clause, it is believed, will meet all the requirements necessary to make the sum stipulated liquidated damages, and protect it from classification with penalties or forfeitures. If it be not stated whether the sum named is intended as a penalty or as liquidated damages, and no regard is paid to the magnitude or to the number of breaches that may occur, or to the amount of damages that may ensue, and the contract is such that it may be partially performed and partially violated, the sum so fixed is a penalty.[1]

323. Damages when Company has Taken Work Away from Contractor.—Some special cases arise in regard to this question of liquidated damages in connection with a provision empowering the company or its engineer in their discretion to annul the contract. When a contract job is to be completed by a specified date, and the company or its engineer has in its [his] discretion taken the work out of the contractor's hands, and declare the contract broken,[2] or the work is suspended,[3] the question arises whether the company can retain the amount stipulated for delay in its completion. If this discretion has been properly exercised in good faith the percentage reserved may be retained as liquidated damages by the company.*

If it be agreed that the abandonment of the work shall extinguish the company's liability, the percentage that has been kept back by the terms of the contract to secure the completion of the work will be regarded as liquidated damages, and cannot be recovered by the contractor.[4] It seems, however, that if the contractors themselves finish the work the percentage reserved is not so regarded, but can be recovered by the contractors. If the

[1] City of El Reno *v.* Cullinane (Okl.), 16 Pac. Rep. 510.

[2] Easton *v.* Pennsylvania & Ohio C. Co. 13 Ohio 79 [1844].

[3] Nourse *v.* U. S., 25 Ct. of Cl. 7, *and see* Dubois *v.* D. & H. C. Co., 4 Wend. (N. Y.) 285.

[4] Easton *v.* The P. & O. Canal Co., *supra, and see* P., etc., R. Co. *v.* Howard, 13 How. (U. S.) 307.

* *See* Secs. 728-733, *infra.*

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contract be abandoned or forfeited, relet, and others complete the work, then the amount retained is regarded in its nature as liquidating damages. In the language of the court,—"If it were not so intended then there would be no security in the retention of this contract. The agreements of the parties are the law by which their rights are to be determined, and I am extremely doubtful at least whether any court can legitimately interfere and upset their arrangements where an honest discretion has been exercised and when neither fraud nor circumvention has intervened. If no act in fact has been done by the contractor nor duty omitted within the terms of the contract which would justify the company or its engineer in declaring it abandoned, then the honest exercise of the discretion conferred ought not to shield the company from the payment so retained."[1]*

324. Delay Caused by Other Contractors—Alterations or Extra Work.†—If the contract simply provides for the retention of a certain sum or percentage until the completion of the work, it seems it is not to be regarded as liquidated damages, and that the company can retain only so much as will cover the damages actually sustained.[2] Therefore when the contractor was delayed in consequence of a third party's failure to furnish necessary explosives and the engineer in charge exercised his honest judgment and terminated the contract, the court held that the ten per cent. reserved until the completion and acceptance of the whole work could not be retained, since the owner [government] had sustained no loss by the failure.[3] If, however, by the contract ten per cent. has been retained to keep the work in repair for a certain period after completion, no action can be had to recover the ten per cent. reserved without an allegation that the contractor kept the works in repair as provided.[4] Delay caused by other contractors may relieve the contractor from damages if he has exercised due care and vigilance,[5] but not so if he has agreed in his contract that the owner or principal contractor shall not be liable or responsible for delay of other contractors, even though the owner has failed to bind other contractors not to delay work.[6] If it be provided in the contract that the contractor shall give written notice of any neglect of other contractors to perform[7] their part of the work, or of any unavoidable accidents that prevent prompt performance,[8] the occurrence of such events will not excuse delay on the part of the contractor unless such written notice has been given. If the

[1] Easton *v.* Pennsylvania & Ohio C. Co., *supra*.
[2] Potter *v.* McPherson, 61 Mo., 240 [1875]; Danville B. Co. *v.* Pomroy, 15 Pa. St. 151 [1850]; The P. W. & B. R. Co. *v.* Haward, 13 Howard's Repts. 4.
[3] Quinn *v.* United States, 99 U. S. 30.
[4] Louisville *v.* Muldoon (Ky.), 22 S. W. Rep. 847.
[5] Graveson *v.* Tobey, 75 Ill. 540.
[6] *Semble*, McNulty *v.* Stearns (Iowa), 52 N. W. Rep. 357; *accord*, Stewart *v.* Keteltas, 9 Bosw. (N. Y.), 261 [1862]; Taylor *v.* Renn, 79 Ill. 181 [1875]; *semble*, Rens *v.* Grand Rapids (Mich.), 41 N. W. Rep. 263, *and see* Wills *v.* Webster (Sup.), 37 N. Y. Supp. 354, *contractor requested to delay*.
[7] Shute *v.* Hamilton, 8 Daly (N. Y.) 462.
[8] Brown *v.* Strimple, 21 Mo. App. 338.

* *See* Secs. 728–733, *infra*.

† *See* Secs. 573, 585, 670, and 689, *infra*.

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contractor has agreed that delay shall not be excused by the neglect or failure of other contractors, the agreement will hold.[1] It is no defense to an action to recover liquidated damages stipulated for in the building contract for delay that a subcontractor failed to fulfill his contract.[2]

A provision by which the architect is given authority to adjust the loss of time due to delays caused by other contractors does not preclude a recovery by the contractor against the owner for delays and obstructions caused by the acts of the architect as superintendent for the owner.[3]

The stipulation for liquidated damages is sometimes avoided by contractors by pleading alterations, extra work, delay by other contractors, or delay in having access to premises. Generally extra work imposed by the company or owner, if it creates extra burdens and prevents the contractor from completing the contract at the specified time, will relieve him from specific liquidated damages.[4] The fact that disputes have arisen as to the work done, materials used, and alterations required, and that the owner refuses to release the contractor from the forfeiture of ten dollars per day for delay, will not justify the contractor in abandoning his contract, even though the owner is in error as to his claims.[5]

Since it is frequently necessary to order extras, it is customary to add to the ordinary clause for liquidated damages a clause similar to the following:

> "and in the event of any alterations or additions being executed under the written order by the engineer as hereinbefore or hereinafter provided, it is further mutually agreed that the contractor shall execute and complete the works contracted for with such alterations and additions in the same manner as if they had been originally comprised in the works of the contract, and the period for completing the entire works shall not exceed the period limited for the completion of the original works, unless an extension of time be also allowed and agreed upon in writing, signed and countersigned and made a part of this contract."

Such a clause was held to bind the contractor, and even though it involved an impossibility, he was precluded from denying his liability of the

[1] Shute *v.* Hamilton, 3 Daly (N. Y.) 462, *and see* Wood *v.* Ft. Wayne, 117 U. S. 312.

[2] Reichenbach *v.* Sage (Wash.), 43 Pac. Rep. 354.

[3] Genovese *v.* Third Ave. R. Co. (Sup.), 43 N. Y. Supp. 8

[4] Weeks *v* Little, 89 N. Y. 566, *and cases cited:* Russell *v.* Sa Da Bandeira, 13 C. B. (N. S.) 149; Palmer *v.* Stockwell, 9 Gray (Mass.) 237; Baasen *v.* Bachr, 7 Wis. 516; Taylor *v.* Renn, 79 Ill. 181 [1875]; *and see* Gutman *v.* Crouch, 134 N. Y. 585, and dissenting opinions, affirming 10 N. Y. Supp. 275; Keogh Mfg. Co. *v.* Eisenberg (Com. Pl.), 27 N. Y. Supp. 356; Texas & St. L. Ry. *v.* Rust (C. Ct. Ark.), 19 Fed. Rep. 239; Marsh *v.* Kauff, 74 Ill. 189; Sweeny *v.* Davidson, 68 Iowa 386; Mansfield *v.* N. Y. Cent. R. Co., 21 N. E. Rep. 1037, premiums earned; Green *v.* Haines, 1 Hilt. 254; Van Buskirk *v.* Stow, 42 Barb. 9; Doyle *v.* Halpin, 1 J. & P. 352; Westwood *v.* Sec'y of India, 11 W. R. 261; Haydenville Mfg. Co. *v.* Art Inst. (Ill.), 39 Fed. Rep. 484 [1889]; *and see* Nelson *v.* Pickwick, 30 Ill. App. 333; as to extras ordered, *see cases* 29 Amer. & Eng. Ency. Law 921; *but see also* Duckworth *v.* Allison, 1 M. & W 412; Fletcher *v.* Dyche, 2 T. R. 32; Legge *v.* Harlock, 12 Q. B. 1015.

[5] Hulton Bros. *v.* Gordon, 23 N. Y. Supp. 770.

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stipulated sum. It was further held that the certificate of the engineer "as to the completion of the work, and with respect to the quality and state of works executed and to the time within which they should have been executed, was not a condition precedent to the company's right to the amount stipulated per day; and further that the clause referring the matter to the engineer did not exclude the right to bring an action for the sum as there was no excluding words in the contract."[1] A provision that any changes in the plans "either in quantity or quality of the work" shall be executed by the contractor without holding the contract as violated or void in any other respect, does not require the contractor to finish his contract within the time specified or pay a forfeiture for each day's delay necessitated by changes in the materials ordered.[2]

In a case where an owner failed to do his part in consequence of which the contractor failed to complete his contract within the specified time, it was held that the contractor was discharged from liability for liquidated damages, and this although some work not affected by the delay of the owner was not completed within the time,[3] and though the owner was not responsible for the whole delay, he cannot recover for any portion thereof, as the liquidated damages cannot be apportioned.[4]

When liquidated damages are stipulated in a bond or contract it seems that the company is not confined to that remedy by way of damages for the breach of contract, but it is entitled to an injunction restraining the contractor from disregarding his covenants.[5]* If the sum named as liquidated damages be insufficient to adequately compensate the damage caused by nonperformance, a suit may be had for rescission and damages.[6]

An extension of the time of performance has been held not to waive the other conditions of the contract,[7] but as will be seen in the section following, it may be evidence of a waiver when accompanied by other acts and circumstances.

325. Waiver of Stipulation for Liquidated Damages.—Care must be taken when there has been default or delay on the part of the contractor not to waive the stipulation for liquidated damages, as in so many other cases cited a failure to notice the default, or a continuance of the work and

[1] Jones *v.* St. Johns College, L. R. 6 Q. B. 115; *and see* Duckworth *v.* Allison, 1 M. & W. 412; Bailey *v.* Stetson, 1 La. Ann. 332, delay caused by unavoidable accident; Leake's Diges of Law of Contracts 697.

[2] Lilly *v.* Person (Pa.), 32 Atl. Rep. 23.

[3] Weeks *v* Little, 89 N. Y. 566; Tobey *v.* Price, 75 Ill. 645.

[4] Wills *v.* Webste (Sup.), 87 N. Y. Supp 354.

[5] Diamond Match Co. *v.* Roeber (N. Y.), 13 N. E. Rep. 419; Wilson *v.* Roots (Ill.), 10 S. E. Rep. 204 [1887]; McCurry *v.* Gibson (Ala.), 18 So. Rep. 806; *and see* Lowe *v.* Beers, 4 Burr. 2228; Harrison *v.* Wright, 13 East. 343; *but see also* Wilde *v.* Clarkson, 6 Term R. 303; Timison *v.* Briggs, 2 South (N. J.) 498; Barney's Ex'r *v.* Bush, 3 Cow. (N. Y.) 151, as to liability of sureties.

[6] Wilson *v.* Roots (Ill.), 10 N. E. Rep. 204 [1887].

[7] Jacksonville, etc., R. Co *v.* Woodsworth, 20 Fla. 368; Barclay *v.* Messenger, 43 L. J. Ch. 449; Paddock *v.* Stout, 121 Ill. 571.

* *See* Sec. 326. *infra.*

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payments as if nothing had happened, may constitute a waiver of the right to exercise the power bestowed by the stipulation. Thus it has been held that allowing the contractor to continue the work as if under the contract, after the time limit had expired and without claiming the forfeiture which might have been exacted, was a waiver of the right to such forfeiture.[1]

The effect of an agreement to do additional or extra work, inadvertently omitted from the original contract, made after the expiration of the time for completion, is to waive an original stipulation to complete by a certain time, and to substitute therefor a stipulation to complete within a reasonable time.[2] If the forfeitures have been waived it seems no recovery of damages can be had,[3] but it has been held that a waiver cannot be implied from silence alone when one is under no obligation to speak.[4] Acceptance of work may be held a waiver of right to demand damages,[5] but a failure on the part of the owner to terminate the contract when it has not been completed on time was held no waiver.[6] Requests or orders to the contractor to go on with the work, or to complete it, have been held to amount to a waiver of the clause for the liquidated damages.[7] The making of payments after default of contractor without objection, after the time for completion has passed, is a waiver of any claim for damages for such failure to complete in time.[8]

326. Delay Occasioned by the Fault of the Owner.*—The failure of the owner to finish the work undertaken by him in season to enable the contractor to complete his contract within the time specified is a sufficient excuse for delay, and discharges the contractor from liability for liquidated damages.[9] This was so held although some of the work not affected by the owner's delay was not completed within the time; the damage being payable upon a failure to complete entirely.[10]

The neglect of the owner to get the necessary permit to proceed from the board of health,[11] or to furnish the contractor with copies of plans and

[1] Sinclair *v.* Tallmadge, 35 Barb. 602 [1861]; Dunn *v.* Steubing, 120 N. Y. 232; Foster *v.* Worthington, 58 Vt. 65; *semble* Robinson *v.* Lake Shore & M. S. Ry. Co. (Mich.), 61 N. W. Rep. 1014; Oberlies *v.* Bullinger, 75 Hun (N. Y.) 248; Barber *v.* Rose, 5 Hill (N. Y.) 76; *but see* Smith *v.* Smith, 45 Vt. 433; *and see* Fowlds, *v.* Evans (Minn.), 54 N. W Rep. 743; Lawson *v.* Hogan, 93 N. Y. 39.

[2] Cornish *v.* Suydam (Ala.), 13 S. Rep. 118; *semble* Luckhart *v.* Ogden, 30 Cal. 547; Van Stone *v.* Stillwell Mfg. Co., 142 U. S. 128; *and see* Van Buskirk *v.* Stow, 42 Barb. 9.

[3] Michel *v.* O'Brien, 27 N. Y. Supp. 173.

[4] Texas & St. L. Ry. *v.* Rust (Ark.), 19 Fed. Rep. 239 [1883].

[5] Adams *v.* Hill, 16 Me. 215; Cummings *v.* Pence, 1 Ind. App. 317.

[6] Grannis L. Co. *v.* Deeves, 72 Hun (N. Y.) 171.

[7] Close *v.* Clark (Com. Pl.), 9 N. Y. Supp. 538; Eyster *v.* Parrott, 83 Ill. 517; *and see* Lawson *v.* Hogan, 93 N. Y. 39.

[8] Brodeck *v.* Farnum (Wash.), 40 Pac. Rep. 189; Paddock *v.* Stout, 121 Ill. 571; Meehan *v.* Williams, 2 Daly (N. Y.) 367; Cooke *v.* Oddfellows, 1 N. Y. Supp. 498 [1888].

[9] Standard Gas Lt. Co. *v* Wood, 61 Fed. Rep. 74, foundations not completed; King Iron Bdge. Co. *v.* St. Louis, 43 Fed. Rep. 768.

[10] Weeks *v.* Little, 89 N. Y. 566; 11 Abb. N. C. 415; Stewart *v.* Ketelta, 36 N. Y. 388 [1882]; *but see* McIntosh *v.* Midland Cos. R. Co., 14 M. & W. 548; 1 Redfield on Law of Rys. 440 (6th ed.) [1888].

[11] Deeves *v.* New York, 17 N. Y. Supp. 460.

* *See* Secs. 439, 440, 670, and 689, *infra.*

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specifications,[1] or to furnish correct plans and specifications, necessitating the doing of a part of the work a second time,[2] or to promptly fix the site of the structure,[3] or to furnish the object to be wrought,[4] or to change its location,[5] or to estimate and pay for work done and materials furnished,[6] or where the architect made material changes in the plans and specifications or failed to furnish the necessary lines and levels,[7] or to have a survey made,[8] will excuse delay on the part of the contractor and prevent a recovery of stipulated damages, but the act of the owner's inspector in rejecting materials which should have been accepted will not make the owner liable for the delay it caused.[9] * An employer or owner can exact no damages or forfeitures for delay caused by his own act in stopping the work,[10] as by flooding a reservoir site before the time for completion;[11] or by his failure to secure a right of way.[12] Evidence may be properly admitted to show that the delay was caused by the architect, and not by the contractor or by the owner.[13] If the owner or company has taken the job away from the contractor, under a clause authorizing him to do so, upon the contractor's failure to proceed with the work in a satisfactory manner, the act of taking the work out of contractor's hands has been held a waiver of his right to claim damages.[14] † Neglect on the part of the owner to provide or furnish materials according to his undertaking,[15] or a failure to put in a side track as agreed, so that materials could be transported and unloaded upon the site or spot,[16] or to perform his part of the agreement.[17] Delay caused by other contractors not having their work done, by reason of which the contractor was prevented from commencing his work when expected,[18] will excuse the contractor for delay in completion. ‡

[1] Welch *v.* McDonald, 85 Va. 500 [1888].
[2] Sperry *v.* Fanning, 80 Ill. 371 [1875].
[3] Blanchard *v.* Blackstone, 103 Mass. 343.
[4] Manistee I. Wks. *v.* Shores Lumb. Co. (Wis.), 65 N. W. Rep. 863.
[5] Damon *v.* Granby, 2 Pick. 345.
[6] O'Connor *v.* Henderson Bdge. Co. (Ky.), 27 S. W. Rep. 251 [1894].
[7] White *v.* School District, 159 Pa. St. 201; *and see* Hammond *v.* Beeson, 112 Mo. 190.
[8] *See* O'Connor *v.* Smith, 84 Tex. 232.
[9] Montgomery *v.* New York (N.Y. App.), 45 N. E. Rep. 550.
[10] Marsh *v.* Kauff, 74 Ill. 189 [1874]; Homebuck *v.* Drumgoole, 109 N. Y. 63; Pennell *v.* Mayor, 14 N. Y. Supp. 376 [1891].
[11] *And see* Skelsey *v.* United States, 23 Ct. of Cl. 61.
[12] French *v.* Syracuse (Sup.), 41 N. Y. Supp. 1036.
[13] Mahoney *v.* Rector of Church (La.), 17 So. Rep. 484; Genovese *v.* Third Ave. R. Co. (Sup.), 43 N. Y. Supp. 8; *and see* Wright *v.* Meyers (Tex.), 25 S. W. Rep. 1122 [1894]; Texas, etc., R. Co. *v.* Saxton (N. Mex.), 34 Pac. Rep. 532 [1893].
[14] Crawford *v.* Becker, 13 Hun 375 [1878]; *accord* Holme *v.* Guppey, 3 M. & W. 387.
[15] Taylor *v.* Netherwood (Va.), 20 S. E. Rep. 888; Bulkley *v.* Brainerd, 2 Root (Conn.) 5.
[16] Huckenstein *v.* Kelly & Jones Co. (Pa.), 21 Atl. Rep. 78 [1891]; s. c., 25 Atl. Rep. 747, 139 Pa. St. 201; *and see* Knowles *v.* Penn. R. Co. (Pa.), 34 Atl. Rep. 974.
[17] Davis *v.* Crookston W. P. & L. Co. (Minn.), 59 N. W. Rep. 482; Keogh Mfg. Co. *v.* Eisenberg, 27 N. Y. Supp. 356; White *v.* Fresno Nat. Bank, 98 Cal. 166; *and see* McAndrews *v.* Tippett, 39 N. J. Law 105, and Haughery *v.* Thiberger, 24 La. Ann. 442; Davis *v.* Crookston W. W. P. Co. (Minn.), 59 N. W. Rep. 482 [1894]; Stewart *v.* Ketcltas, 36 N. Y. 388; Crawford *v.* Becker (N. Y.), 13 Hun 375 [1878]; *but see* Wood *v.* Boney (N. J.), 21 Atl. Rep. 574 [1891]; Frenchi *v.* Collender Co. (Com. Pl.), 13 N. Y. Supp. 294.
[18] Graveson *v.* Tobey, 75 Ill. 540 [1874];

* *See* Sec. 276, *supra*.
† *See* Secs. 323, *supra*, 585, 689, and 726, *infra*
‡ *See* Sec. 324, *supra*.

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Under a forfeiture clause which does not make time the essence of the contract, where the contractor and his assignees have constructed and put in operation waterworks not complying with the contract, and the non-performance of the contract is largely due to the acts of both parties, and in part to unsuccessful experiments authorized by the city, it was held that the contractor and his assignees were entitled, before they were liable to forfeitures, to a reasonable time in which to perform it. That an injunction would lie to restrain the city from interfering with the pipes laid by the contractor or his assignees during the extension of time granted them,[1] but that supplying water from other sources equally as good or better was not compliance with a contract to supply water from artesian wells.[2] So when a contractor contracted to build a bridge "on the present stone piers," and bound himself to complete the work within ten months and one week after receiving notice to begin, and the city failed to prepare the piers to receive the bridge until eleven months after it had given notice to the contractor to begin, it was held that such failure released the contractor from the obligation to complete the bridge within the specified time.[3] So if an owner agrees to pay a bonus or extra price for the performance of a job, if completed by a certain time, the contractor is entitled to recover the additional pay, though he did not perform in the required time, if the delay was caused by the owner's refusal to furnish the tools and requisite site for the erection of the work.[4]

The act of furnishing or placing on the ground some materials that are afterwards used in the construction of the building is not "the commencement of the building," but the digging for the cellar or the excavation for the foundation is the commencement of the building.[5]

Where a contract contains an exemption clause against liability for non-fulfillment of a contract caused by strikes of workmen, a strike caused by a contractor's reducing the wages of his workmen is not covered by such a provision, unless a strike so caused is specially provided against. A stipulation to use every effort to fulfil the contract prevents such an exemption clause operating either where the contractor's own act causes the strike or where he encourages it, or where he could have prevented it and did not.[6] When the completion of the work is conditioned upon "there being no interference from labor strikes," the fact that the men quit work because the builder failed to pay them their wages as agreed does not release the

Weeks *v.* Little, 11 Abb. N. C. 415; Taylor *v.* Renn, 79 Ill. 181; Cooke *v.* Oddfellows, 1 N. Y. Supp. 498 [1888]; *and see* O'Connor *v* Smith (Tex.), 19 S. W. Rep. 168; Smith *v.* Boston, etc., R. Co., 36 N. H. 458.

[1] Foster *v.* City of Joliet, 27 Fed. Rep. 899 [1886].

[2] Foster *v.* Joliet. *supra.*

[3] King Iron Bridge Co. *v.* St. Louis, 43 Fed. Rep. 768 [1890].

[4] Maher *v.* Davis & Starr L. Co. (Wis.), 57 N. W. Rep. 357; liquidated damages, 13 Amer. & Eng. Ency. Law 847; *semble* Mansfield *v.* N. Y. Cent. R. (N. Y.), 21 N. E. Rep. 1073 [1889].

[5] Kansas M't'g Co. *v.* Weyerhaeuser (Kan.), 29 Pac. Rep. 153 [1892]; *accord*, Jacobus *v.* Mut. Benefit Ins. Co., 12 C. E Gr. 604.

[6] D. L. & W. R. Co. *v.* Bowns, 36 N. Y Sup. Ct. 126 [1873].

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contractor from completing the building by the time agreed upon,[1] nor does the fact that the men struck after the date of completion had passed.[2]

The subject of strikes, boycotts, and conspiracies should be an interesting one to contractors, engineers, and architects, and it is to be regretted that the space to which this book is confined will not permit a full discussion of the subject. It would involve so many other topics of criminal law and of torts that it is not deemed advisable to attempt it. The reader is referred to other excellent works upon the subjects.[3]

The questions which arise most frequently in construction work are those mentioned in the cases just cited, which involve questions of how extensive a strike must be, or from what causes it may have arisen, or how much the contractor may have tried to prevent it, in order to excuse delay on his part. These are not questions of law but those of fact, and are therefore for the jury to determine, and their determination cannot be foretold.

It has been held that where a building contract provides for the completion of works by a specified time, "contingent upon strikes and boycotts," it protects the contractor against liablity for unavoidable delay so far as it is due to strikes, and the strikes referred to are not limited to such as occur in the shops of the contractor.[4]

If the contract provide for monthly payments, the wrongful withholding of such payments will excuse the contractor's delay in completing his contract.[5]*

When payment was to be made in specified instalments, if, in the opinion of the architect, the work progressed with sufficient speed to insure its completion by the contract time, and a forfeiture of ten dollars per day for delay beyond that time was to be deducted from the last payment, it was held, in an action to recover the balance due, that the owner was entitled to deduct the ten dollars per day as stipulated damages, and that he need not obtain a certificate from the architect that the work had not progressed with sufficient speed.[6]

When a contract provides that the contractor shall forfeit a certain amount for each day's delay in completing the structure after the day fixed for completion, if he does not complete it by that day parol evidence that the owner's superintendent in ordering extra work stated that he would not exact the forfeiture is admissible, as tending to show a waiver of such provision, but not for the purpose of showing a waiver in respect to other matters.[7]

[1] McLeod *v.* Genius, 31 Neb. 1.

[2] Hexter *v.* Knox, 39 N. Y. Super. Ct. 109.

[3] *See* Criminal Conspiracies, Boycotts, and Strikes in Amer. & Eng. Ency. Law, Vol. 4, p. 608; Vol. 2, p. 512, and Vol. 24, p. 123

[4] Milliken *v.* Keppler (Sup.), 38 N. Y. Supp. 738; Smith *v.* Munch (Minn.), 68 N. W. Rep. 19.

[5] Wright *v.* Meyer (Tex.), 25 S. W. Rep. 1122 [1894], *and see* Wood *v.* Boney (N. J.), 21 Atl. Rep. 547.

[6] Carter *v.* Laudry, 3 Prigsley & B. (N. B.) 516 [1880]

[7] O'Keefe *v.* St. Francis' Church, 59

* *See* Sec. 686, *infra.*

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When the owner himself has assured a contractor, while he is performing work under his contract, that the stipulation for the forfeiture of liquidated damages will not be enforced if he fails to complete the work within the time specified, and there is no proof that the owner actually suffered damages, a jury may be justified in returning no damage for delay.[1] In the same manner a verbal agreement may be proved to show an extension of the time of performance of a written contract.[2]* If it be provided that if the work should be delayed for any reason other than by the *written* consent of the chief engineer a certain sum as liquidated damages shall be paid, the engineer cannot extend the time for the completion of the work by *oral* agreement, especially when the law requires that "all contracts relating to city affairs shall be in writing."[3]

A building contract provided that in case of noncompletion by a certain time the builder should pay a certain sum as liquidated damages. After default the parties made another contract providing that if the buildings were not completed by a certain day the "sum or penalty" due under the former contract should be a stipulated amount "by way of liquidated damages." After a second default the parties entered into a third contract which recited that the builder claimed that the "penalty" should not be exacted for certain reasons, and settled all other questions between the parties "except the one question of penalty," and it was held that the amount agreed to be paid in case of default was not a penalty but liquidated damages, from which the builder could not be relieved on the ground that performance was prevented by act of God.[4]

If the contractor has abandoned the contract, and the owner has caused the work to be substantially completed by the time specified and at the contractor's expense, then the provision for liquidated damages for delay in completion will not be enforced.[5] If when the contract stipulated that the builder should pay $10 per day as liquidated damages for every day's delay after a certain date, and after that date, and before the building was finished, the owner entered and occupied a part of it, the damages are recoverable only from the time the building was agreed to be done to the time the owner entered it.[6]

If clauses for liquidated damages for delay in completion of a piece of work are inserted in the contract, there is a presumption raised thereby that delay was anticipated, if not expected, and therefore if it occurs, it will not amount to a breach of the contract. It has been held, therefore, that a contract which contained a clause for liquidated damages for delay in

Conn. 551 [1890], *and see* Ferrier *v.* Knox Co. (Tex.) 33 S. W. Rep. 896.

[1] Erskine *v.* Johnson (Neb.), 36 N. W. Rep. 510 [1888].

[2] Luckhart *v.* Ogden, 30 Cal. 547.

[3] Malone *v.* City of Philadelphia (Pa.), 23 Atl. Rep. 628 [1892].

[4] Ward *v.* Hudson R Bldg. Co. (N. Y.), 26 N E. Rep. 256 [1891].

[5] McKee *v.* Rapp (Super.), 35 N. Y. Supp. 175.

[6] Collier *v.* Betterton (Tex.), 29 S. W. Rep. 467.

* *See* Secs. 123-131, *supra*, *and* Secs. 724-726, *infra*.

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completion, by necessary implication allowed the contractor a further time beyond that specified for completing the works on condition of his paying the liquidated damages.[1] Without the clause for liquidated damages the failure to complete in time might have been a breach of the contract on the part of the contractor.[2] * Equity does not generally consider time of performance so much the essence of a contract that if completion be delayed a few days no compensation can be had.[3] The owner is entitled to the damages he has suffered in consequence of the delay.[4]

Contractors have been relieved from the payment of liquidated damages when the delay or their failure to fulfill their obligations was due to an injunction,[5] and they have been held to be entitled to an injunction against trespassers who prevent them from prosecuting their work, as they have no adequate remedy at law to avoid the penalties imposed for delay, and an injunction avoids a multiplicity of suits.[6]

327. Provision that a Certain Per Cent. may be Retained for Repairs.

Clause: "The part.... of the second part hereby agree... that the said parties of the first part shall be, and they hereby, are authorized and empowered to retain out of the final installment of money which shall become due and payable to the said part.... of the second part under this agreement, a sum equal to.....per centum of the whole amount of money payable by the parties of the first part to the part.... of the second part, under and according to the terms of this contract, and to expend the same in the manner herinafter provided for, in making such repairs to the works done under this contract as the engineer may deem necessary."

328. Provision that Contractor shall Replace Poor or Defective Work and Materials, and in Case of Neglect, that Owner may Replace them at Contractor's Expense.

Clause: "And it is further agreed, that if at any time during the performance of the work herein agreed to be performed, or during the period of one year from the date of the final completion and acceptance of the same, any of the works constructed under this agreement, or any auxillary works or structures which may have been disturbed in the execution of this contract, shall, in the opinion of said engineer, require to be reconstructed, regraded, or repaired, the said company or owner shall notify the said part.... of the second part, in writing, to make such repairs, and if the said part.... of the second part shall neglect to commence the work of making such repairs and prosecute the same to the satisfaction of said engineer within ..... hours from the date of the service of such notice, then, and in every such case, the

[1] Folsom *v.* McDonough, 6 Cush. 208; Farnham *v.* Ross, 2 Hall 167; *and see* Legge *v.* Harlock, 12 Q. B. D. 1015.

[2] *See also* Sinclair *v.* Tallmadge, 35 Barb. 602.

[3] Roberts *v.* Berry, 2 DeG. M. & G. 284; Warren *v* Marus, 7 Johns. 476; Homan *v.* Steel, 26 N. W. Rep. 472; Porter *v.* Stewart, 2 Ark. 417; *and English cases in* Lloyd's Law of Building 59.

[4] Lucas *v.* Godwin, 3 Bing. N. C. 737; Lindsey *v.* Gordon, 13 Me. 60.

[5] The Phil. Wil. & Bal R. Co. *v* Howard, 13 Howard R. 4; *see also* Derby *v.* Johnson, 21 Vt. 17; *but see* Matthewson *v.* Grand Rapids (Mich.), 50 N. W. Rep. 651.

[6] Palmer *v.* Israel (Mont.), 33 Pac. Rep. 134.

* *See also* Sec. 731, *infra.*

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said company or owner shall have the right to employ such other person or persons as they may deem proper to make the same, and to pay the expense thereof out of any money then due or which may thereafter become due to the said part... of the second part under this contract, or out of the said amount retained for that purpose by the said parties of the first part."

329. If Works are in a State of Good Repair after a Certain Time, Owner will Pay in Full.

Clause: "And the parties of the first part hereby agree, upon the expiration of the said period of one year, provided the said works shall at that time be in good order and repair, which fact shall be determined by a certificate to that effect signed by the engineer, to pay to the said part.... of the second part the whole, or such part of the sum last aforesaid as may remain after the expenses of making the said repairs, if any, in the manner aforesaid, shall have been paid therefrom."

330. Provision that Contractor shall Maintain Works in Working Order and in Complete Repair for a Period Named.

Clause: "The contractor shall maintain the whole of the works above described in good working order, free from all faults and failures arising out of defective or inferior materials or workmanship, and in complete repair, for.....months from the date of the engineer's certificate of the completion of the same. The company or owners, nevertheless, to have full power during the said period of..... months to repair or renew, should the contractor fail to do so when called upon, and to collect from the contractor the amount so expended from time to time, on the certificate of the engineer, in any court of competent jurisdiction. The certificate of the engineer to be final as to the necessity for repairs being made and the amount expended on such repairs."

331. Provision that, Notwithstanding any Inspection or Certificate Made, the Contractor shall be Responsible for Defective Work and Materials.

Clause: "Provided that, notwithstanding any inspection that has been made or certificate that has been given by the said architect for the time being, if any bad work or defects, contrary to the terms of this agreement, shall be discovered.....months after the completion of said work, no further payment, if any be due, shall be made to the builder or contractor, but he shall make good all such defective or bad work, in accordance with the stipulations herein contained, within .....days after notice in writing from the owner; or, in default, the owner may do so, and the cost and expense incurred in such a case shall be paid by, and be recoverable from, the contractor.[1] *

332. Provision that Contractor shall Amend and Make Good all Defective Work and Materials.

Clause: "Any defects, shrinkage, and other faults which may appear within ..... months from the completion of the building, and arising

[1] It has been held that under a contract to repair machinery and "guaranty it fully," the owner, in case of failure of the machine to work after repair, is not bound to return it to be repaired a second time. Electric S & C. Co. *v.* Consolidated L. & Ry. Co. (W. Va.), 26 S. E. Rep. 188.

* *See* Secs. 463–468, *infra.*

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out of defective or improper materials or workmanship, are, upon the direction of the architect, to be amended and made good by the builders at their own cost, unless the architect shall decide that they ought to be paid for the same; and in case of default, the employer may recover from the builders the cost of making good the works."

333. Clauses for Repair.—Clauses for repair have the same binding effect as the original undertaking to build, and are governed by the same laws and rules. What has been said in regard to the plans and specification, the authority and duties of the engineer, and the many other topics treated, will generally apply to this stipulation for repairs.

Some questions arise on work for municipal corporations whose charters frequently require that the cost of maintenance of works shall be defrayed by the municipality and new improvements shall be paid for by owners of property benefited.

334. Provision for Repair May be Objectionable as Creating an Additional Burden for an Improvement.—Few contractors or engineers would see anything objectionable or illegal in such a clause for repairs, yet in a contract for improvements, as of a city, which are to be paid for by assessment, it has been held objectionable, and so much so as to vitiate the assessments made to pay for it. A requirement in a contract for a public improvement which imposed an additional burden upon property owners not authorized by the charter or statute under which the work was done was held to vitiate the assessments for the improvement, and therefore to destroy the fund from which the contractor was to be paid for his work. The fact that the requirement, as one requiring the work to be kept in repair, was shown, by testimony of the contractor and that of others, not to have increased the amount of the successful bid, does not remedy the evil, since other bidders might have bid less if the contract had not contained such a requirement.[1] If the city charter require that the expenses of repairing streets shall be paid from the ward fund, a provision in a paving contract requiring the contractor to keep the pavement in good repair for five years renders the assessment therefor against the property owners invalid.[2] Such a provision has been held not a mere agreement to repair, and therefore objectionable, as imposing upon the property owners assessed for the pavement a burden that should be borne by the city, but it was held an agreement to construct in the first instance a pavement good for five years.[3] Some courts have held that the ordinance is not invalidated, nor the assessments vacated, as the guaranty to keep in repair may be detached or separated from the new construction.[4]

[1] Excelsior Paving Co. *v.* Pierce (Cal.), 33 Pac. Rep. 727, and 34 Pac. Rep. 116; Brown *v.* Jenks (Cal.), 32 Pac. Rep. 701; *contra*, Barber Asphalt Pav. Co. *v.* Ullman (Mo. Sup.), 38 S. W. Rep. 458.

[2] Boyd *v.* City of Milwaukee (Wis.), 66 N. W. Rep. 603.

[3] Barber Asphalt Pav. Co. *v.* Ullman (Mo. Sup.), 38 S. W. Rep. 458; Burgess & Gantt, JJ., *dissenting; semble* Cole *v.* People (Ill. Sup.), 43 N. E. Rep. 607.

[4] Cole *v.* People, *supra;* Fehler *v.* Gosnell (Ky.), 35 S. W. Rep. 1125.

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CHAPTER XII.

THE ENGINEER OR ARCHITECT AN ARBITRATOR, UMPIRE, OR REFEREE.

HIS DECISION AND CERTIFICATE MADE FINAL AND CONCLUSIVE WITHOUT RECOURSE OR APPEAL TO OTHER JURISDICTIONS. LEGALITY OF CLAUSE.

335. Provision that Engineer's Decision and Certificate shall be Final and Conclusive without Recourse or Appeal.

Clause: "The decision of the engineer on all points and matters connected with this contract and specification shall be final and conclusive, whether as to the interpretation of the various clauses, the measurements, extra work, quantity, quality, and all other matters and things which may be in dispute; and from his decision there shall be no appeal.*

336. Provision that Engineer or Architect shall Determine all Questions in Relation to Work, and His Decision shall be Final.

Clause: "To prevent all disputes and litigation, it is further agreed by and between the parties to this contract, that said engineer shall in all cases determine the amount or the quantity of the several kinds of work which are paid for under this contract, and he shall determine all questions in relation to said work, and the construction thereof, and he shall in all cases decide every question which may arise relative to the execution of this contract on the part of the said contractor, and his estimate and decision shall be final and conclusive; and such estimate and decision, in case any question shall arise, shall be a condition precedent to the right of the party of the second part to receive any money or compensation for anything done or furnished under this agreement.†

336a. Provision that Architect's Certificate shall be Binding and Conclusive without Recourse or Appeal, and a Condition Precedent to Payment.

Clause: "And it is further mutually agreed and understood that the decision of the said architect, or such other architect as aforesaid, upon all matters relating to the amount, quality, classification, state, or condition of the works actually executed and upon all questions, doubts, or disputes in regard to the construction or meaning of the said plans, elevations, sections, and specifications, and in regard to all matters in any wise relating to anything to be done under this contract, or to any

* *See* Secs. 86, *supra*, and 344, 345, and 406, *infra*.
† *See* Secs. 342–345, 354, and 407–416, *infra*.

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changes, alterations, or extra work undertaken in connection herewith, as certified by him in writing, shall be binding and conclusive on both parties, except so far as they may be amended and corrected in the final estimate and certificate, which final certificate shall be conclusive in respect to every claim, right, or pretext, without recourse or appeal, and a condition precedent to any liability of the owner to pay for said works, and to any right of the contractor to any claim in respect thereto, under this contract, or in law, or in equity."

337. Provision that Work shall be Done and Completed to Satisfaction of Owner.

Clause: "And the said contractor hereby agrees and undertakes to complete the said works to be performed under this contract, and each and every part thereof, and all changes, alterations, and extra work in connection therewith, in a good and workmanlike manner and in every particular to the entire satisfaction and acceptance of the said owner, whose acceptance of the work as satisfactory shall be a condition precedent to any liability on his part to pay, and any right on the part of the contractor to demand compensation in respect thereto."

338. Necessity and Propriety of Such Clauses.—These or similar clauses are invariably found in engineering contracts, and the frequency of their use is some evidence of their necessity. Every builder, corporation, and engineer having experience in construction knows their value and how requisite they are to the successful completion and settlement of a piece of work. It is a provision found in almost every engineering contract in the history of construction in England and America, and to-day its validity and binding effect are not fully established. The facts that the amount of work to be done and the compensation to be paid are both to be arbitrarily determined by the owner or his agent furnish strong reasons why the validity of such a clause should be tested and its fairness be questioned.

A clause that gives such arbitrary and complete power to determine questions so important, and so likely to cause hardships if not honestly exercised, to one whose interests may be directly opposed to the contractor, would probably be the one to be most frequently assailed and the one to be most easily defeated. It is a clause, too, as before intimated, about which much diversity of opinion has been expressed, and to-day the courts are not fully agreed upon what ground to support it, and in some exceptional cases whether to support it at all.

339. Grounds upon which the Stipulations are Attacked.—The validity of such stipulations has been attacked upon numerous grounds, all of which may be discussed under three topical heads, viz.:

1. That they do not possess the essential features of a binding contract, and are therefore void.

2. That to support them is in violation of the constitutional rights of citizenship, as tending to oust courts of their proper jurisdiction.

3. That as submissions to arbitration they are revocable at any time before the award is made, and therefore are not enforceable; that the

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referee in his usual capacity cannot be an arbitrator or judge, and his decisions should not therefore be given the conclusive effect of an award.

Before proceeding then to discuss the clause in parts, it is proposed first to consider these objects to its validity, and the means by which courts have sought to sustain these provisions, and the difficulties that have been met.

340. Does Such a Stipulation Contain the Essential Features of a Binding Contract, or those of a Condition? Work to be Done to the Satisfaction of Owner or Company.—It is a general principle of the law of contracts that a promise cannot be conditional on the mere will of the promisor, for by promising to do a thing only in case it please himself, he is not bound at all.[1] Such an option to do or not to do, as it shall please the promisor, is not an obligation such as is required in a contract; it is nullity; an agreement to do certain things cannot be modified by a concurrent stipulation that the performance of the act shall depend upon the fancy, caprice, or disposition of the party himself, or his agent; a contract cannot be binding on one party and make the obligation of the other optional with himself; both parties to an executory contract must be bound.[2] It is a principle of our jurisprudence that no man can be a judge in his own cause. One party cannot reserve to himself the right to decide in a case involving his own wrong.[3] If these principles of contract and of the law are to be applied to a stipulation that the contract shall be executed to the satisfaction of the employer, or of his engineer, on the assumption that an engineer is a servant or agent of the employer, *it would seem* that the provision must fail.

Agreements for services where the remuneration is left to the discretion of the employer are of this character, and create no binding obligation, and a covenant by a person amounting in terms to a promise to pay money to himself has been held to be no contract.[4] It has been held that an agreement by a builder to build such a house as he should think fit binds him to do nothing,[5] from which it might reasonably be inferred that a promise by an owner to pay for such a house [or works] as he should choose to accept—*i. e.*, a house [or works] to his satisfaction—will be held equally invalid.[6] The acceptance, approval, or satisfaction of the owner is optional with himself by the terms of his agreement, as much so, it would seem, in the one case as in the other.

Courts will perhaps apply the strict rules of law to cases where no injury will result to either party, and both will be left in the same position as before the contract; or where it is impossible to require the builder to build

[1] Leake's Digest of Law of Contracts 637 [1878].

[2] King *v.* Warfield, 8 Cent. Rep. (Md.) 801; Athe *v.* Bartholomew (Wis.), 33 N. W. Rep. 110.

[3] Bryant *v.* Flight, 3 Jur. 681 [1839]; Milnor *v.* Georgia R. Co., 4 Geo. 385.

[4] Faulkner *v.* Low, 2 Ex. 595; Leake's Digest of Contracts 637.

[5] Smith *v.* B. C. & M. Ry., 36 N. H. 159 [1858]; Lydick *v.* Railroad Co., 17 W. Va. 427.

[6] Gray *v.* Central R. Co., 11 Hun (N. Y.) 70, held a provision making the owner the sole arbiter, valid.

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a structure the exact character of which cannot be determined; or where damages cannot be assessed because the subject-matter of the controversy is not known. In such cases the courts declare that no contract existed, but when an owner has agreed to pay for a structure completed to his satisfaction, and he has stood quietly by and knowingly permitted a builder to erect it in accordance with his views and suggestions, certainly he should not be permitted to render the builder's efforts fruitless by arbitrarily and capriciously refusing to accept and pay for it when completed. To avoid such injustice the courts have construed such stipulations to mean that the structure shall be completed, or the work done, to the owner's *reasonable satisfaction.*[1]

If not so construed the covenant must fail, for the owner's obligation would depend upon his own will or pleasure, and be of no binding effect. Such stipulations have been sustained, where they *could be* construed to mean to the owner's reasonable satisfaction, the courts undertaking that the right of approval on which the contract depends should be exercised in a reasonable, and not arbitrary or capricious manner, for the purpose of defeating the contract.[2] It is sufficient if the work has been performed in such a manner as should have satisfied the owner.[3] The contractor need only show that the work was done in a proper manner, and in a way that should have satisfied the owner, as no question of personal taste or individual preference is involved.[4] For public work performed under a parol contract for whatever "recompense the board might allow as right and proper," it was held that a contractor may sue for a reasonable compensation, even though the board tender what it considers right and proper.[5]

The cases where work and materials have been incorporated into a building upon the land of an owner, and which in consequence belong to the owner, should be distinguished from those cases where the contractor has agreed to build a chattel for a person which can be returned to the maker, or those cases where the parties may be put in *statu quo.*

If a mechanic undertakes to make a machine that shall be satisfactory to the purchaser,[6] or an architect to prepare plans,[7] or an artist to make a plaster bust of a deceased relative,[8] or a portrait or photograph,[9] or a tailor

[1] Langdell's Summary of Contracts p. 1006; Keeler *v.* Clifford, 46 N. E. Rep. 248; *affirming* 62 Ill. App 64; Hawkins *v.* Graham, 149 Mass. 284; Sloan *v.* Hayden, 110 Mass. 143; and other cases in 29 Amer. & Eng. Ency. Law 928; 3 Amer. and Eng. Ency. Law 845, *note.*

[2] Dallman *v.* King, 4 Bing. (N. C.) 105; Parson *v.* Sexton, 4 C. B. 899; Braunstein *v.* Accidental Ins. Co., 1 B & S. 782; Doll *v.* Noble (N. Y.), 22 N. E Rep. 406 [1889]; s. c. 18 Abb. N. Cas. 45 [1886].

[3] Logan *v.* Berkshire Apartment Assn., 18 N. Y. Supp. 164.

[4] Hummel *v.* Stern (Super.), 16 N. Y. Supp. 443; *and see* Stadhard *v* Lee, 3 B. & S. 364; Andrews *v.* Bellfield, 2 C. B. (N. S.) 779

[5] Bird *v.* McGahey, 2 C. & K. 707; *but see* Butler *v.* Tucker, 24 Wend. 447.

[6] Wood Mach. Co. *v.* Smith (Mich.), 15 N. W. Rep. 906; Singerly *v.* Thayer, 108 Pa. St. 291, *an elevator;* Gray *v.* Railroad Co., 11 Hun 70, *a steamboat.*

[7] Moffatt *v.* Dickson, 13 C. B. 543; Moffatt *v.* Laurie, 15 C. B. 583.

[8] Zaleski *v.* Clark, 44 Conn. 218.

[9] Moore *v.* Goodwin, 43 Hun 534 [1887]; Hoffman *v.* Gallaher, 6 Daly 42; Gibson *v.* Crunge, 39 Mich. 49.

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to make a suit of clothes,[1] to the satisfaction of a customer, it is held that the mechanic or artist cannot recover for the article made if the purchaser is in good faith dissatisfied.[2] In such cases it is not enough that he ought to be satisfied with the article. He must be satisfied, or he is not bound to accept it.[3]* Neither the maker nor the jury can decide that he ought to be satisfied with the article.[4]

If it be clear that the purchaser has reserved to himself the unqualified option, and has not left his freedom of choice exposed to any contention or subject to any contingency, the stipulation will be the law of the case. The cases of this class are usually those that involve the feelings, taste, or sensibility of the purchaser and not the grosser considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others.[5]

In some cases where it is not apparent that the purchaser has reserved entirely to himself the exclusive right to decide arbitrarily whether the article is to his satisfaction, he may be supposed to have undertaken to act reasonably and fairly, and to found his determination upon grounds which are just and sensible, thereby raising a necessary implication that his decision in point of correctness shall be open to the consideration and judgment of judicial experts.[6]

From these cases it might appear, at first sight, that what has been said about the binding effect of such agreements had no force or did not apply to these cases. The argument holds as well in the cases of chattels as in those of buildings. In neither case is there a contract created, but simply a declaration of terms that there shall be no debt for the article unless it suit the intending purchaser and he accepts it. In the case of a building, which cannot be returned to the builder, the law considers that the owner has been benefited or enriched, and therefore imposes a contract upon him to pay the builder what it is reasonably worth to the owner, while with plans, a coat, or a portrait, the purchaser is not benefited nor enriched if he does not accept the article, though the maker may be damaged. The law does consider the damage to the maker since he incurred it at his own risk, and knowing that the article might not be accepted. Since one of the two parties must suffer, and there is no just reason why it should be the customer, it is charged to the maker of the article; besides there is usually no

[1] Brown *v.* Foster, 113 Mass. 136.

[2] Marshall *v.* Ames, 11 Ohio Cir. Ct. Rep. 363; B. & O. R. Co. *v.* Brydon, 65 Md. 198.

[3] Silsby Man'f'g Co. *v.* Town of Chico, 24 Fed. Rep. 893; *citing* McCarren *v.* McNulty, 7 Gray 139; Heron *v.* Davis, 3 Bosw. 336; Hallidie *v.* Sutter St. Ry. Co., 63 Cal. 575.

[4] Moore *v.* Goodwin, 43 Hun 534.

[5] *See note*, 26 N. W. Rep. 744 [1886], *citing* Rossiter *v.* Cooper, 23 Vt. 522; Tyler *v.* Ames, 6 Lans. 280; Hart *v.* Hart, 23 Barb. 606; Taylor *v.* Brewer, 1 Maule & S. 290, *and other cases supra.*

[6] Daggert *v.* Johnson, 49 Vt. 345; Hartford, etc., Co. *v.* Brush, 42 Vt. 528.

* *See* Sec. 675, *infra*

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standard by which to measure the value of the misfit or rejected article. It would be difficult to assess the damage.

341. Work to be Done to the Satisfaction and Approval of Engineer or Architect.—It is more frequent in construction contracts to stipulate that the work shall be completed to the satisfaction, approval, or acceptance of the engineer, architect, or agent of the employer or owner than to that of the owner himself, and to further mutually agree that he shall determine the amount, quantity, and quality of the materials and work, and the amount that the employer shall pay, and that the contractor shall receive, on account of his contract. As the engineer is almost always an employee, servant, or agent of the owner, and as companies can act only by or through their officers or agents, who for purposes connected with their business speak the voice of the corporation, it may well be questioned if a decision by the engineer is not, in such cases, the decision of the company itself. It has been held by the English courts that for some purposes at least the engineer, when employed and paid by one party [the company], is the representative of that party [the company]; that there is no intention that he should be indifferent between the parties; that when it is stipulated that certain questions shall be decided by the engineer, it is in fact a stipulation that they shall be decided by the company; that the company does not hold out, or pretend to hold out, to the contractor that he is to look to the engineer in any other character than as the impersonation of the company.[1]

The facts that frequently the questions are to be decided by the incumbent of an office, for the time being, of the company, that he is not a particular individual in whom the contractor might have confidence, but that he might be any one whom the company might select for the office, and further, that the contractor has no voice in his selection, all tend to strengthen the idea that the engineer is usually the representative of one of the parties to the contract.[2] In support of this it has been held that when work was to be performed to the full satisfaction of the architect and to the satisfaction of the owner, it was sufficient if the architect in good faith accepted the work, and that his acceptance bound the owner.[3]

If this view be accepted, the stipulation must fail, for though the courts may construe a contract for work to be completed to one party's satisfaction to be to his reasonable satisfaction, they could hardly contend that an agreement to pay such a price as the party himself, or his agent, should determine, was a contract to pay a reasonable price. The courts have not, it is believed, gone thus far in their own construction of express contracts, though they have in cases where no contract at all has been made.

[1] Ranger *v.* Gt. Western Ry. Co., 5 H. L. Cas. 71 [1854]; Williams *v.* Chicago, S. F. & C. Ry. Co (Mo.). 20 S. W. Rep. 631; Smith *v.* Smith (Com. Pl.). 27 N. Y. Supp. 379: *semble*. Danville *v* Pomeroy, 15 Pa. St 151 [1850]; *but see* Consaul *v.* Sheldon (Neb.), 52 N. W. Rep. 1104.

[2] Smith *v.* B. C. & M Ry., 36 N. H. 459; Hill *v.* So. St. Ry. Co., 11 Jur. (N. S.) 192.

[3] Tetz *v.* Butterfield, 54 Wis. 242; *and see* Vermont St. Ch. *v.* Brose, 104 Ill. 206, *architect or superintendent; and* Wildey *v.* Paw Paw, 25 Mich. 419.

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In its literal interpretation such a contract cannot stand upon pure principles of contract. The contractor would be under obligations to perform his part according to the terms of the agreement, and to the satisfaction of the company or its engineer, who might pay him what, in their judgment, they should consider proper. Such a stipulation would be a repugnance and would render the contract itself as a mode of legal redress wholly idle.[1]

342. Owners' Liability Depends upon his Promise to Pay and not upon the Execution of the Work.—The courts evade the direct force of these arguments by making the liability of the owner or the company to pay depend not upon the execution of the work, but upon the promise to pay; the promise being postponed or made contingent upon an event which frequently has no necessary connection with the merit of the work. They allow the promisor to make his obligation to pay depend upon the existence or occurrence of an event which is often absolutely within the power of the engineer, a person employed and paid by the owner. This contingent liability or indebtedness should be distinctly set forth in the contract, for the courts will avoid such a construction if they can and the terms of the contract will permit such an interpretation. The law distinguishes between a debt created by a conditional promise itself and a conditional promise to pay a debt already existing or created by some other agencies. As Professor Langdell has said in his Summary:[2] "When a conditional promise is made to pay a debt, or when a conditional covenant is made to pay a debt which the covenant itself does not create, though no action will lie on the promise or covenant until the condition is satisfied, it does not follow that an action will not lie for the debt itself without regard to the condition." "Indeed," says he, "as the covenant does not create the debt, it follows that the debt will not be at all affected by any condition which is annexed to the covenant or promise merely. In such cases it is necessary, therefore, to see that the condition is annexed to the debt itself as well as to the promise or covenant."

"In building contracts the owner's indebtedness for the price agreed upon is not created by his promise to pay it, but by the performance of the work. Such indebtedness will arise, therefore, and become payable the moment the work is completely performed, unless it be expressly made conditional or the payment of it be expressly postponed; and it does not necessarily follow that because the owner promises to pay the debt upon a condition—*e. g.*, upon the production of the architect's certificate—that the debt itself is subject to the same condition. Such a condition is very harsh, for it not only makes the payment for work done dependent upon an event which has no necessary connection with the merit of the work, but upon an event which is absolutely within the power of a person (engineer

[1] Herrick *v.* Vermont Cent. Ry. Co., 27 Vt 673; Kistler *v.* Ind. & St. L. R. Co., 88 Ind. 460.

[2] Langdell's Summary of the Law of Contracts.

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or architect) employed and paid by the party who makes the condition. The court should not, therefore, give a condition such a construction if it can fairly avoid doing so. It must be admitted, however, that a condition annexed to a promise to pay a debt will commonly, upon the true construction of the instrument in which it is contained, extend to the debt itself.[1] There is a difference also between a promise to pay a debt on a certain condition and a proviso that the debt shall be paid *only* upon a certain condition," [2]* for the latter necessarily renders the debt itself conditional.

This is without doubt the ground upon which courts sustain the clause of a construction contract, that the engineer shall estimate, inspect, approve, and determine the amount due and to be paid for work done. The indebtedness itself must be made conditional upon the occurrence of the event and the owner's liability be made a condition precedent to the production of the engineer's or architect's certificate to that effect. When this is done there is no debt which can be sued for until the act stipulated for has transpired and the engineer or architect has ascertained what is due and signified his acceptance in the manner required by the contract, for there is no contract to pay in any other way.[3] The practical effect of such a stipulation, it would seem, is *not* to pay a sum of money for the work performed, but to be an agreement to pay for the presentation of the engineer's certificate.

The objection that such a clause is not binding, though well taken in certain cases, would seem to have no effect when the estimate, approval, and certificate of the engineer are made a condition precedent to the employer's liability. If no promise be made, except upon the happening of certain events, then no obligation exists until the event has come to pass, and if the contractor undertakes to perform work and supply materials under such an understanding, he must be taken to have done it gratuitously and to have run his chances of securing the certificate necessary to entitle him to any payment for his work. Yet if the condition makes the payment of the *debt* dependent upon the will or pleasure of the debtor, it is repugnant to the debt itself, and hence will either destroy the debt or the condition itself will be void.[4] If the debt has no existence until the condition is performed, then it cannot destroy the debt, and the courts are not fully agreed that the condition is void.

343. Act of Third Party as Engineer or Architect May be Made a Condition Precedent to Owner's Liability.—However much doubt there may be as to the validity of the clause when the debtor *himself* is to perform the condition, there is no doubt but that a provision that work shall not be paid for unless it be done to the satisfaction of a *third person* (engineer or

[1] Langdell's Cases on Contracts 487, 572.
[2] Langdell's Summary of Contracts, "Conditions Precedent."
[3] Godefroi & Short on Ry. Cas. 94.
[4] Langdell's Summary, Conditions Precedent.

* *See* Secs. 354, 410, 414, 769, 781, *infra*.

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architect) is good and binding, even though such person be employed and paid by the party making the provision, or even though he be an officer, a stockholder,[1] or a lessee[2] of the works, and therefore directly interested.

Some courts discriminate between a condition to pay only upon the promisor's own acceptance or determination, and upon that of his agent, engineer, or architect; but when that engineer or architect becomes a stockholder or lessee of the company the destinction becomes a refinement, and it is believed that the true ground for supporting the stipulation is to be found in some stronger and better purpose than one narrowed to such dangerous limits.

These are the grounds upon which courts have put these provisions, and every well-draughted contract will make the decision, estimate, acceptance, etc., of the engineer or architect a condition precedent to the owner's liability and of the contractor's right to recovery; and, though it may be safe to make a stipulation that work shall be completed to the reasonable satisfaction, approval, or acceptance of the owner or company, it is not safe to make the payment of the price, or its amount, or the obligation of either party depend upon his or its own determination, estimate, or decision.

344. Constitutionality of the Stipulation.—Some courts have questioned the constitutionality of a stipulation to abide the result of the engineer's decision as final and conclusive without recourse to courts of law or equity. It is frequently declared from the bench that parties cannot by private agreement in advance of a controversy oust the courts of their jurisdiction;[3] that although a matter in controversy or a pending civil suit may be finally submitted to arbitration or to the decision of a single judge, yet parties cannot by an agreement in advance, when no dispute or controversy has yet arisen, forfeit their rights to a proper adjudication in the appropriate tribunal established by law.[4] Courts of equity will not enforce such an agreement.[5]

[1] Ranger *v.* Gt. Western Ry., 5 H. of L. Cas. 71 [1854]; B. & O. R. R. Co. *v.* Polly Woods, 14 Gratt 459; Monon Nav. Co. *v.* Fenlon, 4 W. & S. 205; The Memphis, etc., R. R. Co. *v.* Wilcox, 48 Pa. St. 161; *contra*, Milnor *v.* The Ga. R. R. Co., 4 Ga. 385; B. & O. R. R. Co. *v.* Canton Co., 17 Atl. Rep. 394.

[2] Hill *v* So. Staff. R. Co. 11 Jurist. (N. S.) 192.

[3] L. E. & St. L. Ry. Co. *v.* Donnegan, 111 Ind. 179 [1887]; s. c., 12 N. E. Rep. 153; Fidelity & C. Co. *v.* Eickhoff (Minn.), 65 N. W. Rep. 351; Baltimore & O. & C. R. Co. *v.* Scholes (Ind. App.), 43 N. E. Rep. 156; Sanford *v* Commercial Trav. Mut. Accd Ass'n (N. Y. App.), 41 N. E. Rep. 694; Miller *v.* Chicago, B. & Q. R. (C. C.), 65 Fed. Rep. 305; Home F. Ins. Co. *v.* Kennedy (Neb.), 66 N. W. Rep. 278.

[4] Appeal of Rea, 29 Alb. L. J. 188 [1883]; White *v.* Middlesex, 135 Mass. 216; Kistler *v.* I. & St. L. Ry. Co., 88 Ind. 460; Dugan *v.* Thomas, 79 Me. 221 [1887]; Bauer *v.* Sampson Lodge, 102 Ind. 262; Nate *v.* Ham. Ins. Co., 6 Gray 174; Hobbs *v.* Man. Ins. Co., 55 Me. 421; Scott *v.* Avery, 4 H. & L. Cas. 811; Horton *v.* Sayer, 4 H. & N. 642; Thompson *v.* Charnock, 8 Fern. 139; Graham *v.* Ketaltas, 17 N. Y. 491, 496; Kill *v.* Hollister 1 Wils. 129; Walker *v.* Beecher (Com. Pl.), 36 N. Y. Supp. 470.

[5] Gourley *v.* Duke of Somerset, 19 Ves. 431; Agar *v* Macklew, 2 Sim. & Stu. 418; Greson *v.* Ketaltas, 17 N. Y. 496; *and see* Haggart *v* Morgan, 1 Seld. 427; Sinclair *v.* Tallmadge, 35 Barb. 607; Scott *v.* Corp'n of Liverpool, 3 De G. & J. 334; *but see* D. & H. C. Co. *v.* Pa. Coal Co., 50 N. Y. 250 [1872], *and a collection of cases in point.*

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If parties were allowed to enter into such compacts and agreements for the settlement of their differences, it would not be long before the law of the land would be subverted and the country would be governed by the laws of societies, sects, and clans as various as those of the tribes of Africa. The socialists would choose to be governed by laws of their own, and the Protestants would abide the decisions of their deacons, the Catholics and Jews of their priests or rabbis, and the machinery of our courts would be idle. All these societies and the boards of trade may have their rules, and *membership* may be limited to the period during which a member obeys these rules, but under no circumstances can a citizen forfeit his rights to come into the courts for the protection and enforcement of his rights if he chooses so to do. That right the courts always grant. On the board of trade the member forfeits his membership, from church societies he is excommunicated, in Africa and among anarchists he might be put to death, but in engineering work, when the work is done, the company have none of these powers or means to hold or punish a contractor, and he seeks to take his case into court when he is disappointed with the engineer or architect. Generally a punishment is provided if he fails, neglects, or refuses to abide by his contract while the work is in progress; but having completed the work or worked up some plausible excuse for abandoning it, he usually feels himself free to do as he pleases. These are some of the few reasons why contracts are drawn so strictly and why surety or bondsmen are required. Forfeitures the courts will not enforce. The right to resort to the courts for protection and relief is a constitutional right guaranteed to every citizen. It is a right the courts have said that neither the state, its legislature, nor an agreement between the parties themselves can impair.[1]

Insurance policies and contracts for the construction of engineering works where the questions to be decided have not yet arisen and may never arise, are peculiarly within this rule.[2] It has been applied to a city ordinance which provided that before any person can erect any building, or addition thereto, within the city limits, he must obtain a permit from the building inspector, who may grant or refuse such permit, and from whose decision there is no appeal, and which subjects such party to a penalty in case he builds without such permit. Such an ordinance was held to violate the constitutional rights of the citizen, and that it made the right of the owner of property to improve the same dependent on the decision of the building inspector.[3] In this case the decision of the inspector was made final by ordinance and the restriction was not self-imposed.

[1] Atlanta & R. Co. *v.* Monghan, 49 Geo. 266; Appeal of Ren, 29 Alb. Law Jour. 138; Story Eq. Jur., § 670; Scott *v.* Avery, 5 H. L. Cas. 811; *and see* People *v.* Haws, 2 Am. Law Reg. (N. S.) 378.

[2] Insurance cases: Knorr *v.* Bates (Com. Pleas), 33 N. Y. Supp. 691; Prader *v.* Natl. Masonic Accdt. Assn. (In.), 63 N. W. Rep. 601; Sanford *v.* Commercial T. Mut. Acc. Assn. (Sup.), 33 N. Y. Supp. 512; s. c., 41 N. E. Rep. 694, *and see In re* New York, etc., R. Co., 98 N. Y. 447.

[3] City of Sioux Falls *v.* Kirby (S. D.), 60 N. W. Rep. 156. One justice dissented on

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345. Liability may be Postponed until after the Determination of Certain Facts.—The earlier decisions were quite uniform in deciding that a clause providing that certain questions arising, should be referred to a tribunal of the parties' own selection, to the exclusion of the authority of the courts, was invalid. It was generally so held until 1855, when a decision in the English House of Lords,[1] held that although parties cannot by contract oust the courts of their jurisdiction, they may make the determination of certain facts and circumstances a condition precedent to any right of action under the contract.[2]

This will be recognized as the same rule adopted by the courts to evade the first objection to the validity of the clause. It has been generally adopted both in England and America, and although the principle has not been universally adopted, yet its application to construction contracts for engineering and architectural works has always been followed. The covenant must not be an absolute agreement to oust the superior courts of their jurisdiction, for such has been held void,[3] though it may postpone the right to any suits or actions until after the engineer has determined the quantities, classifications, values, and other conditions imposed by the agreement. The parties[4] may impose conditions with respect to preliminary and collateral matters, or they may so bind themselves and prescribe the instruments of evidence as to prevent the court from looking beyond their agreement, but they must not go *to the root of the action.*[5] When therefore the contract discloses nothing more than an agreement generally to refer any and all disputes to arbitration, it does not prevent the contractor from maintaining an action in court. It should not refer any and every matter to arbitration, but provide that the contractor shall not sue nor the company be liable until the engineer has determined the amount to be paid. To some this distinction may not be so apparent, and it has *not* been established without criticism. As Judge Martin once said in a case setting forth such a decision: "If parties may arrange [agree] that before any action is brought an arbitrator [engineer] shall ascertain the sum to be paid, that seems to be only a circuitous mode of saying that no action shall be brought." Yet the decision has been followed and is is now well established that the parties to a contract may not oust the courts of their jurisdiction over the subject-matter of their contracts.[6]

the ground that the law or ordinance does not comtemplate that the inspector or engineer will act arbitrarily.

[1] Scott *v.* Avery, 5 H. of L. Cas 811.

[2] Hamilton *v* Home Ins. Co., 137 U. S. 370 [1890]· Chicago, etc., R. Co. *v.* Stewart, 19 Fed. Rep. 5, *and c ses cit-d;* Hamilton *v.* Liverpool Ins. Co., 136 U. S. 242 [1889]; Old S. Land Co *v.* Com. U. Assur. Co. (Cal.), 5 Pac. Rep 232; Gauche *v.* Lond. Ins. Co., 10 Fed. Rep. 347; *and see note,* 26 N. W. Rep. 744.

[3] Horton *v.* Sayer, 4 H. & N. 643 [1859]; s. c., 5 Jur. (N. S.) 989.

[4] Holmes *v.* Ricket, 56 Cal. 307 [1880]; Saucelito Ld. Co. *v.* C. U. A. Co., 66 Cal. 253 [1884].

[5] Dugan *v.* Thomas, 79 Me. 221 [1887]; Crumlish *v.* Wilmington & W. R Co., 5 Del., Ch. 270 [1879]; *and see* Sutro T. Co. *v.* Seg. Bel. Min. Co. (Nev.), 7 Pac. Rep. 271; *and* Gere *v.* C. B F. Ins. Co., 23 N. W. Rep. 137.

[6] Crumlish *v.* Railroad Co., *supra.*

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Even before the decision of Scott *v.* Avery [1855] there was a form in which a covenant, or condition, or promise might be framed, and which was common in construction contracts, which would prevent the parties from maintaining any action until the amount to be paid was ascertained by a third person. Such were covenants to pay, for the erection of structures or for the performance of work, such a sum as the engineer or architect should estimate or think reasonable with a stipulation that no other sum or sums should be claimed by the contractor.[1]

As before stated, the stipulation or condition should extend to the debt itself and not merely to the promise, and the decision and estimate of the engineer be made a condition precedent to any liability on the part of the owner or company or to any right to recover payment on the part of the contractor. The utmost care should be taken in draughting this clause, as courts have evinced more or less jealously and disfavor with the stipulation. In Massachusetts and Indiana especially have the courts criticised it.[2] Insurance policies and contracts of employment have been in special disfavor.

On the other hand, the legislature of New York has considered some such provision so essential to a construction contract that an act has been passed authorizing the insertion of a clause for the speedy and equitable adjustment of all questions relative to the performance or alteration of contracts for public works.[3]

In an agreement by a railroad employee that in case of a breach of the company's rules and regulations, that the company's president should be sole judge as to whether the company should retain the whole or any part of a sum deposited by the employee as liquidated damages, and the president's certificate should be a final adjudication thereof and binding and conclusive evidence in any court that said money had been forfeited to the company, it was held that such a stipulation was an agreement to submit to arbitration and an attempt to oust the courts of justice from all jurisdiction over the whole controversy, and was therefore void.[4]

An agreement that "if any difference, variance, controversy, doubt, or question should arise between the parties touching or concerning any covenant, clause, proviso, matter, or thing in the said contract contained, then all and every such matter in difference should be determined by arbitrators chosen as therein provided, and further, that the parties should not prosecute any suit or seek any remedy either in law or equity for relief in the premises without first submitting to such arbitration and reference," was held not to prevent an action before any reference or arbitration was had.[5]

[1] Pollock, C. B., *in* Horton *v.* Sayer, 4 H. & N. 643 [1859].

[2] Kistler *v.* Ind. & St L. R. Co., 88 Ind. 460; White *v.* Middlesex R. Co., 135 Mass. 216; B. & O. R. Co *v.* Scholes (Ind. App.), 43 N. E. Rep. 156.

[3] *Referred to in* People *v.* Benton, 7 Barbour 208 [1849]; Act, May 12, 1847, § 11.

[4] White *v.* Middlesex R. Co., 135 Mass. 216 [1883]; *citing* Wood *v.* Humphrey, 114 Mass. 185; Pearl *v.* Harris, 121 Mass. 390; Vass *v.* Wales, 129 Mass 38; Miller *v.* Chicago B. & Q. Ry. (C. C.), 65 Fed. Rep. 305.

[5] Horton *v.* Sayer, 4 H. & N. 643 [1859].

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Here was an agreement not only to forego any suit for the price or compensation, but a renunciation of any remedy at law or equity. The determination of the engineer was made a condition precedent to any suits or actions, but not a condition precedent to liability on the debt.

To impose a condition precedent to coming into court, some decisions require *only* that the parties shall make the amount to be paid, depend upon some agreed mode of liquidation or adjustment or reference, holding that when such a condition is imposed that the amount of indebtedness is not known until determined, and therefore no action will be allowed, because it is beyond the power of the court to determine it.[1] No implied promise to pay what may be reasonably due can be substituted for such an express promise, and therefore no obligation to pay arises until the amount can be determined. The courts say further that such an agreement does not close the access of the parties to the courts, for the obligation, when it is ascertained, can be enforced only by the courts.

The decisions are numeous to the effect that when a contract provides that no action shall be brought until after the award of arbitrators, that it will keep the parties out of the courts until the award is made,[2] and that the award is a condition precedent to payment or recovery.[3] *

It should be stated before closing the discussion of this objection, that the stipulation above referred to have very rarely been held invalid in engineering contracts. That the decisions adverse to their validity have been chiefly confined to insurance and general contract obligations where the difficulties attending their execution do not require their use and support. Therein may lie the true ground for their support, which is hereinafter discussed.

346. Is the Agreement a Submission to Arbitration?—The questions raised by the objections made to the stipulations are: Should such stipulations be considered submissions to arbitration? Is the engineer or architect an arbitrator? And should his decision be given the conclusive effect of an award?

In so far as the form and substance of such agreements are concerned, there is nothing to deny them the name and character of submissions to arbitration, nor to prevent their being upheld as such. The objections must therefore be sought in the circumstances attendant: the date of the agreement with reference to the time when the controvery arose, the subject-matter, and the persons to whom the arbitration is submitted.[4]

347. Provision that Engineer's Powers shall not be Revoked by Either Party.—Engineer if Interfered With, may Proceed Ex Parte.

[1] Appeal of Rea, 29 Alb. Law Jour. 138, *and cases cited.*

[2] Hamilton *v.* Home Ins. Co., 137 U. S. 370 [1890].

[3] Hamilton *v.* Liverpool Ins. Co., 136 U. S. 242 [1889].

[4] *See* Russell's Law of Awards, pp. 40, 41, and 116.

* *See* Secs. 407–416, *infra.*

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Clause: "Neither the contractors nor the company shall have any power to revoke, annul, or interfere with the authority of the engineer; and if either party shall, in the opinion of the engineer, attempt so to do, or to hinder or delay the engineer from making any certificate, order, or award, it shall be lawful for the engineer, if he shall see fit so to do, to proceed *ex parte*, and any certificate, order, or award which may be made by him thereafter shall be final, binding, and conclusive on the parties, notwithstanding any attempted revocation by either of them, or otherwise." *

348. Before the Award is Made, Agreements to Submit to Arbitration are Revocable.—The element of time and the existence or non-existence of the controversy is the first serious objection to agreements to submit to arbitration. Submissions of existing difficulties, the nature and importance of which are known to the parties to arbitration, is a mode of settling disputes which has been known from the earliest times. It was practised among the Romans, and is to-day a tribunal recognized in all civilized countries, by which the rights of nations as well as of individuals are amicably determined, and their differences adjusted. The courts have not only suffered the existence of such tribunals, but they have encouraged their support and patronage,[1] but an agreement to submit questions and disputes, not yet arisen, and whose precise character has not been determined, have always met the disfavor of the courts, and have frequently been declared invalid, revocable, and unjust. The English courts have held that a general submission of all questions to the determination of an engineer was not an arbitration, and could not as such be made a rule of the court, under acts of 1854; that the certificate was not an award, nor liable to be examined as such.[2] Mr. Russell, in his book on Law of Awards, has said: "A building agreement authorizing proceedings in case of certain defaults by the builder, to be ascertained and decided by the architect without appeal, is not a submission to arbitration. A decision which precludes differences from arising instead of settling them after they have arisen, is for many purposes frequently *not* an award. One who determines the amount to be paid a contractor for work done is often not an arbitrator in the proper sense, unless there have been differences between the parties on the point previous to their submitting it to his decision; but when the words of the submission are large enough to embrace the case of a judicial inquiry, and the object of the parties is to have their respective cases heard and decided upon the evidence produced before the arbitrator, it is not less an arbitration because the ultimate object is to ascertain the value of property or the amount of compensation." [3]

[1] *See* Faggard *v.* Williamson (Tex.), 28 S. W. Rep. 557.

[2] Leake's Digest of Law of Contracts 640; Wadsworth *v.* Smith, L. R. 6 Q. B. 332; Sharpe *v.* San Paulo Ry. Co., L. R 8 Ch. 597; Fry's Specific Performance of Contracts, § 841.

[3] Russell's Law of Awards, 40, 41; Stevenson *v.* Watson, L. R. 4 C. P. D. 148; Wadsworth *v.* Smith, L. R. 6 Q B. 333; Northampton Gas Co. *v.* Parnell, 15 C. B. 630.

* This is not a desirable stipulation.

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The feeling has been so strong that it has become a rule of law that in general, and in absence of statute to the contrary,[1] executory agreements to submit to arbitration are not enforceable.[2] They may be revoked and avoided at any time before the award is actually made and delivered.[3] Whether the submission is the result of a voluntary act of the parties or is embodied in a contract makes no difference; at common law, and in some states by express enactment,[4] the agreement may be revoked at any time before the matter in dispute has been fully submitted to the arbitrators for their decision.[5]

If the submission calls for a written award it may, it seems, be revoked at any time before the award is signed, even after the arbitrators have individually expressed to strangers their respective views.[6] The submission may be revoked even though the agreement to arbitrate provides against any revocation, and by its terms the party seeking to revoke has, for a valuable and executed consideration, expressly waived and abandoned the right to revoke. It was held that such stipulations, like other executory agreements, when broken, simply left the other party to seek redress by the ordinary action of damages for the breach. That the arbitrators derived their power to act, simply from the continuing consent of the parties, and when the agreement, while yet executory, is broken by the refusal of either party to be bound or to perform it, the power of the arbitrator is at an end.[7] And the quotation of an early English case is cited, in which the justice said: "Man cannot by his act make such authority, power, or warrant not countermandable, which is by law or by its nature countermandable; he cannot make that irrevocable which is by its own nature revocable."[8]

349. Either Party is Liable for a Breach of His Agreement to Submit to Arbitration.—These cases cited are not construction contracts, but if a contractor can at any time before any disputes have come up revoke his agreement to abide by the decisions and estimates of the engineer, which no doubt he can do as well as he may refuse to proceed with the work, or neglect

[1] *See* § 2383, Code of Civil Procedure, N. Y.

[2] Hopkins *v.* Gilman, 23 Wis. 476 [1868].

[3] Randel *v.* Ches. & Del. Canal Co., 1 Harrington (Del.). 233 [1833]; Kinney *v.* B. & O., etc., Assn. (W. Va.) 14 S. E. Rep. 8; Harding *v* Hart (N. C.). 24 S. E. Rep. 668; Gleason *v.* Ketelhas, 17 N Y. 491; 1 Amer. & Eng. Ency. Law 664, 669; *see, however*. Buckwalter *v.* Russell (Pa.), 13 Atl. Rep. 310 [1888]; *and see* Guild *v.* Atchison, T & S. F. R Co. (Kans. Sup.), 45 Pac. Rep. 82, which held that when a price was to be fixed by appraisers in a contract of sale, and the appraisers had been selected, that th ir appointment could not be revoked.

[4] Sindlinger *v.* Kerkow (Cal.), 22 Pac. Rep. 932.

[5] Rison *v.* Moon (Va.), 22 S E. Rep. 165; Boston & L. R. Co. *v.* Nashua & L. R. Co., 139 Mass. 463; *and see* McKenna *v.* Lyle (Pa.), 26 Atl. Rep. 777.

[6] Butler *v.* Greene (Neb.), 68 N. W. Rep. 496.

[7] People *ex rel* Ins. Co. *v.* Nash *et al.*, 111 N. Y. 310.

[8] People *v.* Nash, 111 N. Y. 310; *but see* Denver Construction Co. *v.* Stout, 8 Colo. 61, which distinguishes a stipulation in a contract founded upon a consideration from a submission to arbitration, and holds it irrevocable; *accord*, Mills *v.* Bayley, 2 H. & C. 36; *and see* Parmlee *v.* Hambleton, 24 Ill. 605; Smith *v.* Alker, 2 Cent. Rep. 904; *and see* 26 N. W. R. 744, *note*.

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to fulfill any other condition or provision of his contract, he is also liable to an action for the breach and any damages resulting from it to the party [company].[1] Whether any damages could be shown might be a question, but that does not alter the parties' relations nor their rights.

350. Agreement to Submit to Arbitration is Irrevocable after Award is Made.—The different relations which exist between the parties *before* the arbitrator or engineer has rendered his award or certificate, or has decided disputes that have arisen, and those that exist *after* the decision has been made, must be kept in view. When matters have been allowed to go before the engineer without objection on the part of the owner or contractor, and the engineer has made his estimate or report under the terms of the submission, there can be no doubt but that his decision will be held final and conclusive, and binding upon both parties. It is then too late to raise any questions as to the validity or binding effect of the agreement to submit questions or disputes to the engineer. The revocation of such an agreement must be exercised before the certificate, estimate, or award has been made, if at all.[2]

351. Courts will not Enforce Agreements to Submit to Arbitration.—Courts frequently undertake to specifically enforce the performance of contractual engagements when damages for a breach cannot be ascertained, or where the difficulties of the situation are otherwise insurmountable, or will not admit of any other solution. Agreements to submit to arbitration when broken present complications of adjustment and settlement which the courts might ordinarily be expected to relieve by insisting upon a substantial performance, but they do not,[3] and they sustain their refusals by reasons which, for cases of arbitration strictly, seem sound and sensible. They are summed up in the following statements, viz., that courts will not compel a party to submit the decision of his rights to a tribunal which does not possess full, adequate, and complete means within itself to investigate the merits of the case and to administer justice; that an arbitrator, in the absence of a statutory authority, cannot compel the attendance of witnesses nor administer oaths; he cannot compel the production of documents, books of account, and papers, nor insist upon the discovery of facts from the parties under oath. He cannot enforce his decree.[4] The court is powerless to compel the parties to perform their agreement to arbitrate or to name the arbitrators or to agree upon them. If the parties refuse to appoint them the court cannot select them, and if they have been selected it is doubted if the court can require them to perform their functions.[5] It

[1] Rison *v.* Moon (Va.), 22 S. E. Rep. 165; *and see* Wiley *v.* Goodsell (Sup.), 38 N. Y. Supp. 376; Murphy *v.* Northern British & M. Co., 61 Mo App. 323.

[2] Kidwell *v.* Baltimore, etc., R. Co. (Va.), 11 Gratt. 676, *and cases cited;* Wood's Law of Railroads 996

[3] Stevenson *v.* Watson, 4 C. P. D. 148; 1 Amer. & Eng. Ency. Law 667, *and cases collected;* 22 Amer. & Eng. Ency. Law 1000 and 1010, *and cases collected.*

[4] 1 Amer. & Eng. Ency. Law 667, *and cases collected.*

[5] People *v.* Nash, 111 N. Y. 310.

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may be doubted if the court has power by mandamus to compel arbitrators to perform their functions.[1]

A provision in the contract for referees in certain contingencies, which is not of the essence of the contract, has been held not a ground for refusal of specific performance of the contract;[2] but a provision that either party may terminate the contract, and that arbitrators shall be appointed to determine the terms of the rescission and the compensation, has been held a good reason for a court to refuse to cancel the contract.[3] The party who refuses to supply the deficiency by naming an arbitrator may be denied relief from a court of equity, except upon the term of his doing equity, which may consist in his consenting to the accounts being taken by the court or its master,[4] and although equity will not decree specific performance of a contract to arbitrate, yet where a question of damages arises it is not error for the court, *by consent of parties*, to permit the amount to be ascertained by arbitrators and to decree the amount found by them.[5] In cases where buildings or works have been stipulated to be done in such a manner as a third person may direct, and where such direction has either been refused or not given, specific performance has been refused.[6]

This impracticability of compelling the parties to name arbitrators, or, upon the parties' refusal, for the court to appoint them, has constituted a complete bar to any attempt to enforce agreements to refer to arbitration, and it has become an established principle of the common law that submissions to arbitration may be revoked at any time before the award is made.[7]

If such agreements may be revoked, the advisability of such a clause may well be questioned, for although the contractor be liable for any damages resulting from his refusal to submit to the engineer's estimates and decisions, it would be difficult to show how the company has been injured or what damages it has suffered if the engineer's estimates be regarded as honest and just, without proving or assuming that the court and jury's determination of the questions and quantities were unjust and excessive, in consequence of which the company suffered. If the contractor has substantially performed his contract, but has revoked his submission to the engineer's decision, and has come into court for the determination of his rights and what is justly due him, the company should prove that they have suffered damages thereby to be entitled to any recovery for the breach.

A further reason which courts give for refusing to enforce such clauses is, that they tend to refer the decision of difficult legal questions to inex-

[1] People *v.* Nash, 111 N. Y. 310; *but see also* Wood on Mandamus 110, *and* Tapping on Mandamus 92, *which are strictly cases of arbitration.*

[2] Union Pac. Ry. Co. *v.* Chicago, etc., Ry. Co., 16 Sup. Ct Rep. 1173.

[3] Young Lock-nut Co. *v.* Browley Mfg. Co (N. J. Ch.). 34 Atl. Rep. 947.

[4] Ch slyn *v.* Dalby, 2 Younge & C. 170.

[5] Conner *v.* Drake, 1 Ohio St. 166.

[6] Fry's Specific Performance (2d ed.) 157 [1881], *citing* Tillett *v.* Charing Cross Bridge Co., 26 Beav. 419; Earl of Darnley *v.* London C. & D. Ry. Co., 3 De G. J. & S. 24.

[7] C. M. & St. P Ry. Co. *v.* Stewart, 19 Fed. Rep. 9 [1883]; Tobey *v.* Bristol Co., 3 Story 826; Haggert *v.* Morgan, 5 N. Y. 422, 4 Sandf. 198; Gervais *v.* Edwards, 2 Dru. & War. 80.

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perienced and incompetent persons. That such questions are primarily and more properly for the determination of the court and are not questions for an arbitrator [engineer]; which, if true, is an excellent reason for holding such clauses revocable and for refusing to enforce their specific performance.

352. Consideration of Objections to the Submission of Questions to Engineer's or Architect's Determination.—The objections to the stipulation being regarded as irrevocable submissions to arbitration, having been enumerated, let us consider their force and see if they be insurmountable. It is believed that a brief survey of the objections to giving such agreements the effect of submissions to arbitration will show that they are disputable, and it may be doubted if they apply to the usual stipulation in engineering contracts.

353. Engineer is in Possession of Records and Evidence.—First, it is not necessary that the engineer should administer oaths, summon witnesses, or compel the production of papers. He is himself the judge and the witness. He is in possession of all the facts and documents pertaining to the case. He has been an eye-witness of the progress of the work, of the changes, misfortunes, and good fortunes connected with it. The measurements, reports, and records of the work have been made and prepared under his direction, and are in his possession or subject to his call. They are subject to his control, and their prompt delivery can be demanded and required of any of his assistants or of strangers. If either party to the contract own or obtain possession of them and refuse to surrender them, then they but prejudice their cause, and the evidence they contain must be taken as against the party who retains them, as would be done in court; and even if the records were destroyed the engineer, having been best informed in the work, would be best able to furnish satisfactory evidence with regard to it. The engineer is, as it were, a judge of a higher court, possessed of all the evidence and acquainted with all and every circumstance, and he therefore *does* possess the full, adequate, and complete means, within himself, necessary to investigate the merits of the case.

354. Engineer can Administer Justice with the Aid of the Courts.—Secondly, can the engineer administer justice? He can administer justice in that he may put the contractor in a position to enforce his rights. He himself may not compel the proprietor or company to pay, nor can he issue an execution against his property, but he can, by his certificate or decree, confer upon the contractor all the rights, privileges, and demands for which he has stipulated in his contract or is entitled, which is all that justice demands. He may render the contractor's right to recover absolute for so much as he may determine, and to enforce its payment the contractor has only to appeal to the courts without the delay of a jury trial and its attendant vexations.[1]

[1] Flynn *v.* Des Moines & St. L. R. Co., 63 Iowa 491 [1884].

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The rule that courts will not specifically enforce agreements to arbitrate, nor select the arbitrators when the parties refuse, is one generally adopted,[1] but it is not without exception. In a recent Michigan case we find a court of equity ordering the master to have each party select such an engineer as the contract required to act as arbitrator in readmeasuring the work within a limited time, and if they did not make the selection, for the master himself to select two for the purpose.[2] But there are many cases to the contrary.[3]

In contracts for the construction of works, the engineer is either agreed upon and named in the instrument or his selection is unconditionally provided for. If it is arranged beforehand, by the terms of the contract, that his appointment shall be independent of any act of the parties, there is no reason why he should not be determined as well as the executor or heir of a deceased person. And it is not so easy to see why the court could not, if it desired to do so, appoint an arbitrator to settle the affairs and difficulties of a single transaction of a living person as well as they may appoint an administrator to settle the business of a deceased person to the interests and in justice to his kin and creditors, or of a receiver to adjust differences between a company that is in trouble and its creditors. If the selection of the engineer has been left by the parties to the court, or to some third party, as when an umpire is selected by arbitrators to act with them, or even to some circumstance or event which should change the character of the questions to be determined, then they have surrendered their rights and privileges, and it is beyond their power to have any further voice in his selection. If the engineer named live and is capable of performing his duties, or if the court or third person make a choice, or the event has come to pass, then there is no necessity for the court to impose an engineer of their own appointment upon the parties or to require them either singly or severally to name one. If the engineer named die or is incapacitated, the contract should provide for the appointment of his successor; and if the parties or methods provided for his appointment fail in the performance of their functions, then there is time for courts to say that the attempt to submit to the engineer's decision has failed, and until it has failed it should be held irrevocable and binding. If the engineer's appointment be a duty devolving upon the company, which fails to appoint a suitable engineer, then the court may say that the company shall not take advantage of its own wrong and imply an agreement on the part of the company to furnish an efficient engineer, and that he shall perform his duties, the breach of which implied agreement gives the contractor access to the courts.

355. Make Liability of Company or Owner Contingent on Determination of Engineer.—If, as has been suggested, the liability of the company and

[1] Kidwell *v.* B. & O. R. R. Co., 11 Gratt. 676.

[2] Sullivan *v.* Su ong (Mich.), 9 S. E. Rep. 156 [1889].

[3] Hopkins *v.* Gilman, 22 Wis. 476 [1868]; *and see also* People *v.* Nash, 111 N. Y. 310.

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the right to recover of the contractor be made conditional on the determination of the engineer, then the contractor is barred of any action until he obtains such abjudication, and he can recover for his work only by performing his agreement to submit the questions to the determination of the engineer. This is a burden imposed upon the contractor by the company for its protection against any such contingency as the contractor refusing to perform the submission. He is required to furnish a certificate from the engineer, architect, or superintendent before any liability attaches for any part of the work. Such a clause is, and invariably should be, inserted in the contract, and it should clearly and explicitly make the engineer's estimate, decision, and certificate a condition precedent to any liability on the part of the company, and to any right to recover on the part of the contractor for what he has done. Such a stipulation should be and generally is held conclusive and binding, and the contractor has no remedy at law and can recover nothing for what he has done until he produces the required certificate, or proves a breach of contract, either expressed or implied, on the part of the company.

356. Parties are Bound after Award is Made.—"A simple agreement inserted in a contract that the parties will refer any dispute arising thereunder to arbitration will not bar a suit at law by either party upon the contract before an offer to arbitrate; but when the contract stipulates that the arbitration is to be a condition precedent to the right to sue upon the contract, or this may be inferred upon construction, no suit can be maintained unless the plaintiff has made all reasonable effort to comply with the condition,"[1] or can show that the defendant has hindered the performance thereof.[2] To secure the certificate the contractor must submit the questions to the determination of the engineer, which submission after the decision is made is as binding as any other award, if honestly made. It is not necessary in general therefore that courts should either select, name, or appoint the engineer to determine the questions arising under a construction contract, and it is only under the rarest combination of circumstances that the court would have any of the complications upon which these objections are based.

357. Stipulation should not be Held Void Because there is a Possibility it May Fail.—It is therefore submitted that it is a harsh and unnecessary rule that declares a stipulation of a contract void and without effect because there is a possibility that it may fail, and that case too arising out of the bad faith, arbitrary refusal, or dishonesty of one of the parties which may arise in any transaction, and which may be relieved against equally as well in one case as in the other. This occurrence too is rendered even more distant by the fact that the moment the work begins, at that moment the arbitration

[1] Perkins v. United States Electric Light Co., 16 Fed. Rep. 513; *note in* 26 N. W. Rep. 744.

[2] 1 Redfield on Railways, 447 (6th ed.); *and see* Thurnell v. Balbirnie, 2 M. & W. 786; Miles v. Gary, 14 Vesey 400.

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begins, and as the award is made at different periods as the work progresses, (in monthly estimates usually), the contractor may be said to have permitted the award to be made, after which he would be irrevocably bound for so much of it, under the strict rules of arbitration.

358. Stipulation does not Leave Decision of Important Questions to Incompetent Persons.—The objection that such clauses refer the decision of difficult legal questions to inexperienced and incompetent persons is not well founded. It is an objection that can as well be made to submissions to arbitrations in general. The questions involved may or may not furnish legal points to be decided, but certainly they are no more important than those brought up by submissions in general which might include construction contracts. The difficult questions are rarely of a legal character, at least of such a character as involve the nicer points of law that would require the opinion of the court. They are questions pertaining to the measurements, quality, character, and classification of the materials employed, or with regard to the perfection or workmanlike character of the work and of the ultimate completion of the work according to the plans, specifications, and contract.

359. Engineers and Architects are Most Competent to Determine the Questions at Issue.—The character of the questions to be determined furnishes the strongest reasons why they should be determined by an engineer. As judges from the bench have admitted, and "without disparagement to the ordinary tribunals of the country," they are questions "which the courts are least fitted to decide,"[1] and in which an engineer or architect is most competent to administer exact and equal justice between the parties. The engineer's or architect's whole education, training, and experience have been to the very end that he should perform the functions of his office. From his superintendence and direction of the undertaking he is perfectly acquainted with all its details. He has designed, directed, measured, and seen it completed. The specifications and frequently the contract are his own creation, and the meaning and interpretation of every clause and expression as understood in the profession and trades are known to him. He is familiar with the processes of construction employed, with their relative merits and the care and success with which they have been carried out, and with every step of the progress of the works, and yet it is contended in the face of these facts that he is inexperienced and incompetent.

360. Courts, Juries, and Experts are Powerless to Determine or Decide the Questions Presented.—As to the practical features of the work, it cannot be denied that the engineer is the proper, if not the only person who should have their determination. It cannot be urged that a judge with his classical knowledge of latin, greek, and letters, with his very limited experience, and with a knowledge of engineering acquired from the study of high-school geometry, algebra, and physics, and that too lost in the dim forget-

[1] Justice Rogers in Monongahela Nav. Co. *v.* Fenlon, 4 Watts & Sergent 205 [1842].

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fulness of the past, can better determine the practical questions arising under a contract for the construction of an engineering structure. Nor can it be argued that a jury indifferently selected, without adequate information or the power to acquire it, will be more competent or better qualified to determine difficulties arising under such a contract, whether of fact or of law. If experts, however profound in their calling, are called to assist the court, their partisan and prejudiced opinions present only the black and the white of the questions, and tend to confuse the judge and jury, frequently resulting in the throwing out of all the testimony, and in the judge or jury deciding the question upon their own understanding or conclusions. This is no more than what might be expected. Experts are called by the parties for their preconceived opinions to establish or refute some fact or statement, and it is only when they are prepared to assert or deny such facts that they are retained. An expert witness is directly for or against the issue, and a judge or jury derives little competence or experience from the conflicting testimony they afford. Experts cannot have a full knowledge of the work, of its character, quantities, perfection or the difficulties attending its performance. Defective work and materials may have been concealed and buried from view. Difficulties have been encountered and obstacles removed, and thousands of circumstances and conditions have existed, known only to the engineer and contractor, and which are wholly beyond the reach of the most skilful and experienced expert. Foundations and embankments may have settled, materials been wasted, mistakes been corrected, alterations and changes made, to the detriment or benefit of either or both parties, which might never be known from inspection, and which could be shown and explained to a court only by the most expensive litigation. Contradiction could be positively settled only by undoing work that had been done at great cost, and the contest would become interminable and ruinous.

Justice Danforth of New York once reviewed these difficulties in giving his opinion after going over an important case in these words: "The purpose of the parties was to prevent the necessity of measurements and computations after the contract was executed, the structure built. . . . The wisdom of this precaution appears by reading the evidence of witnesses who came after the contractor and made measurements; whose conjectures, judgments and opinions indicate the difficulty if not the impossibility of measuring materials after they are furnished (and in the structure). Of the two methods, estimates before the work and conjectures after, the parties elected the former."[1]

361. Difficult Legal Questions Do Arise Without Doubt.—That difficult legal questions arise cannot be doubted, and the varied and inconsistent decisions in the books show how well the courts have grappled with them. They show that the courts have not viewed the difficulties presented from any one standpoint, nor met them by any common rule or principle, and

[1] Swift v. The People, 89 N. Y. 52 [1882].

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litigants have met defeat in the same courts that have on other occasions given them judgment. This, however, may not be from want of legal knowledge, but rather from the abundance of it. If, instead of seeking to invent fictions, and to establish decisions upon refinements that are susceptible only to the most discriminating, the courts had sought some practical solution of the difficulties, they would have had less trouble and more uniform decisions. As Lord Campbell sought, entertained, and learned from the commercial world the customs and laws established and maintained by the necessities of their business—the law-merchant; so might the courts, as they have in many instances, found the true ground for supporting and maintaining these clauses of a construction contract. This, it is submitted, is a true reason for the existence, and a real cause of the persistent and universal use of such stipulations.

362. Practical Common-sense Reasons for Upholding Such a Stipulation.—The magnitude, extent, and great cost of engineering and architectural works commend them to the courts for a favorable construction according to their true intent and meaning. The public health, the growth, improvement, and protection of the nation require that these undertakings and operations be encouraged and fostered. In England and the United States, where they have received favorable constructions, the wonderful progress and development of the industries and public works is most marked. Without such clauses and the belief that the determination of the tribunal selected by the parties would be upheld, it is certain that but little contract work would be had, and a death-blow be given to a means of securing the performance of public works that has been adopted by every corporation, municipality, and public institution of the present day a misfortune more disastrous and far-reaching than would be caused by the overthrow of practical laws and customs pertaining to factors and brokers, or of those pertaining to commercial paper, even. Few capitalists, corporations, or public institutions would invest their wealth in enterprises in which their rights and differences with contractors were to be submitted to an ordinary jury, whose sympathies are distinctly with the contractor, and against the so-called monopoly, and whose decisions would be based upon knowledge and experience acquired in the shop, in trade, in husbandry, or in the practise of the polite professions—A good argument for a professional jury.[1]

363. Parties Desire to Avoid the Courts and their Legal Decision, Preferring the Decision of a Practical and Trained Engineer.—Furthermore, it may have been, and is, the desire of both parties to avoid the technical refinements, fictions, and discriminations of the law, with which they are not acquainted, and to have their differences settled strictly in accordance with the customs and usages ordinarily practised on such works, and with which they are familiar, and in which the tribunal to which they have

[1] *See* Sharpe *v.* San Paulo Ry. Co. (Eng.), L. R. 8 Ch. App. 609.

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agreed to resort is informed and experienced. To keep out of the courts is often the very object of the reference. It is an undertaking that both parties have entered into, and an express condition, without which the contract would never have been entered into, nor the work undertaken. If such is the express wish and undertaking of both parties, the courts cannot consistently subvert the intention and declare that they contracted under any other condition or understanding.[1]

It is therefore submitted that the objections that the engineer or architect is inexperienced, and incompetent to determine the questions submitted to him, according to the express terms of the contract, is not well taken.

364. Interest of the Engineer an Objection to His Serving as an Umpire.—Finally, it has been held that the engineer is interested, and is therefore disqualified from acting as a referee or umpire.

It is almost a universal custom in engineering construction for the party having work to be done, and who must therefore pay for it, to provide the engineer, or to select the tribunal who shall determine differences arising. The engineer is usually employed in the capacity of a superintendent and director of the work, and with the express understanding that he will look out for his employer's interests. It is his duty to see that the work is skillfully and correctly executed, and in strict accordance with the terms of the contract. He is there in the interests of the proprietor, receives his compensation from him, and may have individual interests in the undertaking.[2] He is not required nor expected to watch the contractor's business, nor to promote his interests, and any attempt to do so might render his position untenable, change the relations of the parties, and render the stipulation of his choice invalid.

An arbitrator or umpire *should have* no interest in the questions he is to decide. There should be nothing to influence him in favor of either contestant. Relationship, joint interest, or a preconceived opinion should render him incompetent to act. It is an established rule that where a judge is interested in the result of a cause he cannot either personally, or by deputy, sit in judgment upon it. From which it has been inferred that the relation of employer and employee ought to exclude the engineer from acting as a judge, arbitrator, or umpire where his employer is a party to the controversy.

365. Engineer should have No Secret Interest.—While all these things may be true, and the engineer is frequently interested and an employee of one of the parties, and though to be regretted, it need not be a reason for refusing to enforce a stipulation to abide by his decisions. If the contractor knew that the engineer was an employee of the company when he took the contract, and with such knowledge of his interests agreed to submit to and

[1] *See* Sharpe *v.* San Paulo Ry. Co., L. R. 8 Ch. App. 607.

[2] Ranger *v.* Gt Western Ry. Co., 5 H. L. Cas 71 [1854]; Williams *v.* Chicago S. F. & C. Ry., 112 Mo. 463.

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abide by his decision, there is no good reason why he should not be held to his agreement if he has had the benefit of the engineer's honest judgment, for which he stipulated. If not strictly as an arbitrator, at least by analogy as a *quasi*-arbitrator, umpire, or referee, and this is the established law. In no case could it be hoped to secure an arbitrator whose tendencies and interests were absolutely balanced or null; such perfection does not exist in human hearts. Some confidence must be reposed in the honesty and impartial judgments of men. Absolute disinterestedness is not expected or required, and it has become a question of what degree or amount of interest will prevent a person from exercising judicial functions when known to the parties.

The interest permitted has been almost unlimited. Questions have been submitted to infants, married women, idiots, and even lunatics,[1] who have been regarded as arbitrators, and there seems to be no rule to prevent a matter being submitted to one of the parties himself.[2] With knowledge, the arbitrator may be a partner of one of the parties, and the fact that the person acting as arbitrator had previously acted as counsel of one of the parties, will not invalidate the award, even though the other party was ignorant of the fact.[3] He may be indebted to one of the parties if the debt be not insecure, or its payment does not depend upon the result of the controversy,[4] or he may be an indorser on a note given by one of the parties.[5] One of the parties may hold a mortgage on the furniture of one of the arbitrators;[6] and the architect may have testified as a witness in an action between the owner and contractor.[7] It has been held that an engineer who was a stockholder, or even a lessee, of a railroad company was not disqualified from acting as a *quasi*-arbitrator between it and the contractor, although the fact was not brought to the contractor's attention, and he was wholly ignorant of it.[8]

If there be no secret interest, and both parties know that the engineer is an employee, or even a stockholder, of one of them, it can afford no legal objection to his acting in his capacity of umpire or arbitrator. The parties are held to have waived the right to object, and his award is held as binding as that of any other arbitrator. Surely it is a question as much for the parties interested to decide as for anybody. If a contractor has such unlimited confidence in an engineer or in the other party, for the selection of a proper engineer, he can best judge of the degree of interest

[1] 1 Amer. & Eng. Ency. Law 671.
[2] 1 Amer. & Eng. Ency. Law, 672.
[3] Goodrich *v.* Hurlbert, 123 Mass. 190 [1877]; Leominster *v.* Fitchburg R. Co. (Mass.) 7 Allen 38.
[4] Anderson *v.* Burchett (Kans.), 29 Pac. Rep 315 [1892].
[5] Bullman *v.* N. B. & M. Ins. Co. (Mass.), 34 N. E. Rep. 169.
[6] Mather *v.* Day (Mich.), 64 N. W. Rep. 198.
[7] Barclay *v.* Deckerhoof, 171 Pa. St. 378 [1895]; McMillan *v.* Allen (Ga.), 25 S. E. Rep 505, *and see* Hart *v.* Kennedy (N. J.), 20 Atl. Rep. 29 [1890], *and* Silver *v.* Conn. R. L. Co., 40 Fed. Rep. 192 [1889].
[8] Ranger *v.* Great Western Ry., 5 H. L. Cas. 71; Hill *v* South Staff. Ry. Co., 11 Jurist (N. S.) 192; Mon. Nav. Co. *v.* Fenlou, 4 W. & S. 205; B. & O. R R. Co. *v.* Polly Woods Co., 14 Gratt. 459; *but see* Milnor *v.* Ga. R., etc., Co., 4 Georgia 385.

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he would have exist and still trust to his judgment. Courts have therefore established the rule that only such interests as are unknown to the contesting parties will render a person incompetent to act as an arbitrator. His interests must not be secret, but must be brought to the notice of all the parties to the agreement.

Finally, if the objections that these stipulations are not submissions to arbitration, and that the engineer is not an arbitrator, are met, it should follow that his decisions are good and will be given the effect of an award. Whether they are, will be determined in the chapter following.

366. No Definite Line of Separation of Cases For and Against Binding Effect of Engineer's Decision.—It must be admitted that the contrary decisions are not separated by any definite line or rule, but that they depend much upon the disposition of each court; its desire to maintain the dignity and supremacy of the court, on the one hand, and its recognition of what public policy, the methods of business, and difficulties of engineering construction require on the other hand. Judges, not unlike mankind in general, have certain objects uppermost in their mind, sometimes called "hobbies," and one may have justice uppermost in his mind, another the public good of mankind, and a third, more paternal and charitable, the wish to alleviate the hardships and sufferings of man, and to guard the weak from the stronger, and yet another may partake of the character of a disciplinarian and be willing that a man should bear the consequence of his folly. As Campbell, the great commercial judge of England, was so instrumental in establishing the law-merchant, so have Chancelors Cranworth, Walworth, and Redfield, and Ld. Justice James been pioneer judges, who have established the rules to govern engineering construction.

An independent tribunal is a necessity. The character of the work, the difficulties and dangers attending it, demand it. Mistakes, changes, and unforeseen conditions demand it. It is and can be created, and is maintained by the higher courts of state and crown, recognizing its utility and necessity. It is necessary in construction, location, or surveying, and the true ground is not to be found in the philosophy of the law, nor is it believed to be founded upon the principles of jurisprudence. They are upheld from the convenience and necessity of the case.[1]

As our laws have been modified and molded into the law-merchant, for the convenience and security of business, and to encourage and build up commercial interests, so have the barriers to public improvement and the nation's development been removed, to foster and encourage architectural and engineering works.[2] The nature of such undertakings, their magnitude, great cost, and importance, renders it convenient and advisable, if

[1] Sharpe *v.* San Paulo Ry. Co., L. R. 8 Ch. App. 607; *and see* Boetiler *v.* Fendick, 73 Tex. 488; Goodyear *v.* Weymouth, 1 H. & R. 67; Grafton *v.* Eastern Cos. R. Co., 8 Exch. 699; Clarke *v.* Watson, 18 C. B. N. S. 278; Martin *v.* Leggett, 4 E. D. Smith (N. Y.) 257; Glaucus *v.* Black, 50 N. Y. 145; *and see* 29 Amer. & Eng. Ency. Law 926.

[2] Boswell *v.* Laird, 8 Cal. 472-3 [1858].

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not necessary, that their direction and management be under one person, a person skilled in the technicalities and peculiarities of the work, as well as informed as to the wishes of the owner, which person may be the owner himself.

To a layman not familiar with the fictions and refinements of the law it is simply an exception to the rule, and practically amounts to saying that the contractor's rights depends upon his good luck in having an honest and conscientious engineer or employer, or upon the ability of the court to conduct an astute investigation; that the employer's obligations to pay, or to perform, depend upon his approval of his work and behavior or that of his engineer or architect, and that the courts undertake to guaranty him that the employer shall not capriciously nor unreasonably exercise his power to defeat the contract or to deny him his just compensation.

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CHAPTER XIII.

ENGINEER OR ARCHITECT AS A QUASI-ARBITRATOR, UMPIRE, OR REFEREE. HIS DUTIES, POWERS, AND OBLIGATIONS IN A JUDICIAL CAPACITY.

367. Provision that Engineer shall be the Sole Judge and Decide all Questions.

Clause: "To prevent any disputes, doubts, differences, or litigations arising, or happening, touching, or concerning the said works, or any of them, or relating to the quantities, qualities, description, classification, or manner of work done and executed, or to be done and executed by the contractors, or to the quantity, quality, or classification of the materials to be employed therein or in respect of any additions, deductions, alterations, or deviations made in, to, or from the said works, or any part of them, or touching or concerning the meaning or intention of the specifications and of this agreement, or any part thereof, or of any contract entered into by and between the company and the contractors pertaining to works herein described, or of any plans, drawings, instructions, or directions referred to in the said specifications or the contract, or which may be furnished or given during the progress of the works, or touching or concerning any certificate, order, or award which may have been made by the engineer, or in anywise whatsoever relating to the interests of the company, or of the contractors in the premises; it is expressly agreed that every such question, doubt, dispute, and difference shall from time to time be referred to, and be settled and decided by the engineer, who shall be competent to enter upon the subject-matter of such question, doubt, dispute, or difference, with or without former reference or notice to the parties to this agreement, or either of them, and that he shall judge, decide, order, and determine thereon; and that to the engineer shall also be referred the settlement of this contract, and the determination of the sum or sums, or balance of money to be paid to or received by the contractors from the company, and it is further expressly agreed that such decision as to any and every question, doubt, dispute, and difference, and said determination and estimate of the quantities, qualities, classifications, and of the sums, values, and all other matters hereinbefore or hereinafter mentioned and described shall be a condition precedent to any right of the contractors to receive, demand, or claim any money or other compensation under this agreement, and a condition precedent to any liability on the part of the owner or company to the contractors, or on account of this contract, or for any labor or materials furnished in connection therewith."

368. The Object is to Create a Tribunal to Determine Questions Arising with Regard to the Work.—Such an agreement is to all intents and pur-

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poses a submission to arbitration of any and all differences and disputes arising under the contract, or in respect to the work as it may be expressly provided. By the agreement a tribunal is created, the office of which is to determine and to decide all questions submitted by the express terms of the submission and of no other questions.

The discussion of this tribunal naturally prompts us to begin with its creation. The judicial powers of an engineer are wholly dependent upon the mutual understanding and agreement of the parties. The agreement is likened to a submission to arbitration, and the engineer is in many respects the arbitrator of the submission. The analogy is not complete. An arbitrator should be a disinterested person, and the engineer is not. He is usually the paid servant of the company. He is to direct its works, promote its interests, attend to its business, and in every way be mindful of its rights and dues. He owes no duties to the contractor except what he can demand by the terms of his contracts; he is under no obligations to protect his interests, or assist him in his affairs.

369. A Faulty Introduction.—To begin this clause with the words: "If any disputes arise, etc.," or by the words: "Any and every dispute as to the construction of the specification, etc., shall be decided by the engineer," seems to be bad practice, for it limits the authority of the engineer to cases in which disputes have actually arisen. It was held under such a provision that directions by an engineer in a letter to the contractor complaining of the manner in which certain work was being done and ordering certain changes, were unauthorized because no dispute as to the specifications had arisen.[1]

To have such a stipulation hold with regard to the engineer's decisions or prevent the contractor from bringing an action at law, it would seem to be necessary to allege and to prove that there were disputes,[2] and that the company or owner shall have offered to submit such disputes to arbitration.[3] When therefore it was proved that "in case of dispute as to the value of extra work, it shall be submitted to arbitration," etc., the contractor may sue for extras without alleging or proving anything as to an arbitration, the subject of arbitration not having been raised by the owner and he having refused to pay, not on the ground that the arbitration clause was not carried out, but for other reasons.[4] A like ruling was made on an insurance policy which postponed any action, in case of disagreement as to the amount of loss, until said amount was submitted to arbitration. A loss having occurred, the insurance company refused to pay anything until further proofs of loss were furnished, but never offered to submit the amount of loss to arbitra-

[1] Fitzgerald *v.* Moran (N. Y.), 36 N. E. Rep. 508; *and see* Hohenzollern Co. *v.* London Corporation, 54 L. T. Rep. 596 [1886]; *and* Boettler *v.* Fendick (Tex.), 11 S. W. Rep. 497 [1889].

[2] Johnson *v.* Varian, 37 Alb. Law Jour. 295 [1888]; Sinclair *v.* Tallmadge, 35 Barb. 602; Smith *v.* Aiken, 102 N. Y. 87.

[3] Milwaukee M. Ins. Co. *v.* Stuart (Ind.), 42 N. E. Rep. 290.

[4] Porter *v.* Swan, 35 N. Y. Supp. 1037.

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tion. The contractor having brought an action to recover his loss four months later, it was held not in violation of the arbitration clause of the policy.[1]

When, however, a job has been finished under the direction and supervision and to the acceptance of an architect or engineer whose decision was to be final, and the contractor has accepted payment in full on the certificates of the architect or engineer, the parties are bound by such certificates even as to matters about which no "disputes or controversy has arisen,"[2] there being no averment of fraud nor any allegation of concealment of defects by the contractor.

Under a contract providing first for the payment of the price of locomotives delivered upon the certificate of the engineer that the locomotives were in perfect working order, and by a subsequent clause "that all disputes are to be settled by arbitration," it was held that a refusal by the engineer to certify or to give his reasons for not certifying was a dispute within the later clause for arbitration, and entitled the contractor to proceed under it; and that whether the arbitrator was right or wrong, not having exceeded his jurisdiction, the court enforced his award.[3] In view of this case it is therefore recommended that the phrase employed in the text, "To prevent all questions, disputes," etc., be used as one which more properly expresses the intention of the company, and as embodying the idea of settling all disputes.

370. Powers are Confined to those Expressly Conferred by the Contract. —In performing the functions conferred by this stipulation the engineer must have strict regard to the terms of the contract. His duties are to be ascertained from it, and his powers are limited to what it confers or may be clearly implied from its terms. He cannot go beyond it nor behind it. He must act strictly within its terms. The application of the clause is limited to the questions enumerated, or that were plainly intended to be referred to the engineer's decision. His powers will not be enlarged by implication beyond the plain words used.[4] An appointment of an engineer to see whether certain work was done according to contract does not confer the power of a referee upon him.[5]

The subject-matter of the controversy must be clearly within the prospective submission to take away the rights to a trial by jury,[6] and the engineer's determination will be conclusive only as to that part of those

[1] Milwaukee M. Ins. Co. *v.* Stuart (Ind.), 42 N. E. Rep. 290; *accord* Moyer *v.* Sun Ins. Office (Pa.), 35 Atl. Rep. 221; *but see* Murphy *v.* N. British & M. Co., 61 Mo. App. 323, which held that an offer by an insurance adjuster, which was rejected by the person insured, was such a disagreement as would bring into operation the provision for arbitration.

[2] Boettler *v.* Tendrick (Tex.), 11 S. W. Rep. 497 [1889].

[3] Hohenzollern Co. *v.* London Corp'n, 54 L. T. Rep. 596 [1886].

[4] Launman *v.* Younge, 13 Pa. St 306; Sawtells *v.* Howard (Mich.), 62 N. W. Rep. 156; Lorey *v.* Lorey, 1 Mo. App. Rep'r, 189.

[5] McKinney *v.* Page, 32 Me. 513.

[6] Launman *v.* Younge, *supra.*

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items which are clearly within the powers conferred upon him.[1] He cannot refuse the contractor a final certificate, because the subcontractors are not paid, when the certificate was due upon the full completion of the building.[2] A power to be the sole judge of the "quality, character, value, and number of materials furnished" has been held not to give him the arbitrary determination of the quantities,[3] and power to decide "as to the interpretation of the drawings and specifications, and as to the quality and quantity of work or materials or any other matter connected with the work, furnishing materials or in settlement of this contract," was held not to include a claim for damages for unreasonable delay in performing the contract.[4] The determination of the question of "substantial performance" cannot be implied from a power to determine any dispute as to the value of alterations, additions, etc.,[5] and *vice versa*.*

The engineer's decision or estimate is an adjudication which is conclusive only upon the condition that it is made according to the contract.[6] Therefore, when work has been undertaken for a lump sum, and the engineer's decision is conclusive, they cannot arbitrarily deduct from the contract price a large sum as for an error in computing the quantities in the preliminary estimates.[7] If the company or city will have its engineer's estimates and decisions final and conclusive, they must expressly provide for it. They will be conclusive and binding, upon the contractor, only where it is made a clear and positive stipulation in the contract and payment is made conditional upon its having been rendered. Such arbitrary powers cannot be implied, and must be so clearly expressed as to leave no doubt of the evident intention of the parties.[8] The fact that the contract provides for monthly estimates, and in the end for a final estimate of the quantity, character, and value of the work by the engineer, is not enough to make his estimates unimpeachable. The parties not having agreed that the amount to be paid shall be determined by the engineer, or that his estimates shall be final and conclusive, they have not the quality of an adjudication, but must depend, for finality, on their own inherent accuracy, which may be tested by any competent proofs which would disclose its errors and mistakes.[9] They are merely *prima facie* correct.[10] A provision for payment upon the architect's certificates as the work progresses was held not to make a certificate a con-

[1] Sanders *v.* Hutchinson, 26 Ill. 633; Mills *v.* Weeks, 21 Ill. 596; McCall *v.* McCall (S. C.), 15 S. E. Rep. 348.

[2] Mahoney *v.* Rector (La.), 17 S. Rep. 484.

[3] Estel *v.* St. Louis & R. Co., 56 Mo. 282 [1874].

[4] Michigan Ave. M. E. Ch. *v.* Hearson, 41 Ill. App. 89.

[5] Oberlies *v.* Bullinger, 27 N. Y. Supp. 19.

[6] Drhew *v.* Altoona City, 121 Pa. St. 401.

[7] Peters *v.* Quebec Harbor Com'rs, 19 Can. Sup. Ct. 685.

[8] The Memphis, C. & L. R. Co. *v.* Wilcox, 48 Pa. St. 161 [1864].

[9] The M., C. & L. R. Co. *v.* Wilcox, 48 Pa St 161 [1864]; *and see* Schwerin *v.* DeGraff, 21 Minn. 354 [1875]; Clarke *v.* Williams, 29 Neb. 691; Pucci *v.* Barney, 20 N. Y. Supp. 375.

[10] McCoy *v* Able (Ind.), 30 N. E. Rep. 528; Central Trust Co. *v.* Louisville, etc., Ry. Co. (C. C.), 70 Fed. Rep. 282.

* *See* Secs. 591–596, *infra*.

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dition precedent to the final payment.[1] The engineer's decision relates exclusively to matters embraced within the submission.[2] His power is subordinate to the contract, he cannot alter its express provisions, nor add to its requirements;[3] his decisions are conclusive only with regard to work described in the contract and specifications.[4] He must measure and classify the materials and work according to its express terms and the rules and scales established by the parties.[5] If he be sole judge of the work, its quality and character, he cannot accept what the contract forbids, nor demand what the contract does not require. If materials or work are described in the specifications, he is confined in his acceptance to things which answer that description, and it is no answer that they are as good, or as suitable, for the purpose; the company will not be bound by his acceptance, unless it conforms to the contract requirements, and this is so even if accepted in good faith, under an erroneous view of the contract.[6]*

371. Employment or Agency of Engineer or Architect Confers no Special Powers upon Him.—In connection with the limitation of the engineer's power as a *quasi*-arbitrator to the actual terms of the submission, is the restriction of the engineer's authority, as an agent or representative of the company, to the powers specially conferred by the contract or by some other instrument in connection with it, as for example a power of attorney.[7] It has been held that when an engineer has executed the original contract and no limitations were placed on his power, the owner or company will be bound to pay for extra work done by his orders or under his supervision and direction.[8]

The engineer is an agent with special powers, simply to do the engineering and to superintend and direct the work. Unless specially conferred, he has no power to contract or or to vary the terms of the parties' agreement. He can create no new obligations not embraced by the contract. The courts exercise extra caution in determining the rigid and close construction of the terms creating his powers to act as the representative of the parties.[9]†

[1] Braun *v.* Winans, 87 Ill. App 248; Oberlies *v.* Bullinger, 75 Hun (N. Y.) 248; *but see* Michaelis *v* Wolf, 136 Ill. 68; *and see* Schuler *v.* Eckert, 90 Mich. 165.

[2] Dubois *v.* D. & H. Canal Co., 12 Wend. 334, 15 Wend. 87.

[3] Sharpe *v.* San Paulo Ry. Co., 8 Chanc. App. 597; Dillon *v.* Syracuse, 9 N. Y. 98.

[4] St. John *v.* Potter (Com. Pl.), 19 N. Y. Supp 230.

[5] Starkey *v.* DeGroff. 22 Minn 431 [1876]; *also see* 13 Ill. 147; Alton R. Co. *v.* Northcott. 15 Ill. 49 [1855]; *and* 25 Amer. & Eng. R. Cas. 265.

[6] Alton R. Co. *v* Northcott, *supra;* G., H. & S. A. Ry. Co. *v.* Henry and Dilley, 65 Tex. 685 [1886]; *see also* Cooper *v.* Langdon, 9 M. & W. 60; Stewart *v.* City of C., 125 Mass. 102; Benton Co. *v.* Patrick, 54 Miss. 240; Starkweather *v.* Goodman, 48 Conn. 101; Alexander *v.* Robertson (Tex.), 24 S. W. Rep. 680.

[7] Kimberly *v.* Dick. L. R. 13 Eq. 1; Campbell *v.* Day, 90 Ill. 363.

[8] Houston, etc., R. Co. *v.* Trentem, 63 Tex. 442; *and see* Commissioners *v.* Motherwell, 123 Ind. 364, where architects were held agents of owner; Dodge *v.* McDonnell, 14 Wis. 553.

[9] Woodruff *v.* R. & P. Ry. Co., 108 N. Y. 39; Gardner *v.* B. & M. Ry. Co., 70 Me. 181; Braney *v.* Town of Millburg (Mass.), 44 N. E. Rep. 1060; *but see* Moore *v.* Whitney Union, 3 Bing N. Cases 814.

* *See* Secs. 381–388, and 392–396, *infra.*

† *Compare* Secs. 553–558, *infra.*

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372. Power to Supervise, Direct the Work, and Order Changes and Determine all Questions does not Authorize Him to do Anything not Expressly Provided For.*—The clauses of arbitration giving the engineer authority to determine any and every question and dispute, and the power conferred in another clause to order any changes, alterations, with provisions for allowances of additions and dimensions of the work, and a third clause that the engineer shall have the full supervision, superintendence, and direction of the work, would seem to a contractor to give to the engineer authority to order, direct, decide, and determine almost anything; but such is not the case. On the contrary, he is limited strictly to the special powers clearly and explicitly conferred by the contract, and his duties must be performed in the manner therein described.[1]

In a contract for the construction of a railroad, the whole of which was to be performed for a lump sum, a change of plan by the engineer greatly increased the excavation, and he promised to make an equivalent saving on other parts of the road in sidings and turnouts, which he never did. The contractor brought suit for the extra work caused by the change, and it was held he could not recover; that an engineer had no power to vary the terms of the contract; that he could give directions to do only those things within the limits of the contract.[2]

373. Contractor should not Perform Additional or Extra Work by Direction of Engineer without Authority from Owner.—The court said that "if a contractor disapproves of a new plan or of changes as not in keeping with his contract, he should insist upon a new and collateral contract with the company and not undertake to contract with the engineer, who has no power to alter the terms of the agreement or to enter into a new one, on behalf of the company." So where an engineer had requested a contractor to re-excavate a cut that had caved in and agreed that the work should be taken outside of the contract at a price named, it was held that the contractor could not recover for the extra work so done. No authority on the part of the engineer being shown, none could be implied.[3] The court said: "If an engineer has unlimited authority to change the contract at will and to make special agreements for work fairly embraced therein, then the company has very little protection from the reduction of their contract to writing." In a case where an engineer had

[1] *See* Gallagher *v.* Sharpless (Pa.), 19 Atl. Rep. 491 [1890].

[2] Sarpe *v.* San Paulo Ry. Co., L. R. 8 Ch. App. 603; Bouton *v.* McDonough Co., 84 Ill. 384; City of Dallas *v.* Brown (Tex.), 31 S. W. Rep. 298; *and see* Cooper *v.* Landon, 9 M. & W. 60; Railroad *v.* Peto, 1 Y. & J. 37; Vanderwerke *v.* V. C. Ry. Co., 27 Vt. 125 [1854]; Coker *v.* Young, 2 Fost. & Fin. 98; Woodruff *v.* R. & P. R. Co. 108 N. Y. 39 [1888]; Pashby *v.* The Mayor, 18 C. B. 2 [1856]; Barker *v.* Troy, etc., R. Co., 27 Vt. 766; White *v.* S. R. & S. G. R. Co., 50 Cal. 419; Shaw *v.* Wolverton W. W. Co., 6 Exch. 137; 1 Redfield on Rys. (5th ed.) 431–3.

[3] Woodruff *v.* R. & P. R. R. Co., 108 N. Y. 39. *and many cases cited by counsel in* Dodge *v.* McDonnell, 14 Wis. 553.

* *See* Sec. 768, *infra*.

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power to extend the time of completion of work so much as he deemed reasonable, in consequence of delay caused by the company not removing certain obtacles which they undertook to remove, and was given the usual powers to decide differences and disputes, his decision to be final and binding, it was held that he had no authority to make an agreement on behalf of the company that no unnecessary delay should occur in removing the obstacles, or that they should be compensated for the delay.[1] It was held, however, that there was an *implied agreement* on the part of the company [board] that there should be no unreasonable delay, and that if the contractor was in fact prevented from completing the contract in time by reason of the unreasonable delay on the part of the company, he was entitled to damages.[2] Such a decision shows how cautious and discriminating the courts are in limiting the authority of an agent [engineer] to the special powers conferred upon him by the contract.*

376. Engineer Cannot Pledge His Employer's Credit to Pay Subcontractors or Workmen.—It follows that an engineer cannot pledge the company to pay a subcontractor (who has discontinued work on account of the contractor's inability to pay him) if he will go on and complete the work, there being nothing to show that the engineer had authority to make such an agreement. And if the subcontractor performs the work at the instance of the engineer he cannot recover for it from the company.[3] No authority to supervise the letting of subcontract or the hiring of men can be implied from the power to superintend the construction of a building to see and that the same is built in strict conformity to the specifications and plans.[4]

This is a frequent occurrence. Engineering work is generally important, driving, and an early completion the utmost necessity. The engineer is frequently the only representative of the company upon the works, and it is doubtful if a contractor would refuse to perform any ordinary task imposed upon him by the engineer, even if he knew he might not receive any compensation for it. Frequently the engineer is clothed with authority to require so many things, some so closely allied to others as to almost imply authority to order new or extra work. Thus when an engineer was authorized to superintend and direct the work and to require the removal of earth from one section to another, it was held he could not direct extra work to be done in another section than that which belonged to the subcontractor and bind the company to pay for it.[5] Other cases have held that an engineer, by virtue of his position, has no authority to bind his company by

[1] Lawson *v.* Wallasey Board, 62 L J. Q. B. D. 302.
[2] Lawson *v.* Wallasey Board, 62 L. J. Q. B. D. 302.
[3] Powrie *v.* Kansas Pac. Ry. Co., 1 Colo. 529 [1872]; Blanding *v.* Davenport I. & D. R. (Iowa), 55 N. W. Rep. 81; Mills *v.* Weeks. 21 Ill. 561; Bouton *v.* Supervisors, 48 Ill. 384.
[4] Lewis *v.* Slack, 27 Mo. App. 131.
[5] Thayer *v.* V. C. Ry. Co., 24 Vt. 440 [1852].

* Sec. Nos 374, 375 ar omitted.

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his contracts,[1] and that there is nothing in his general duties to authorize him to employ others.[2]

377. Ratification of Engineer's Orders may be Implied from Acquiescence or Adoption of Prior Orders—Instances.—Frequently implied authority of the engineer to direct changes and order new work may be shown. It is a principle of the law of agency "that acquiescence of an employer [principal] for a long period of time in the unauthorized acts of an agent [engineer] creates a presumption of ratification" of the acts.[3] The fact that an engineer has done other similar acts which the company have adopted or ratified may furnish a ground on which may be founded an inference of authority. Thus the fact that the engineer had on previous occasions made similar promises or pledges to employees, and that the subcontractors had been paid by the paymaster upon the direction and orders of the engineer, would be evidence to show that the engineer did have authority.[4]

There are such cases in the books as where a company's engineer directed stone to be bought and delivered for a bridge and promised that the company should pay for them, it was held that the company must pay for them, it being shown, under objection and exception, that the engineer had on a previous occasion made a similar purchase of cement used on the same bridge, and which the company had paid for without protest or objection; and held further, that the objections and exceptions to the admission of such evidence could not be sustained.[5] The fact that an owner has paid one bill of extras ordered by his architect without objection does not estop him from denying the architect's authority to subsequently order other extra work;[6] but where a company has stood by and seen works ordered by their engineer performed, it will be held to have assented to their execution. The courts say: "It would be fraud on the part of a company to have desired by or through their engineer such alterations, additions, and omissions to have been made; to have stood by and seen the expenditures going on, and to have taken the benefit of such expenditures, and then to refuse payment on the ground that the expenditure was incurred without proper orders having been given for the purpose."[7]

378. The Engineer Cannot Promise Extra Compensation for Work or Materials Comprised in the Contract.—Work ordered or directed by the engineer must not be such work as can be included in the contract. Therefore, when in a contract for the construction of a railroad, the whole of which was to be performed for a certain sum or price, the engineer changed

[1] Gardner *v.* B. & M. R. Co., 70 Me. 181 [1879]; s. c. 7 Amer. Corp. Cas. 326.

[2] Tuay r *v.* V. C. Ry. Co., 24 Vt. 440 [1852]; McIntosh *v.* Hastings, 156 Mass. 344.

[3] Shinn *v.* Hicks (Tex.), 45 S. W. R. 486 [1887]

[4] Powrie *v.* Kansas Pac R. Co., 1 Colo. 529 [1872].

[5] Beattie *v* D., L. & W. Ry. Co., 90 N.Y. 643 [1882]; *see also* Olcott *v.* Tioga R. Co., 27 N. Y 546–560.

[6] Starkweather *v.* Goodman, 48 Conn. 101 [1880].

[7] Hill *v.* So Staffordshire Ry. Co. 11 Jurist (N. S.) 193 [1865].

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the plan and greatly increased the excavations, having promised and agreed to effect or make an equal saving in other parts of the road, which he did not do, it was held that the contractor could not recover for the extra excavations removed, even if the company did know and did not dissent to what the contractor was doing at the instance, request, and promises of the engineer. The contractor, it was held, could not claim more than the contract price because the engineer found he had made a mistake and promised he would give more, and the company verbally promised or in some vague way ratified his promises. A contract under seal, the court said, could not be altered in that way; and such a promise would be a perfect *nudum pactum*, and was a totally distinct thing from a claim to payment for actual extra work not included in the contract.[1]

379. Engineer Cannot Change Contract and Specifications nor Make New Terms.—As Chief Justice Redfield of Vermont once said: "No one could for a moment be led into any misapprehension as to the extent of an engineer's authority to charge the company by varying existing contracts or making new ones. The engineers are there for no such purpose; they have no such agency except under specific limitations and restrictions,[2] and the fact that the company had paid similar claims to other persons will not bind them to pay this, unless that fact had been known to the contractor at the time he did the work and operated to induce him to confide in the authority of the engineer."[3] Although the company accepts work done under a contract made by the engineer, or under the old one enlarged by him, the company is not liable for such work. The engineer must have special authority to so contract, for it is not within the scope of his agency.[4]

It was held, therefore, that an engineer of a railroad had no authority to employ a freight or station agent in the early operation of the road; and the fact that the engineer could not attend to the business and that the work performed was necessary to be done, was held not to imply authority in the engineer nor to give the agent so employed a right to recover.[5]

380. Owner or Company is not Bound by Admissions or Statements of Engineer.—If the engineer cannot create obligations binding upon the company, it is equally as well settled that he cannot bind his company by any statements and admissions which he may make with reference to it, and therefore evidence of such statements and admissions are incompetent.[6]

[1] Sharpe *v.* San Paulo Ry. Co., L. R. 8 Ch. App. 607.

[2] Adlard *v.* Muldoon, 45 Ill. 193; Dodge *v.* McDonnell, 14 Wis. 553; Benton Co. *v.* Patrick, 54 Miss 240; Jones *v.* Reg., 7 Can. Sup. Ct. 570; Reg *v.* Starrs, 17 Can. Sup. Ct. 118; Rex *v.* Peto, 1 Y. & J. 37; Cooper *v.* Langdon, 9 M. & W. 60; Baltimore Cemetery Co. *v.* Coburn, 7 Md. 203; Bouton *v.* McDonough Co., 84 Ill. 384.

[3] *See* Woodruff *v.* Rochester & P. R. Co., 108 N. Y. 39 [1888], *and many cases cited in* Vanderwerker *v.* V. C. Ry. Co., 27 Vt. 125 [1854].

[4] Boynton *v.* Lynn Gas Lt. Co., 124 Mass. 197 [1878].

[5] Wallis *v.* Toledo A. A. & N. W. Ry. Co. (Mich.) 40 N. W. R 205 [1888].

[6] Wolf *v.* The Des Moines & Ft. Dodge R. Co., 64 Iowa 380.

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An architect is not, it seems, usually authorized to receive notice of an assignment of the contract on behalf of his employer.[1]*

It is sometimes stated that authority to an architect to superintend the erection of a building makes him an agent for all purposes necessary to secure the erection and safety of the building.[2]

There is little authority for the statement if one is to infer from it that the architect or engineer has power to make material changes in the contract, specifications, plans, or can order additional or different materials on the credit of the owner or company. This statement is founded upon four or five cases decided in the same courts. One wherein a contractor recovered for furnishing 8-inch iron pillars ordered by the architect in the place of 6-inch iron pillars called for in the contract. The structure had been accepted by the county, and the work was a public work [a court-house].[3] The courts of Indiana have adopted this rule in several cases of public works, where work is undertaken by a board of commissioners who are more than likely to be ignorant of the needs of a structure.[4] †

381. Engineer's Powers to Determine Quantities.

"To prevent all disputes and litigation it is further expressly agreed by and between the parties to this contract and their legal representatives, that the said engineer [said architect] shall determine the amounts, quantities, and weights of the materials furnished and of the work done."

The estimate of the amount and quantity of work and materials employed is, without doubt, the engineer's most legitimate business, and should always be made one of his duties. His education and experience have been to that end, to enable him to skillfully and expeditiously measure and correctly estimate the quantities of work and materials.

The engineer should consult the contract to ascertain how he shall make the measurements and computation. Although engineers are generally left to their own discretion, to employ whatever rules or methods they deem best, yet frequently the contract provides for the use of certain rules or tables or methods, in which case the contract must be followed strictly.[5]

Clauses which provide that in calculating the quantity of masonry, walling, and excavation, the most rigid geometrical rules shall be applied, any custom to the contrary notwithstanding, are sometimes met,[6] ‡ and although perhaps prudent in a strange place, or in a government contract

[1] Renton *v.* Monnier, 77 Cal. 449.

[2] 29 Amer. & Eng. Ency. Law 882; Clarke's Owner, Architect, and Builder Before the Law 82.

[3] Gibson Co. *v.* Motherwell Iron Co, 123 Ind. 364.

[4] Clinton Co. *v.* Hill, 122 Ind. 215; Harris Co. *v.* Byrne, 67 Ind. 21; *and see* Benton Co. *v.* Patrick, 54 Miss. 240; Bass *v.* Board, 115 Ind. 234, but there are many cases to the contrary.

[5] Williams *v.* Chicago, etc., Ry. Co. (Mo.), 20 S. W. Rep. 631.

[6] Martinsburg P. R. Co. *v.* March, 114 U. S. 549 [1884].

* *But see* Sec. 849a, *infra.*

† *See supra and* Secs. 553–568, *infra.*

‡ *See* Secs. 603–4, *infra.*

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which may be entered into and executed in different places, yet their use may lead to difficulties. They are good in that they protect the government or company from exorbitant prices authorized by local trade customs and usage, and enable the cost of a projected work to be more definitely ascertained; but since the rules and methods of computing earthworks and masonry are but approximate to the exact amount, it opens a field for dispute as to what is or is not the exact geometrical value of the work and materials, which is no easy problem to solve, especially after the work has been done and settlings, subsidences, cavings, and washings have taken place. Probably no two engineers or surveyors would make exactly the same estimate of a piece of work or of a quantity of materials, although they should agree approximately; yet the difference would be sufficient ground for a quarrelsome contractor to appeal to a jury and make trouble, which illustrates the wisdom of making the engineer's determination of such questions final and conclusive.*

If no particular method of measurement and calculation is required by the terms of the contract, the most appropriate rule is that which is countenanced and usually employed in the trade under which the work may be classed. If the engineer is acting in the capacity of a referee or *quasi*-arbitrator he may employ any method that his good judgment and conscience may dictate,[1] which will be that which the parties may agree upon, or that they had in mind when the contract was entered into, if that can be ascertained. That method of admeasurement which shall give to each that which he is justly entitled to under the terms of the contract should be the one adopted, if the engineer has any choice, and that will be the rule which is most correct.

When the quantities of several different materials of excavation, for which different prices are to be paid, were to be determined "by the measurement and calculation" of the engineer, it was held not to require him to measure each kind of material excavated, but that the word "calculations" should be understood in the sense of the term "estimate," and that when the whole cut or embankment had been measured he could determine, by reference to the known contents and data collected, the quantities of the different materials excavated.[2]

382. Engineer must Act in Good Faith and Have Strict Regard for the Methods Prescribed in Contract.—The engineer cannot exercise his selection of a rule arbitrarily. He cannot perform his duties by making a mere guess of the quantities handled; they must be exercised in a reasonably correct and careful manner.[3] A method of estimating earthworks which does not

[1] Palmer *v.* Clark, 106 Mass. 373 [1871]; *but see* Hartwell *v.* Mut. Life Ins. Co., 50 Hun 497 [1888]; *and s e* Fellows *v.* Snyder (Kan.), 32 Pac. Rep. 639, which held it a question for jury.

[2] Scoville *v.* Miller, 40 Ill. App. 237.

[3] Henderson *v.* City of Louisville, 4 S. W. Rep. 187; Anderson *v.* Imhoff (Neb.), 51 N. W. Rep. 854; *but see* Palmer *v.* Clark, 106 Mass. 373 [1871].

* *See* Custom and Usage, Secs. 603 to 628, *infra*.

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take into consideration or allow for the loss of materials from subsidence and settling, or for the waste due to erosion, has been successfully attacked and declared erroneous, and an injustice that the courts would not permit.[1] A contractor who is filling in a trestle with dirt should not be allowed the measurement of the space occupied by a culvert under the trestle.[2]

Under a contract to haul and embank excavations, which provided that "the measurements of the quantities will usually be made in the cuts or pits from which the material has been taken," and further, "that the quantities and amount should be determined by the chief engineer, whose determination shall be conclusive upon both parties," it was held that as the specifications showed that the measurements were not in all cases to be taken in the cuts, that the exception would have to be determined by outside testimony, which resulted in the court ordering the measurements being made of the embankments, instead of in the cuts, as the engineer had determined.[3] This decision was arrived at from the existence of a usage to measure rock excavation, over which the controversy had arisen, in the embankment, and the decision was followed some years later in a very similar case.[4] These decisions are decided upon narrow ground when based upon so small a technicality as the use of the word *usually* as here employed would warrant, and it is submitted that the testimony must indeed have been very strong that would sustain such a departure from the decision of earlier cases. The word *usually* may have been introduced to accommodate the engineer in his estimates and to avoid the delay of the work when measurements had not been made where the contractors wished to work.[5] These Texas cases also support in a degree the statement that when the contract provides that the engineer shall determine the quantities of work it does not give him the conclusive determination of the manner in which it shall be done according to the contract. It does not give to the engineer the interpretation of the contract.[6] The contractor may show that the engineer misconstrued the contract in his classifications of the work, and had not measured the work according to the contract, and he may show these things by evidence without alleging fraud.[7] It is wrong, therefore, to admit evidence varying the standard of measurement fixed by the contract so as to show a greater amount of work done by the contractor than would be shown by measurements in accordance with the terms of the

[1] Henderson *v.* City of Louisville (Ky.), 4 S. W. Rep. 187 [1887]; Clark *v.* United States, 6 Wallace 543 [1867]; *and see* M'Intosh *v.* Midland Cos. R. Co., 14 M. & W. 548.

[2] East Tenn. R. Co. *v.* Matthews, 85 Ga. 457.

[3] G. H & S A. Ry. Co. *v.* Henry & Dilley, 65 Texas 685 [1886]; *see also* Mulholland *v.* New York, 20 N. E. Rep. 856 [1889].

[4] G. H. & S. A. Ry. Co. *v.* Johnson, 74 Texas 256 [1889]

[5] Lewis *v.* Chicago, etc., R. Co. 49 Fed. Rep. 708 and 714.

[6] Williams *v.* Chicago, etc., Ry. Co. (Mo.), 20 S. W. Rep. 631.

[7] Williams *v.* The Chicago, etc., Ry. Co., 112 Mo. 463 [1892]; *accord* Lewis *v.* Chicago, etc., R. Co., 49 Fed. Rep. 708; Summers *v.* Chicago, etc., R. Co., 49 Fed. Rep. 714; *and see* Sherman *v.* New York, 1 N. Y. 316.

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contract, though it provides that the estimate of the engineer is to be conclusive as a basis of payment, and such overmeasurement is made by him, since such estimate is conclusive only on condition that it be made in accordance with the terms of the contract.[1] *

383. Engineer's Power to Determine Quality, Character, and Classification.

> "That he shall determine the kinds, nature, quality, character, and classification of the work done and the materials furnished, employed, excavated, quarried or mined, as the case may be, or of the tools, apparatus, or machinery manufactured."

This clause gives to the engineer the determination of the class to which the work done or the materials supplied most nearly conforms or agrees.[2] It may include the inspection, acceptance, or rejection of work, tools, and machinery, and the culling or condemning of inferior materials. Different prices are paid for different classes, and it is a difficult matter to draw the line where the one class shall end and the next class begin. Such questions would afford no end of strife and litigation if they were not determined in some definite and arbitrary manner.

The engineer's decision is generally made the ultimatum on such questions, and the justice of his classification will depend much upon his knowledge of the trades and the materials employed by them, or upon the care with which he inquires into them when the questions are presented. An improper or hasty classification of materials or work might cause great injury to either party to the contract.

384. Classifications must Be According to Contract.—Frequently the rules for classifying are described in the specifications, in which case the description must be carefully studied and rigidly applied. If the time when the classification is to be made is not expressed such classification may be made before the work is completed.[3] The materials and work must be classified strictly in accordance with the express terms of the contract and by the rules, scales, and tests agreed upon. No materials or work can be accepted which the contract forbids, nor any be dispensed with which it requires. If the contract specifies that mortar shall consist of equal parts of Portland cement and sand, it has been held that a different mixture could not be authorized.[4] An engineer has no power to change the terms of contract, or to refuse to classify as loose and solid rock that which the contract expressly declares should be loose and solid rock.[5]

[1] Fisher *v.* Borough, 1 Pa. Super. Ct. 386; *accord* Gonder *v.* Berlin Br. R. Co., 171 Pa. St. 492 [1895].

[2] Brown *v.* Decker (Pa.), 21 Atl. Rep. 903 [1891].

[3] Ricker *v.* Collins (Tex.), 17 S. W. Rep. 382 [1891].

[4] Fitzgerald *v.* Moran (N. Y.), 36 N. E. Rep. 508.

[5] Williams *v.* The Chicago Rv. Co., 112 Mo. 466 [1892]; *and see also* Mansfield *v.* Railroad, 17 Ohio 396; 2 Sutherland on Damages 520; 2 Wood on Ry. Law 995; Starkey *v.* DeGraff, 22 Minn. 431; Rail-

* *See* Secs. 370, *supra*, and 381–388, *infra*.

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The contractor cannot be required to furnish materials for testing and experimenting when contract does not provide for it.[1]

385. Engineer cannot Make a New and Intermediate Classification.—When a contract named prices for several classes of excavation and the engineer was to designate the class to which work done belonged, it was held that he could make no new or intermediate class or concomitant price; that when the prices were fixed by the contract at seventy-five (75) cents per cubic yard for rock and thirty-five (35) cents for earth excavation, that he could not allow a different price, as fifty (50) cents for loose rock. Such an act was held in excess of the engineer's powers; that he must make the classifications as described in the contract and not according to what he thought would be reasonable. The making of a new price was held, in effect, the making of a new contract.[2]

A recent case seems opposed to this. Under a contract which provided that if excavations could not be plowed by a good six-mule or six-horse team, it was to be classed as loose rock. The engineer made a classification which allowed twenty-five per cent. loose rock when six horses could plow half of the time, and fifty per cent. when eight horses were required, and the court held that there was no material error in the engineer's classification, and that the estimates should not be set aside.[3]

When, as in the preceding case, materials are to be classified in accordance with a certain test, it is not well to name the materials of the class unless it be the intention to include them in that class, irrespective of the test. Thus, in a case where excavations were to be measured and paid for either as earth, loose rock, or solid rock; loose rock to comprise "shale or soapstone, lying in its original or stratified position, coarse bowlders in gravel, cemented gravel, hardpan, or any other material requiring the use of pick and bar, or which cannot be plowed with a strong ten-inch grading-plow, well handled, behind a good six-mule or horse team;" it was held that the materials mentioned were to be classified as loose rock, irrespective of the plowing test, which was only applicable to the "other material," not specifically named.[4]

386. No Extra Compensation can be Allowed to Relieve Against Hardship.—Extra pay cannot be allowed by the engineer for picking where the excavations are difficult when the contract provides for the classification of the materials excavated under it at prices named.[5] When certain prices were agreed upon for several kinds of work, and an extra allowance

road *v.* Wilcox, 48 Pa. St. 161; DuBois *v.* Railroad, 12 Wend. 334; Bridge Co. *v.* McGrath, 134 U. S. 260.

[1] Steffen *v.* St. Louis (Mo.), 36 S. W. Rep. 31.

[2] Drhew *v.* City of Altoona, 121 Pa. St. 421, *see also* South *v.* South, 70 Pa. St. 195; *and* Nesbitt *v.* Louisville, etc., R. Co., 2 Spears (S. C.) 697; *and* Chicago, etc., R. Co. *v.* Vosburgh, 45 Ill. 311.

[3] Ross *v.* McArthur, 85 Iowa 203. In this case it is but fair to state that this classification was suggested by the company. *And see* Du Bois *v.* Del. & H. C. Co., 12 Wend. 334.

[4] Lewis *v.* Chicago S. F. & C. Ry. Co. (Cir. Ct.), 49 Fed. Rep. 708.

[5] Drhew *v.* City of Altoona, *supra.*

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was made for excavations, and the contract provided that the engineer should be "sole judge of the quality and quantity of work done and of materials furnished, and of any questions arising under the contract, and from his decision there should be no appeal," it was held he was not authorized to refuse an extra allowance for frozen excavations, for the reason that it was the contractor's own fault, and that the work might have been done before cold weather set in. Such a holding by the engineer was declared a going behind the agreement of the parties, which the engineer could not do. That the engineer had no authority to vary the terms of the agreement and to fix another or a different measure of compensation.[1]

387. English and American Decisions Compared.—The English courts have not been so arbitrary in limiting the powers of the engineer, and some very different decisions have been the result. In a contract a certain price was fixed for "excavation," and the price of "any other description of work" was left to the engineer, and the question arose whether the removal of a large quantity of very soft and swampy soil was excavation within the terms of the contract, or if not, whether it could be considered as within the phrase "any other description of work." It was held to be a proper question for the engineer, who was by the contract to determine any dispute or differences arising between the contractor and company as to the meaning of the presents, or anything contained in the contract, or anything to be done thereunder,* and that the arbitrator [engineer] might allow a different [greater] price for such work [excavations].[2] The contractors successfully contended that under the clause in the schedule of prices for "any other description of work" the engineer (as the soil had turned out so different from what had been anticipated) could reform the schedule of prices for the excavations.

Although the powers given to the engineer in the English case were more extended than in the American, it is interesting to state that the arguments of the company's counsel [the losing side] of the English case were almost identical with the dictum of the judge in the Pennsylvania case,[3] which is directly to the contrary. If the cases are to be reconciled, it must be by the presence of the clause leaving the price of "any other description of work" to the engineer, and by the extended powers accorded the engineer by the English courts.

To the same effect as the English decision is an early American case [1853], in which the engineer fixed the price of a species of excavation not mentioned in the specifications or contract. This contract gave no extraordinary powers to the engineer, but stipulated "that the engineer should be

[1] Starkey *v.* DeGraff, 22 Minn. 431 [1876]; *and see* Phelan *v.* Albany, etc., R. Co., 1 Lans. (N. Y.) 258.

[2] Kirk & Randall *v* The E. & W. Dock Co., 55 L. T. R. (N. S.) 245 [1887]; s. c. 12 App. Cas. 738 [1887]; *see also* Feeney *v.* Town of Millbury (Mass.) 44 N. E. Rep. 1060 [1886].

[3] Drhew *v.* City of Altoona, 121 Pa. St. 421.

* An exceptionally strong clause.

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inspector of the work; that he should determine when the contract was complied with, according to its just and fair interpretation, and the amount of the same, and that his decision should be obligatory and conclusive, without further recourse or appeal.[1]

If the engineer acts, and his decisions are within the powers conferred by the contract, there is no appeal from his decision unless it can be proved that he has not exercised his fair and honest judgment. Thus when an engineer classified "pier masonry" as "bridge masonry," for which a smaller price was paid, his decision and classification was held conclusive unless impeached for fraud, or such gross mistake as necessarily implied bad faith, and the fact that the price was inadequate and unjust was held to make no difference.[2] *

Other familiar examples are such as require the engineer to discriminate between good and poor work, to determine what materials are sufficient to meet the requirements of the contract, as the class to which masonry properly belongs, or where to classify excavations either as rock, clay, loam, hardpan, or gravel, to select and grade lumber, and cull that which is inferior or unsuitable, and, in short, to determine the relative merit and value of all the parts that make up the structure.

388. Powers to Determine the Sufficiency and Skill with which Work is Performed.

> "That he shall be sole judge of the quality of the work, and of the skillfulness and sufficiency with which it is performed, and the workmanlike manner in which it is completed."

This power, like others conferred, is to be read along with the rest of the contract, and must be exercised in accordance with the specifications and terms agreed to by the parties in their contract. Much may be left to the engineer's discretion and judgment, which is for his own honest determination; but so far as the contract and specification show an evident intention to limit that discretion, and to fix or name the quality of the work, and the perfection of its execution, so far must the engineer follow their descriptions and instructions.[3]

He must first determine its fitness and conformity with the specifications and requirements of the contract, and as to the rest consult his own discretion and good judgment. If work, he must decide whether it has been executed in the manner and to the degree of perfection promised or demanded in the contract. He cannot dispense with the performance of a substantial part of the work. He may decide matters left to his judgment, such as whether work has been executed in a workmanlike manner, or whether materials are of the kind required, but, as has been said, it can-

[1] Condon *v.* South Side R. Co., 14 Gratt. (Va.) 302 [1858].
[2] Martinsburg & P. R. Co. *v.* March, 114 U. S. 549 [1884].
[3] Lewis *v.* Yagel, 77 Hun (N. Y.) 337; Burke *v.* Kansas City, 34 Mo. App 570.

* *See* Sec. 378, *supra.*

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not be contended that he could accept a brick house for one to be built of marble; nor would the fact that the brick house was substantially, and for service, as good, and even better, than the one of marble, render his decision any more binding.[1]

However conclusive the engineer's decision may be declared, or however strictly the contractor is to follow his instructions in all things, they will not justify a departure from the express terms of the contract without there is a collateral agreement between the parties themselves to the same effect.[2] Masonry laid in mud cannot be accepted for masonry to be laid in cement,[3] nor bluestone for brownstone, nor a twelve-inch wall for a sixteen-inch wall, nor four-inch curbs for six-inch curbs,[4] nor railroad ties with ten-inch faces for ties with twelve-inch faces. Acceptances of such work which are not in conformity with that specified in the contract are beyond the power of the engineer and are pretty good evidence of fraud and collusion with the contractor.

When it was stipulated

> "that materials shall be of the best quality and the work performed in the best manner subject to the acceptance or rejection of an architect, all to be done in strict accordance with the plans and specifications and to be paid for when done completely and accepted,"

it was held that an acceptance by the architect of a different class of work or of inferior materials did not bind the owner and did not relieve the contractor from the agreement to perform the work according to the plans and specifications.[5] It was so held when a contractor who had undertaken by contract to build a sewer according to plans, profiles, and specifications and according to the directions of the city engineer, and who instead had followed the orders of an assistant engineer detailed to supervise the work, and had laid part of the sewer-pipe at a less depth than was shown on the plans or required by the specifications. A new assistant engineer having been detailed in charge of the work, he ordered the pipe taken up and relaid to grade shown on plans. The contractor did as ordered and made claim for the extra work, and it was held he could not recover; that the contractor had done only what the contract had required him to do, and the engineers had no authority to vary the plans and specifications of the contract.[6] * The acceptance by an architect of heating apparatus installed does not require

[1] Bond *v.* The Mayor, etc., 19 N. J. Eq. 376 [1869] This is a strong case, but it illustrates the principle the better for that reason. *See* Smith *v.* Brady, 17 N. Y. 173, which held that the architect's certificate could not dispense with the substantial fulfillment of the provisions of the contract.

[2] Burke *v.* Kansas City, 34 Mo App. 570.

[3] State *v.* McGuilley, 4 Ind. 7; Fitzgerald *v.* Mornn, 141 N. Y. 419.

[4] Bond *v.* Mayor, 19 N J. Eq. 376 [1869].

[5] Glaucius *v.* Black, 50 N. Y 145 [1872]; Johnson *v.* DePeyster, 50 N. Y. 666, *and* Adlard *v.* Muldoon, 45 Ill. 193; *see also* Bird *v.* Smith, 64 E. C. L. R. 785.

[6] Burke *v.* Kansas City, 34 Mo. App. 570; Bonesteel *v.* New York, 22 N. Y. 162; Bond *v.* Newark, 19 N. J. Eq. 376; Hartupee *v.* Pittsburgh, 97 Penna. St. 107; *and see* Adams *v.* New York, 4 Duer 295; Goldsmith *v.* Hand, 26 Ohio St. 101; Starkey *v.* DeGraff, 22 Minn. 481.

* *See* Secs. 370, 381–388, *supra*, and 465–468, *infra*.

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owner to pay for it when the specifications guaranteed that it should keep the house at a certain temperature, which guaranty had not been performed.[1]

These cases might have been decided otherwise if architect's decision had been made final and conclusive and he had been given the determination of disputes and questions arising out of the contract or work, and of the construction and meaning of the drawings, specifications, and contract.[2]

389. Powers of Engineer or Architect may be Extended by Other Clauses, so as to Permit Some Deviations from Plans and Specifications.—Thus in a contract providing that the contractor should take down all defective walls and rebuild them according to the architect's plans, specifications, etc., and by which the architect was made the superintendent of the work and materials, with full power to inspect, accept, or reject any work done, or materials to be used, whether worked or otherwise, when not in accordance with the plans, specifications, and detail drawings, and which made the architect's decision in that matter and all other matters relating to the building binding and conclusive upon both parties, the court held that the contractor was justified in following the architect's instruction and that he was not bound to take down walls not directed to be taken down by the architect, even though required by the plans and specifications.[3]

The decision of this case is seemingly contrary to those cited in the preceding section, and especially with the New York case, Glaucius *v.* Black. The New York case was not regarded as an authority to govern the Illinois case because the architect's powers were more limited. In the New York case, the work was subject to the acceptance or rejection of the architect, and all to be in strict accordance with the plans and specifications, the architect having power to reject any particular work or materials, and in such case the builders were to remedy the defects. This was the extent of the architect's authority, and it was held that his acceptance of the work did not relieve the contractors from their agreement to perform the work according to the plans and specifications. The court based its decision in the Illinois case upon the fact of the architect being made superintendent, not only with the power to inspect, accept, and reject work or materials not in accordance with plans and specifications, but, in addition, the larger authority to determine "all other matters relating to the building, and all other work referred to in the agreement, which decision should be binding and conclusive in regard to the same upon both parties alike."

These rules are founded upon the laws of arbitration which confine the decision of the referee to the subjects mentioned and the powers granted in the contract of submission. The authority cannot be extended, nor

[1] Gay *v.* Huskins, 31 N. Y. Supp. 1022; *see* Fitzgerald *v.* Moran, 141 N. Y. 419.

[2] *Semble* Wyckoff *v.* Meyers, 44 N. Y. 143.

[3] Bonnett *v.* Glattfeldt, 120 Ill. 166 [1887]; Smith *v.* Farmers' Trust Co. (Iowa), 66 N. W. Rep. 84; Glaucius *v.* Black, 50 N. Y. 145, *contra.*

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any items included beyond those comprised in the original submission. All other questions must be rejected.[1] If questions are plainly within the reference and clearly were intended to be left to the engineer's discretion and judgment, the parties must abide by his decision if his judgment is honestly exercised.[2]

390. Prior Promise to Classify Work or Materials in a Certain Way Not Always Binding.—When it was provided that, "at the end of the work, the engineer shall certify the quantity and character of the work done and that the contractor shall be paid according to such certificates," to obviate any disputes as to the measurements of certain excavations the engineer told the contractor he would classify certain work to be done as "75 per cent. solid rock," with which arrangement the parties expressed themselves as satisfied. There was no intention to make or consent to any arrangement outside of or inconsistent with the written contract. After the work was finished the engineer, in his final certificate, failed to adopt the classification promised, and it was held that the final determination of the engineer was binding on the parties, and the contractor must accept what the final certificate allowed him independent of the engineer's promise. Such an agreement by the engineer was held not to modify the terms of the contract between the parties; but had the arrangement been between the company and the contractor, and in the form of a collateral or subsequent agreement, the decision must have been different and the contractor have recovered for "75 per cent. of solid rock."[3]*

An act of an engineer in increasing the monthly estimates of a contractor beyond what was justly due to him to enable him to meet his payments, and with the understanding that in the final estimate a reduction of the proper amount should be made, does not commit the owner to the consequences of the engineer's misconduct while acting as arbiter for both parties.[4] An antecedent verbal agreement between contractor, owner, and engineer as to quality of materials that would be accepted cannot be shown.[5]

These cases are authority for the oft-repeated statement that the authority of an engineer is limited to the powers and duties conferred by the contract. He cannot order extra work on behalf of his company nor promise beforehand any particular classification. When put in charge of construction as inspector he has no authority to permit deviations or changes in

[1] Doane College *v.* Lanham (Neb.), 42 N. W. Rep. 405 [1889].

[2] Henderson Bridge Co. *v.* O'Connor, 11 S. W. Rep. 18 [1889]; Gerald *v.* Tunstall (Ala.), 20 So. Rep. 43; *and see* Alton R. Co. *v.* Northcott, 15 Ill. 49.

[3] Dorwin *v.* Westbrook, 11 Hun (N. Y.) 405; Sharpe *v* San Paulo Rv. Co., 8 Ch. App. 607; *but see* O Donnell *v.* Forrest, 44 La. Ann. 845; *and see* Jones *v.* Gilchrist (Tex.), 27 S. W. Rep. 890, which held that an approval of materials in advance could not be revoked; *and see* Bradner *v.* Roffsell (N. J.), 29 Atl. Rep. 317; *and see also* Ricker *v.* Collins (Tex.), 17 S. W. Rep. 378 [1891]; Gulf, etc., R. Co. *v.* Ricker (Tex.); Price *v.* Chicago, etc., R. Co., 38 Fed. Rep. 304.

[4] Gonder *v.* Berlin Br. R. Co., 171 Pa. St. 492 [1895].

[5] Jones *v.* Risley (Tex.), 32 S. W. Rep. 1027.

*As to classification, *see* Secs. 378, 383, *supra*, and Secs. 463–468, *infra*.

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plans approved and adopted by the department by which he is employed.[1] He cannot arrange to accept defective or deficient work, and that the deficiencies shall be made good to his company.[2]

391. Engineer to Determine the Value of Work and Materials.

"and that he shall finally determine in each and every case the value of the several kinds of work and materials which are to be paid for under this contract, and the compensation which the said contractor shall receive therefor at the rates herein provided for."

In such a clause providing that monthly estimates shall be made of the character, quantity and *value* of the work, the import of the word "value" as used is significant and to be distinguished from the word "price." The prices are usually fixed by the contract, and the "value" must be understood to be the result obtained by applying the prices scheduled in the contract to the quantities estimated and according to the classification made by the engineer.[3] An instance is afforded in a case where the engineer was made the sole and final judge of the quality, character, value, and number of materials furnished, and it was held that his decision as to quality was final and conclusive, but not as to quantity.[4]

392. Engineer to Determine Questions in Regard to Additions, Omissions, and Extra Work.

"and that he shall determine the question as to what are additions and omissions, and the quantities, quality, character, classification, sufficiency, and value of any and every materials and work arising from, due to, or required by any alteration, deviation, addition, or omission in the plans, specifications, or contract, or in any matters growing out of the construction or completion of the works made or caused to be made by the engineer or owner [company] or by the necessities of the work, the same as if it had been included in the original specifications, plans, and contract, and all questions as to whether they are properly and skillfully executed in conformity with the plans and specifications, and his decision, estimate, and certificate in respect thereto shall be a condition precedent to any right to recover therefor by the contractor."

Without this clause the engineer's decisions may be confined to matters strictly within the contract, plans, and specifications, and will not include extra work.[5]* Such a stipulation is binding upon the parties in the same manner as those which precede in respect to work regularly within the contract;[6] but a stipulation giving the engineer power to determine the true value of extra work and work omitted does not make him a judge of what

[1] New York *v.* Hamm (Com. Pl.), 24 N. Y. Supp 730.

[2] Barcus *v.* Hannibal, etc., Pk. Rd. Co., 26 Mo. 102; Adlard *v.* Muldoon, 45 Ill. 193; *and see* Bonesteel *v.* New York, 22 N. Y. 162; Burke *v.* Kansas City, 34 Mo. App. 570; Bond *v.* Newark, 19 N. J. Eq. 376

[3] Denver, etc., Ry. Co. *v.* Riley, 7 Colo. 494 [1884].

[4] Estel *v.* St. Louis, etc., R Co. 56 Mo. 282 [1874].

[5] Pashby *v* Mayor, 18 C. B 2; Starkey *v.* De Graff, 22 Minn. 431; Busse *v.* Agnew, 10 Ill. App 527.

[6] Fowler *v.* Deakman, 84 Ill. 130; Mills

* *See* Secs. 591–599, *infra.*

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is extra work or whether the extra work done at an agreed price is properly done.*

393. Provision that Engineer Shall Determine Every Question Arising Out Of or Pertaining to the Work or Contract.

"and he shall decide all and every question, dispute, difference, or doubt relative to the execution, performance, fulfillment, and completion of this contract;" or "and he shall determine all and every question, dispute, difference, or doubt in relation to and arising from said work and the construction and completion thereof, and he shall in all cases decide every question which may arise relative to the execution of this contract [on the part of the said contractor]."

394. Powers Defined Under Different Contract Stipulations in Use.— Of the two clauses given the latter is to be preferred, insomuch that the former confines the engineer's decisions to matters strictly within the contract, and the latter includes all questions arising from the work itself. This is important if it is desired to keep out of courts and to give every question pertaining to the work to the determination of the engineer. The former might fail to include "extra work," which could be comprehended in the latter. Alterations and changes and sometimes additional works are required as accessories to the projected work which do not belong to the contract, but are a part of the structure.[1] They are usually undertaken under collateral or subsequent contracts or mere verbal agreements or orders. If the engineer's authority is confined to the contract as by the first form it is doubtful if his jurisdiction would extend to such alterations, changes, or new work, unless they were added to or made a part of the original contract. [They have been provided for in a clause.] †

It is a question for the parties to consider as to what powers they will give to their engineer, and what extent, if at all, they will limit them. It is customary in America to give him full sway with regard to questions pertaining to the work and materials and to everything that will enable him to promote and expedite the work, and thus save time and expense. The wisdom of this cannot be questioned. If the proprietor or company have not the confidence necessary for them to do that, they will do well to let their engineer go and to get another one whom they *can* trust.

By the forms in use in England the powers of the engineer are more comprehensive, frequently extending to every possible question or dispute between the parties, even to the interpretation and construction of the contract itself; but the justice and policy of giving such unlimited power is questioned and their validity in the courts of this country doubted. Courts are pretty certain to give such stipulations the narrowest interpretation

v. Weeks, 21 Ill. 561; McNamara v. Harrison, 81 Iowa 486; Morgan v. Birnie, 9 Bing. 672; Zimmerman v. Gerin, L. Ch., 11 Misc. Rep. (N. Y.) 49; Ball v. Doud (Oreg.), 37 Pac. Rep. 70 [1894].

[1] *See* Morgan v. Birnie, 9 Bing 672.

* *See* Secs. 593-599, *infra*, Extra Work; *and see* Secs. 370, *supra*, and 395-396, *infra*.

† *See* Sec 392, *supra*, *and* Secs. 592-599, *infra*.

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possible and will grant only those powers to an engineer which are clearly and expressly agreed to by the parties.

395. Instances in which Engineer's Decisions have been Held Not Binding under a General Clause—Extra Work.—For the purpose of comparing the contract forms in use the following stipulations are cited, with the decisions which have been rendered upon them: Under a stipulation that in case "disputes and differences should arise with the contractors in any way relating to the contract, or if any question should arise between any of the several subcontractors relating to the proposed buildings, such dispute, difference, or question should be settled by the architect, whose decision should be absolute and final," it was held that this condition applied only to disputes as to the mode of carrying on the several works, and not to claims for extra work by the contractors against the corporation.[1]* A stipulation "constituting the engineer an umpire to determine all questions growing out of the contract and making him sole judge of the quality and quantity of work done and materials furnished," was held not to extend to extra work done outside the contract. By the decision of this second case it may be doubted if the second form would cover such extra work, for it seems that nothing less than an express provision for the measurement, classification, and value of the extra work, and an incorporation of the agreement for the extra work into the contract, will safely and certainly give to the engineer the full determination of questions pertaining to it.[2] Where the contract stipulates for an arbitration in case of disputes as to the true value of extra work or of work omitted, it does not include questions as to whether certain work is extra work, or as to whether extra work done at an agreed price is properly done. Such a stipulation, said the judge, would oust a court of law or equity of all jurisdiction over the matter falling within the stipulation.[3]

In a case where a contractor was to be paid for certain improvements [iron work] to a building, upon the estimate of the architect, and having prepared the materials for the improvements, the building burned up, it was held that the case contemplated for the architect's estimate never arose, and that a recovery could be had for the materials wrought without the architect's certificate.[4]

When the engineer is to decide as to disputes between the contractors as to the manner of connecting the work or otherwise, his decision is not a condition precedent to the right of one contractor to maintain an action for extra work caused by wrongful acts of another contractor.[5]

[1] Pashby *v.* Mayor of B., 18 C. B. 2; O'Reily *v.* Kerns, 52 Pa. St. 214.

[2] Starkey *v.* DeGraff, 22 Minn. 431; *but see* Reg. *v.* Starrs, 17 Can. Sup. Ct. 118.

[3] Weeks *v.* Little, 47 N. Y. Super. Ct. 1; Hart *v.* Launman, 29 Barb. (N. Y.) 410; Sinclair *v.* Tallmadge, 35 Barb. 607; Doyle *v.* Halpin, 1 Jones & S. (N. Y.) 369; *but see* Reg. *v.* Clmon, 23 Canada Sup. Ct. 62; *and* Sharp *v.* San Paulo R. Co., L. R. 8 Ch. App. 605, *note*.

[4] Rawson *v.* Clark, 70 Ill. 656.

[5] Delamater *v.* Folz, 3 N. Y. Supp. 711 [1889].

* *See* Chapter on Extra Work, Secs. 592–597, *infra*.

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396. Other Instances Not Covered by a Sweeping Clause—Breach by Either Party.—A provision that the engineer shall decide all questions that may arise relative to the execution of the contract, and that his decision shall be final, does not give him the determination of the question whether the contractor has incurred a penalty provided for in the contract. The question was as to the effect which the failure of the city to have the bridge piers ready by a stated time had on the contractor's liability for liquidated damages.[1]

A provision that performance shall be to the satisfaction of an architect named, who is employed to adjust all claims of the parties to the agreement, does not prevent the owner from suing the contractor and his sureties on a bond for a breach of the contract before the architect had adjusted any claims arising out of the breach.[2] A clause referring any disputes or differences as to the construction or meaning of the agreement and specification, or sufficiency of the performance of any work to be done under it, or price to be paid, to the engineer, whose decision should be final and conclusive, was held not to give him the conclusive determination of the amount of work done; but that the question whether the final estimate of the whole work done was correct, might be properly tried by the court.[3] Price was held to refer to the price per cubic yard, and not to the cost of the whole.

Under a provision that "if the engineer certify that the contractors have failed or refused to supply skilled workmen or proper materials, the owner may terminate the contract, take possession, etc., and that the expense and damage incurred by the owner shall be determined by the engineer, whose certificate shall be conclusive," it was held that where the contractor had wrongfully abandoned the work, and the owner had taken possession, etc., that the engineer's certificate of the expense incurred by him was not conclusive, he having made no certificate setting forth the failure or refusal of the contractor to complete the work.[4]

When the terms of a submission were that arbitrators should "investigate the matters complained of and determine all questions that might arise relating to compensation for work done under the contract, it was held to include the determination of how much work had been performed, how much of each kind of work, what the compensation should be for each part and parcel of the said work, and whether the final estimate was correct and just to the parties.[5]

When the contract referred to an architect "all disputes, however arising, and all questions of doubt as to the tenor and intention of the drawings and specifications, or of the contract," and provided that the contractor

[1] King Iron Bridge Co. *v.* St. Louis, 43 Fed. Rep. 768 [1890]; *see also* Wood *v.* Ry. Co., 39 Fed. Rep. 52.

[2] Oakwood Retreat Ass'n *v.* Rathbone (Wis.), 26 N. W. Rep. 742 [1886].

[3] Denver S. P. & P. Ry. Co. *v.* Riley, 7 Colo. 494 [1884].

[4] Charlton *v.* Scoville (N. Y.), 39 N. E. Rep. 394.

[5] The People *v.* Benton, 7 Barb. 208 [1849]; *and see* Gallagher *v.* Sharpless (Pa.), 19 Atl. Rep. 491 [1890].

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should deliver the building free from all claims, and should furnish and provide, and deliver at his own cost, all necessary materials, it was held to give the architect jurisdiction over the question whether the contractor and his sureties were bound to refund to the owner the amount paid by him on a mechanic's lien filed for materials furnished for the building.[1] *

397. Engineer's Power when the Contract has been Rescinded or Performed.†—When a contract has been rescinded by mutual consent of the parties, but the contractor is permitted to continue the work, the engineer's authority is at an end and expires with the contract. If a new agreement be made, his powers will be limited to the extent that the new agreement creates.[2] Items that are not included in the original contract nor covered by subsequent extension cannot be allowed in the award.[3] If the structure has not been completed under the terms of the contract, the engineer cannot determine questions and disputes arising from work subsequently performed on or about the works.[4] This might be different, however, under a provision that the engineer shall "determine any and every question or claim arising out of the contract."

Work done upon the job after the contract has been taken out of the contractor's hands by the company is not done under the contract, and therefore questions arising out of such work are not for the engineer's determination and decision, unless they are so made by express agreement; a recovery may be had for what such work is reasonably worth.[5] The contractor should not be allowed to continue with work without a new and formal contract. However, a suspension of the work in good faith by the company according to an express provision in the contract will not relieve the contractor from his agreement to abide by the decision of the engineer as to the quantity and quality of the work done,[6] ‡ and the question whether a contractor's failure to complete works in due time, and the damages he suffered, and the extra work required of him, was caused by the architect's delay and default in supplying the requisite plans and setting out the lands, was held not a proper one for the architect's determination.[7]

The want of the architect's certificate will not defeat the contractor's right to damages for a breach by the owner of his contract,[8] or a refusal on

[1] Barclay *v.* Deckerhoof, 171 Pa. St. 378 [1895]

[2] D. & H. Canal Co. *v.* Dubois, 15 Wend. 87 [1835]; *and see* Adams *v.* Cosby, 43 Ind. 153.

[3] Doane College *v.* Lanham (Neb.), 42 N. W. Rep. 405 [1889]; St. John *v.* Potter (Com. Pl.), 19 N. Y. Supp. 230; Osborne *v.* O'Reilly, 42 N. J. Eq. 467.

[4] Battie *v.* McGregor, 10 Scotch Sessions Cases 1094 [1883].

[5] O'Reilly *v.* Kerns, 52 Pa. St. 214; Weeks *v.* O'Brien (N. Y. App.), 36 N. E. Rep. 185, 141 N. Y. 193; *and see* Gillen *v.* Hubbard, 2 Hilt. 303.

[6] Snell *v.* Brown, 71 Ill. 133 [1873]; *but see* Weeks *v.* O'Brien (N. Y. App.), 36 N. E. Rep. 185.

[7] Roberts *v.* The Bury Improvement Com'rs, 39 L. J. R. 120; *and see* Mich. Ave. M. E. Ch. *v.* Hearson, 41 Ill. App. 89, *and* Memphis & L. R. Co. *v.* Wilcox, 48 Pa. St. 161; McAlpine *v.* L. & A. Ry. Co., 17 Scotch Sessions Cases 113 [1889].

[8] Linch *v.* Paris Lumber Co., 80 Tex. 23

* *See* Sec. 370, *supra.* † *See* Sec. 745, *infra.* ‡ *See* Sec. 745, *infra.*

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his part to allow the contractor to proceed with the work.[1] A stipulation that the engineer's decision shall be final and conclusive in any dispute which may arise between the parties does not include the question of damages to contractor from a rescission of the contract.[2] A provision for payments every two weeks on the architect's certificates for the amount of work done, less 15 per cent., which is to be held until completion of the contract, relates only to advances to be made while the work is progressing. If the contractor is prevented from completing the work by the other party's insolvency, he need not produce certificates in order to recover.[3]

398. Engineer's Powers when Contract has been Modified by Subsequent Agreements.—A material modification of a written contract by a subsequent parol agreement reduces the whole contract to parol, and the written contract can be used no further than to mark the terms and extent of the new stipulations.[4] When such a parol modification has been made, a provision in the original written contract "that the engineer should be the final arbiter of disputes" remains in force, but his decision is not final if he entirely ignores the subsequent parol agreement;[5] and whether a change agreed to by the parties is or is not such a material modification as to reduce the whole to a parol agreemont is a question for the jury.[6]

Under an agreement that the engineer should determine "all questions arising relative to the execution of the contract, and that his decision should be final and conclusive," it was held that the engineer's jurisdiction did not extend to additional compensation due, under a subsequent promise, made when the contractor had threatened to rescind the contract on the ground of misrepresentation.[7] The decisions have gone so far as to hold that if a contract was entered into, based upon certain plans and specifications, and new plans were adopted and alterations made which made the job a materially different piece of work, and to which the contractor had to conform, and to which he did not assent, that the binding effect of the original contract was destroyed, and therefore the conclusiveness of the engineer's decisions was at an end.[8]

Another instance is a case where an implied contract was held not to be subject to the engineer's decisions. When the contract was made, certain obstacles were to be removed by the company, who delayed the removal for an unreasonable time. It was held that there was an implied contract that there should *not* be unreasonable delay, and that the contractor was entitled

[1] Velsor *v.* Eaton (Sup.), 14 N. Y. Supp. 467; Hall *v.* Bennett, 48 Super. Ct. N. Y. 302; *and see* Dinsmore *v.* Livingston, 60 Mo. 241, *and* Yates *v.* Valentine, 56 Mo. 530.

[2] McGovern *v.* Bockius, 10 Phila. (Pa.) 438.

[3] Childress *v* Smith (Tex. Civ. App.) 37 S. W. Rep. 1076.

[4] Malone *v.* Phila., etc., R. Co. (Pa.) 27 Atl. Rep. 756, *and see* City of G. *v.* Devlin (Tex.), 19 S. W Rep. 395.

[5] Malone *v* Phila., etc., R. Co. (Pa.), 27 Atl. Rep. 756.

[6] Malone *v.* Phila., etc., R Co. (Pa.), 27 Atl. Rep. 756.

[7] Osborne *v.* O'Reilly, 42 N. J. Eq. 467, 9 Atl. Rep. 209 [1887].

[8] County of Cook *v.* Harms, 108 Ill. 151 [1883].

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to damages. The engineer was clothed with the usual powers, and in addition was authorized to extend the time for completion in consequence of this anticipated delay. The court held that the question, between the contractor and company, as to the amount of damages suffered from the delay, was not a matter in connection with the contract such as to make the engineer's certificate final and binding.[1]

399. Many Cases Hold that Agreements for Changes and Alterations Are subject to Engineer's Determination Same as for Work Under Contract.— The decisions on these points are not all one way. There are cases in which the courts seem to have had more regard for the evident understanding between the parties and less for the technical phraseology of the contract. Thus alterations required under a provision "that alterations directed by the engineer should be made as directed," were held not to abrogate the contract or substitute a new one, but that they were within the original contract, and therefore within the jurisdiction of the engineer to determine and estimate,[2] and where a higher class of masonry was required by the engineer than was contemplated in the specifications or the contract, which was built by the contractor under instructions from the company that work should be done "as directed by the engineer," and that they would pay what it was reasonably worth, it was held that the whole work, including the extra work required by the engineer, under the subsequent parol agreement, should be estimated by the engineer; that the special contract would be pursued so far as the intention of the parties could be traced, but that it must be taken in its proper connection with the original contract, with reference to and in modification of which it was made; that all the work was to be done as the engineer directed; that changes were to be made *if* the engineer directed them, and *as* the engineer directed, and all was to be estimated by the engineer; and the court held that if the engineer was not to determine the nature, quality, and quantity of the extra work, it would doubtless have been so stated.[3]

This, it is submitted, is, without doubt, the reasonable construction of the subsequent parol agreement, and the universal understanding under which such changes are directed and made, as every engineer and impartial contractor will agree; but courts have not their practical experience, nor their understanding of such matters, and if parties will certainly and surely bring extra work and collateral and subsequent agreements within the engineer's jurisdiction, they will either make such work or agreements a part of the original contract or stipulate for the engineer's determination as to each, at the time it is done or entered into.

If the contract has been relinquished by mutual consent and payments have been made and received, according to the estimates of the engineer,

[1] Lawson *v.* Wallesly Board, 62 L. J Q B. D. 302 [1882], L. R. 11 Q. B. D. 229 [1883].

[2] O'Reilly *v.* Kerns, 52 Pa. St. 214.

[3] McCauley *v.* Keller, 130 Pa. St 53 [1889], 18 Atl. Rep. 607.

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they will be considered as evidence of the intention of the parties to have the work determined in that manner. The contractor having taken the payments without objection or complaint, according to the engineer's estimates and classification is precluded from denying them afterwards when the work has been finished.[1] But if the original contract has been rescinded, the contractor is no longer bound by his submission to the engineer's decisions, nor limited in his claims to the compensation specified in the contract. He therefore is not compelled to bring his suit upon the special agreement, but may sue upon a *quantum meruit*, and the amount of recovery will be determined by a jury, and the engineer's estimates will have no binding effect.[2] In this there lies a lesson for companies and engineers, if they will avoid the uncertain determination of juries. Hasty and imprudent steps to rescind or annul or relinquish a contract are not to be taken. It may put work intended for the engineer's direction and estimate into the hands of a court or jury, and involve all the difficulties, vexations, and delays that the contract and the clauses of reference sought to avoid. The contract should be kept whole so long as there are disputes unsettled, unless a settlement be had or a release be given or a new agreement be made that brings the act and its consequences within a clause of the original contract providing for such an emergency.

An agreement to refer "the determination of amount or quantity of several kinds of work and the compensation to be received therefor to an engineer," and also that he should "in all cases decide every question which could or might arise relative to the execution of the contract," was held not to embrace a claim for damages arising from a refusal to permit the contractors to proceed with the execution of the work.[3]

If the owner refuse to allow the contractor to proceed with the performance of his contract it has been held that the provision "that all disputes as to the construction of the work and to the value of extra work, etc., shall be settled by the engineer" ceases to be operative,[4] and that a stipulation requiring the production of the engineer's certificate a prerequisite to compensation cannot defeat the contractor's right to damages for breach of the contract by the company or owner.[5]

It may be safely laid down as a general rule, that provisions making "the decision of an engineer final and conclusive in all matters in dispute" relate exclusively to matters embraced within the contract.[6] So strictly and explicitly have some courts confined the powers of the engineer to the clear and express terms of the contract, that the following clause was held not to

[1] Board of Trustees of I. & M. Canal *v.* Lynch, 10 Ill. 521; *accord*, Seymour *v* L. D Co., 20 N. J. Eq. 396 [1869].

[2] D. & H. Canal Co. *v.* Dubois, 15 Wendell 87; Bonnett *v.* Glattfeldt, 120 Ill. 175; *and see* Mich. Ave. M. E. Ch. *v.* Hearson, 41 Ill. App. 89; Linch *v.* Paris Lumber Co., 80 Tex. 23.

[3] Launman *v.* Younge, 31 Pa. St. 306 [1858].

[4] Velsor *v.* Eaton, 14 N. Y. Supp. 467.

[5] Lynch *v.* Paris, etc., Co. (Tex.), 15 S. W. Rep. 208 [1891]; Markey *v.* Milwaukee (Wis.), 45 N. W. Rep. 28 [1890].

[6] Launman *v.* Younge, *supra*.

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make him sole judge of the final estimate: "It is further agreed, that in case any disputes or differences shall arise between the company and contractor as to the construction or meaning of the agreement and specification, or sufficiency of the performance of any work to be done under it, or the price to be paid, *all such* disputes or differences shall be referred to the engineer, who shall consider and decide the same, and his decision shall be final to the parties who hereby submit all and singular the premises to the award and arbitration of the engineer, and agree that the same shall be final and conclusive between them to all intents and purposes whatsoever; and it is further agreed that the submission to the engineer, touching all matters herein agreed to be submitted to him, shall be deemed, considered, and taken as an essential part of this agreement, and not revocable by either of the parties thereto." It will be noticed that measurements of the work are not specifically mentioned, and although it was provided in another part of the contract that the engineer should make "the final estimate of all the work done," it was held that the differences concerning this "final estimate" were not, in terms, submitted to the final decisions of the engineer, and could not by a fair and reasonable implication from the language employed in the contract be included in the submission. It was held that the language used did not singly nor collectively include the measurement and final estimate of the work; that the engineer's estimate was not conclusive, but that the question whether the quantities had been underestimated was one that could properly be tried by a court of law.[1]

400. Engineer's Power to Determine all Questions may Sometimes be Limited by Specializing.

> "and the fact that the engineer's powers, duties, functions, authority with regard to and concerning certain work and certain matters have been specifically mentioned and enlarged upon, shall not be taken to exclude his authority to consider and determine conclusively any and all questions, doubts, and disputes arising out of, pertaining to, or concerning the said works, and their prosecution, progress, construction, operation, completion, and final settlement of said works, and of all other works connected with, accessory to, necessary or convenient to the safe, substantial, rapid, and proper erection and completion of the aforesaid structure, or of the full and complete execution of this contract."

This clause is suggested on account of a rule of construction frequently applied to contracts, that the general expressions of a contract are to be controlled by the special provisions it contains, for, as the courts have said, why should parties particularize if general provisions are to control?[2] In answer to which it may be said that parties frequently particularize to

[1] Denver, S. P. & P. Ry. Co. *v.* Riley, 7 Colo. 494 [1884].

[2] Launman *v.* Younge, 31 Pa. St. 306; Story on Contracts, § 641; Denver *v.* S. P. & P. Co. 7 Colo. 494 [1884]; Delaware, L. & W. R. Co. *v.* Bowns, 36 N. Y. Super Ct. 126 [1873]; Cree *v.* Bristol, 33 N. Y. Supp. 19; *but see* Commonwealth Title Ins. Co. *v.* Ellis (Com. Pl.), 5 Pa. Dist. Rep. 33.

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emphasize and make clearer, without ever dreaming of destroying what they have previously agreed upon or decided. Without this clause, the decisions seem to indicate that it is at times dangerous to specify in detail, lest the force of the provision be confined to the detail mentioned, and shall not include general questions and disputes. Thus the words "all disputes" in the introductory phrase of the clause at the beginning of the chapter have been controlled and limited to the distinctly enumerated grounds anticipated in the same sentence or clause, and that they have no application except to the disputes arising out of the work, the materials employed, and the compensation to be paid under the contract.

As some of the undertakings of a contract must be specified in detail, it is advisable to continue it throughout the contract and to comprehend every possible emergency and difficulty that can arise upon, in, or about the works, or under the contract. To do this would require almost superhuman powers, and it is the fallibility of such an undertaking that prompts this stipulation. The citation of several cases will show its utility and the protection it affords. For example, in a contract stipulation which provided that the engineer should "estimate the quantity and value of any extra work that may be caused by the alteration of the line of the canal, and determine every other question necessary for the adjustment and final settlement of this contract," etc., etc., it was held that the enumeration of one species of extra work, viz., that due to alteration of the line, was an exclusion of all others, and that other extra work, such as the excavation of "hardpan," was not included in the classification named, and was not therefore for the engineer's determination, and that the contractor was entitled to recover whatever it was reasonably worth. And this was so held notwithstanding there was a general provision that "the decision of the engineer as to all the extra work and the allowance for it" was to be conclusive.[1] By the particular stipulation, the effect of the general provision had been destroyed.

Although this case was practically overruled afterwards, yet it is instructive in that it shows the tendency of the courts to construe such clauses narrowly, and it shows the danger of particularizing without it is carried out. The higher court affirmed the judgment obtained by the contractor but upon a different ground, viz., that the contract had been rescinded, by which rescission the powers of the engineer were curtailed.

A striking case of the effect of specializing in part is shown where a contract was let to build a house according to certain specifications, which contained a description of every part, except the roof, stipulating the manner, size, measurement, and material of each with great particularity; it was held that the contractor need not furnish the roof.[2] Another example is afforded

[1] Dubois *v.* D. & H C. Co. 12 Wendell, 334 [1834]; *see also* 15 Wend. 87.

[2] Reynolds *v.* Jourdan, 6 Cal. 108; *but see* Williams *v.* Fitzmaurice, 3 H. & N. 884.

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in a contract which provided that "If, at any time, the business of the company is interrupted by storms, floods, breaks, accidents, combinations, turnouts, strikes among the miners or other employees, or *by any occurrence whatever,*" etc., the words "by any occurrence whatever" were construed in connection with the other words of the same sentence to mean *any unavoidable occurrence.*[1] An express provision for forfeiture of rights may preclude an implication of other causes of forfeiture.[2]

A special provision in a contract will be held to override a general provision only where the two cannot stand together. If reasonable effect can be given to both, each is to be retained.[3]

401. Engineer to Determine the Meaning and Intention Expressed in the Specification and Contract.

> "that he shall determine every question in respect to, touching, or concerning the meaning or intention of the specification and of this agreement or of any part thereof, or of the contract entered into by and between the company and contractor."

This is a clause commonly found in English contracts for the construction of engineering and architectural works, but it has not found much favor in American practice nor with American courts. A contract is supposed to create or impose some certain obligations upon the parties, and to confer certain well-defined rights as between the parties. If the interpretation and construction of the contract be left to the agent of one of the parties, it may well be doubted if the rights or obligations created are defined or are capable of being ascertained independent of the parties; and the question might be raised whether a written instrument to be so interpreted would be sufficient evidence of the contract to satisfy the statute of frauds. The fact that its interpretation and construction was for some one other than the court would render its terms indeterminate as well as the amount to be paid. Certainly the contract is not committed to writing, if it can be changed and modified to suit the whims and fancy of the mind; its terms are not fixed nor is the object of the statute satisfied.

Of course, if parties desire to leave their obligation to a third person to determine, or in words clear and unmistakable, submit the determination of their rights under a contract wholly to the skill, integrity, and judgment of an engineer and he in the employ of one of them, there is no law which prevents him from doing so, though there may be statutes requiring certain forms and certain registrations in some states. When such transactions take place they excite suspicion that undue advantage has been taken, and courts are not slow to inquire into them, and to give more than ordinary care to the investigation. It must not be forgotten that laws are for the protection of the weak against the strong, and that the courts are

[1] Delaware, L. & W. R. Co. *v.* Bowns, 36 N. Y. Super. Ct. 126 [1873].
[2] German Fire Ins. Co. *v.* Roost (Ohio Supp.), 45 N. E. Rep. 1097
[3] Cree *v.* Bristol, 33 N. Y. Supp. 19.

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the guardians of peace and justice, and if there be any doubt as to the clear intention of the parties to submit the meaning of the contract to the engineer, their agreement will be given the most rational construction, which will be against such extended powers.

402. Engineer Should Not be Able to Enlarge his Own Powers.—It is usual to constitute the engineer a referee as to the meaning of the plans and specifications which are his own invention and handiwork, a certain construction of which is necessary to the proper erection and completion of the works. His powers cannot be enlarged by implication, but they will be confined strictly within the terms of the contract. Therefore, when a contract provided that the specifications and drawings should not be used to the exclusion of the instructions and directions of a designated person, but jointly with them, and that the work, when finished, should be subject to the acceptance of the general manager and chief engineer, and that the interpretation and full intent of the drawings should be given by the engineer; and that his decision pertaining to any question which might arise should be conclusive. It was held that the contract did not give the engineer and general manager exclusive right to determine the construction and meaning of the specifications, but only the drawings.[1] *

The engineer as an officer under the contract is a creation of the contract, his office owes its existence to the agreement between the parties. Should he then be permitted to interpret or construe the instrument of his creation? That would be in effect to define his own authority, to limit or extend his own powers, and to determine his duties in sympathy with his own views and ideas. By his decisions he might make terms for the parties wholly inconsistent with the obligations they had intended to assume. He might dispense with a material part of the contract, or by a harsh construction of conflicting or ambiguous parts work great hardships upon the contractor. Being an agent of the company, if the engineer felt himself devoted wholly to the company's interests, or lacked in that very essential quality of a good engineer, decision of character, or "backbone," it would put the contractor entirely at the mercy of the company or employer.

This, it is submitted, is one very good reason why these clauses are subject to the close scrutiny and strong disfavor of some courts, sometimes resulting in their being declared void and against public policy. Not so much because they oust the courts of their jurisdiction as that they tend to destroy themselves. Why create a contract which is supposed, intended, and declared to give both parties certain rights one against the other, and at the same time and in the same instrument appoint some other agency which may create new terms, or even destroy the rights and obligations so established? If the engineer be a referee, the question loses little of its force, for

[1] Pollock v. Pennsylvania Iron Works Co. (Com. Pl.), 34 N. Y. Supp. 129.

* *See* Chap. IX., Secs. 225–233, *supra*.

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if he may interpret the contract of submission, it enables him to define his own powers, which should be in the power of the parties to determine.

We find decisions in sympathy and direct support of these remarks. A contract containing a provision to the effect that "if any dispute arose during the execution of the contract, the engineer should in all cases decide such questions, and that his estimates and conclusions should be final and conclusive," it was held that such a provision might well apply to questions as to quality of the materials, as to whether the work was being prosecuted with sufficient energy, and to other questions of like character, but that it did not constitute the engineer the final umpire to decide mixed questions of law and fact.[1] Under a similar provision it was decided that the engineer had no power to give a legal construction of what the contract required of the parties, but merely to determine the differences which relate to the workmanship, and to the fitness and quality of the materials used.[2] So it has been held that if an engineer is to estimate work done under a contract, and his estimates are based upon an erroneous view of its terms, it will not conclude the parties. It is the duty of the engineer to estimate the work strictly according to the terms of the contract.[3] If the contract directs the manner of making the measurements, his construction of the contract will not be conclusive upon the parties, although his estimates, if fairly made in the manner pointed out in the contract, would conclude them.[4]

These decisions must be supported upon the ground that these matters were not submitted to the engineer's decision, because if plainly within a submission to arbitration there could be no question as to the conclusive and binding effect of the arbitrator's decision on points of law and fact, and even the construction of the contract,[5] although it may be doubted that his interpretation of the submission itself would be binding and conclusive.

Where the plans and specifications for a building were accessible to the builder before he made the contract, and an examination of them would have shown that there were apparently discrepancies in them, he was held bound by a provision of the contract that if any discrepancies shall be found to exist between the plans, working drawings, and specifications, the decision of the architects as to their true intent and meaning shall be final.[6]

403. The Contract Creates the Powers of the Engineer or Architect.— The engineer's power is subordinate to the contract, and the agreement of

[1] Jemmison *v.* Gray, 29 Iowa 537; *but see* Randegger *v.* Holmes, 31 N. Y. 679 [1866].

[2] Mason *v.* Bridge, 14 Maine 468 [1837].

[3] The Alton, etc., R Co. *v.* Northcott, 15 Ill. 49 [1853]; G. H. & S. A. Ry. Co. *v.* Henry, *supra;* G. H. & S. A. Ry. Co. *v.* Johnson, 74 Tex. 256 [1889]; McAvoy *v.* Long, 13 Ill. 147; Kistler *v.* Ry. Co., 88 Ind. 460

[4] McAvoy *v.* Long, 13 Ill. 147.

[5] Vanderwerker *v.* V. C. Ry. Co., 27 Vt. 130 [1854]; Sweet *v.* Morrison, 116 N. Y 19 [1889]; Kirk *v.* The E. & W. India Dock Co., 55 L. T. R. (N. S.) 245; Hall *v* Norwalk F. I. Co. (Conn.), 17 Atl. Rep. 356; Snodgrass *v.* Gavit, 28 Pa. St. 221 [1857]; *and see* Strauss *v.* Wannamaker (Pa. Sup.), 34 Atl. Rep. 648.

[6] Kelly *v* Public Schools of Muskegon (Mich.), 68 N. W. Rep. 282; Guthat *v.* Gow, 95 Mich. 527, *followed.*

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the parties is the source of his power and authority. A contractor should follow the engineer's instructions in those things only wherein he has authority to direct him, and a contract prescribing what things should be done, and providing further that the contractor should in all things follow the directions of the engineer, was held not to change this rule.[1] If the contractor has received monthly estimates of his work upon a particular construction of his contract without objection, he will be held to have acquiesced in that construction and to be bound by it.[2] *

404. Can the Engineer Interpret the Contract Wrongfully if he Interprets it Honestly?—Whether the preceding cases were decided upon the principle of arbitration that the engineer's decision was confined exclusively to matters submitted to his consideration by the terms of the agreement or on the ground of public policy does not seem to have been decided. It is impossible to say what would be the decision of a court if the construction of the entire contract, including the agreement to submit to the engineer's award and estimate, were left expressly and wholly to his judgment. It is confidently believed that if the engineer were the agent or employee of one of the parties that such a stipulation would be declared void as against public policy. It could not be denied that it was not within the terms of the submission. Clauses are frequently inserted in English contracts, giving the engineer almost absolute power over the terms of the contract and specifications, to interpret, construe, and arbitrarily determine every question; and the English courts have strongly intimated that an arbitrator [engineer] might determine the extent of his own powers and duties. In reference to the point a noted judge has said, "that the meaning of the contract is submitted to the arbitrator [engineer], and he has not exceeded and will not exceed his jurisdiction by receiving the evidence," evidently meaning thereby that the engineer's powers were unlimited. In the arguments of the same case, in which the Lord Chief Justice took a part, the counsel was asked: "Does your argument come to this, that the arbitrator [engineer] has a right to interpret it wrongly and then to decide as if he had interpreted it rightly?" to which the counsel shrewdly replied: "No. In the contemplation of the court he cannot interpret it wrongly, if he interprets it honestly," and continued by adding, "That is the view which the courts have always taken as to the powers of an arbitrator, and no case can be found at variance with it." The engineer's interpretation was sustained even though it did seem contrary to the plain meaning of the language employed.[3] A similar view was recently expressed in a dissenting opinion by Justice Kellam of Dakota, in a case in which the right to build within the city limits was arbitrarily conditioned upon the owner getting a permit from the building inspector.[4]

[1] State of Indiana *v.* McGuilley, 4 Ind. 7 [1853].

[2] Kidwell *v.* B. & O. R. Co., 11 Gratt. 676 [1854].

[3] Kirk *v.* The E. & W. India Dock Co., 55 L. T R (N. S.) 245 [1886].

[4] Sioux Falls *v.* Kirby (S. D.), 60 N. W. Rep. 156.

* *See* Secs. 578–581, *infra*.

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405. English, Scotch and American Views.—If the parties have agreed that disputes as to the meaning of the contract, or the sufficiency of the work done under it, or the price to be paid, shall be submitted to the engineer, the parties have been held bound by the engineer's decisions.[1] After decision had been made this might be true. If the contractor did not intend to abide by the engineer's decision he should not have allowed the questions to go to the engineer, and to have received his determination or award.

The Scotch decisions seem to be to the same effect as the English, for when a contract provided that "all disputes and differences which might have arisen, or shall or may arise, between the parties under or in reference to this contract, or in regard to the true intent, meaning, and construction of the same or of the said specifications, conditions, and schedules, or as to what shall be considered carrying out the work in a proper, uniform, and regular manner, or as to any other matter connected with or arising out of this contract, and generally all disputes and differences in any way connected with the construction of this contract or arising out of the execution or failure to execute properly the work hereby contracted for or not," should be submitted and referred to the final sentence and decree arbitral of the arbiter [engineer] named, it was held that as the whole matter, including the construction of the contract, had been referred to the arbiter, and that the court could not interfere with the arbiter's award, even on the ground of injustice.[2] The following year this opinion was sustained, and it was held that the engineer might extend the time for completion and might be empowered to determine disputes as to the contract itself or its interpretation.[3]

There are some American courts which have expressed the same opinion, but it is believed not to have been fairly and squarely decided, and has yet to be fully settled. Thus it has been held that in the absence of fraud or mistake that the action of an arbitrator empowered by the contract to construe and determine its conditions is final and conclusive between the parties.[4] And in the United States circuit court, Arkansas, it has been recited that "it is not the province of courts and juries to make contracts for parties, or to alter them after they are made, but to enforce them as the parties made them."[5] In a recent case it was decided that a provision that should any dispute arise respecting the true construction or meaning of the drawings or specifications, the matter should be decided by the architect, and that his decision should be final and conclusive, gives the architect the power to dispense with requirements contained in the specifications.[6]

[1] O'Donnell *v.* Forrest (La.), 11 So. Rep. 245; O'Donnell *v.* Henry, 44 La. Ann. 845.

[2] Adams *v.* Ry. Co., 16 Scotch Sessions Cases 843 [1889].

[3] Adams *v.* Gt. North of Scotland Ry. Co., 18 Scotch Sessions Cases 1 [1890].

[4] United States *v.* Ellis (Ariz.), 14 Pac. Rep. 300 [1887]; Porter *v.* Buckfield, 82 Me. 559.

[5] Texas, etc., Ry. Co. *v.* Rust, 19 Fed Rep. 239.

[6] Duell *v.* McCraw (Sup.), 33 N. Y. Supp. 528; *see* O'Donnell *v.* Forrest (La.),

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Foremost among the decisions to the contrary, and one that is frequently cited, is an Indiana case. A clause in the contract provided that "finally it is agreed that if any dispute or misunderstanding shall arise between the parties as to the meaning or execution of the provisions of this contract, it shall be referred to the engineer of said railroad company, and his decision shall be final and alike binding upon both parties," was declared against public policy and void.[1] The court contented itself by saying that "a clause of a contract that means that the engineer shall be sole umpire of all differences that may arise between the parties and thus preclude themselves from the right to resort to the courts for the settlement of such differences is against public policy and void," and Redfield is quoted as saying also that "a stipulation that no action shall ever be brought upon a contract, or, what is equivalent, that all disputes under it shall be referred to arbitration, is a repugnance which, if literally carried out, must render the contract itself as a mode of legal redress wholly idle."[2]

406. Objection that Such a Clause Ousts Courts of Their Proper Jurisdiction, Treated.—The argument that the stipulation for the engineer's final determination ousts courts of their proper jurisdiction was handled without gloves in a New York case,[3] where Justice Allen said: "It appears to be well settled by authority that an agreement to refer all matters of difference or dispute that may arise to arbitration will not oust a court of law or equity of jurisdiction. The reason of the rule is by some traced to the jealousy of the courts and a desire to repress all attempts to encroach on the exclusiveness of their jurisdiction,[4] and by others to an aversion of the courts, from reasons of public policy, to sanction contracts by which the protection which the law affords the individual citizen is renounced." An agreement induced by fraud or overreaching, or entered into unadvisedly through ignorance, folly, or undue pressure, might well be refused a specific performance,

11 So Rep. 245, in which the contract contained a clause giving engineer power to determine meaning of contract.

[1] Kistler *v.* The Ind. & St. L. R. Co., 88 Ind. 460 [1882].

[2] 1 Redfield on Ry's (6th ed.), p. 447. The Indiana courts seem to have been particularly alive to the usurpation of their powers to judge of the rights of their citizens, as is shown in the following remarks of Chief Justice Elliott of the Indiana supreme court: "We cannot agree with counsel that the engineer's estimate is conclusive, for we understand it to be settled by our decisions that parties cannot, by an agreement in advance, oust the jurisdiction of the courts and make conclusive the estimate of engineer or other person." Kistler *v.* Ind. & Co., 88 Ind. 460; Bauer *v.* Sampson Lodge, 102 Ind. 262–9; Railway Co. *v.* Donnegan, 111 Ind. 179; Supreme Council *v.* Garrigus, 104 Ind. 133; Supreme Council *v.* Forsinger, 125 Ind. 52–55; "The doctrine of our court is well sustained by authority." Dugan *v.* T omas-79 Me. 222; Ins. Co. *v.* Morse, 20 Wall, 445: Scott *v.* Avery, 5 H. L. Cas. 811. Thompson *v.* Charnock, 8 Term R. 139; Reed *v.* Ins. Co., 138 Mass 572; Stephanson *v.* Piscataqua Co., 54 Me. 55; Starkey *v.* DeGraff, 22 Minn. 431. "But while we do not regard the estimate as conclusive, we do regard it as *prima facie* correct." Linville *v.* State, 29 N. E. Rep. 1129; *authorities cited* in Elliott on Roads, etc., pp. 430–438, *notes*. As the estimate of the engineer is *prima facie* correct, the burden is upon the contractor to show fraud or mistake. McCay *v.* Able (Ind.), 30 N. E. Rep. 528 [1892].

[3] D. & H. Canal Co. *v.* Pa. Coal Co., 50 N. Y. 250.

[4] *See* Indiana and Georgia Courts Decisions.

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or disregarded when set up as a defense to an action. But when parties stand upon an equal footing and intelligently and deliberately in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign at this day any good reason why the contract should not stand and the parties be made to abide by it and the judgment of the tribunal of their choice.[1]

"The rule that a *general* covenant to submit any differences that may arise in the performance of a contract, or under an executory agreement, is a nullity, is too well established to be now questioned, and it is not necessary to inquire into the reasons of the rule or question its existence. The better way, doubtless, is to give effect to contracts, when lawful in themselves, according to their terms and the intent of the parties, and any departure from this principle is an anomaly in the law, not to be extended or applied to new cases unless they come within the letter and spirit of the decisions already made. Were the question a new one, I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstance entitling him to relief, to repudiate his agreement to submit to arbitration and seek a remedy at law, when his adversary had not refused to arbitrate, or in any other way obstructed or hindered the arbitration agreed upon. The tendency of the more recent decisions is to narrow rather than enlarge the operation and effect of prior decisions, limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences without a resort to courts of law, and the rule is essentially modified and qualified."

407. May Make Payment or Any Right to an Action Conditioned on the Engineer Determining Any Differences Existing.—The parties agreed to a rate (or price) "to be established in manner following," and the determination and adjustment was held clearly to be a condition precedent to the right to demand and receive the price. The court said: "It would have added nothing to the legal effect to have in terms that it should not be otherwise established, and to have excluded in words the interposition of the courts." Either party may well say, in an answer to an action, "That is not the measure of liability to which I assented." Thus understood and interpreted, the case is not within the rule which nullifies contracts ousting the courts of their jurisdiction, but is within another rule equally as well established by authority, and founded in good reason, that a person may covenant that no right of action shall accrue till a third person has determined any differences that may arise between the parties to the covenant, or determine the measure of the liability of the covenantor and the amount to which the contractor shall be entitled.[2]

[1] D. & H. Canal Co. *v.* Pa. Coal Co., 50 N. Y. 250 [1872]; Lawrence *v.* Shaefer (Sup.), 42 N. Y. Supp. 992.

[2] This principle was recognized in Del. & Hud. C. Co. *v.* Dubois, 15 Wend. 87; Butler *v.* Duncan, 24 Wend. 447; Smith *v.*

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408. Two Classes of Cases, the Distinction between them Well Marked and Defined.—There are two well-defined classes of cases. In one class the parties undertake, by an independent stipulation, covenant, or agreement, to provide for an adjustment and settlement of all disputes and differences by arbitration, to the exclusion of the courts; and in the other they merely, by the same agreement which creates the liability and gives the right, qualify the right by providing that before a right of action shall accrue certain facts shall be determined or amounts and values ascertained, and this is made a condition precedent either in terms or by necessary implication.[1] The second class of cases may be reconciled to a great many decisions to the contrary, on two distinct grounds. First, that the latter class of cases differed from the other cases in that the decision or award of the engineer had been made a condition precedent to the liability of the company or to the contractor's right to recover, in which case no debt would arise, and therefore no suit could be brought until the engineer's decisions were rendered; or, secondly, by the explanation that the contract gave to the engineer such extended powers, not usual in engineering contracts, and which public policy would not admit, having given the engineer power to define the meaning of the contract provisions, or agreement of submission. The stipulation should not be an attempt to preclude the contractor from appealing to the courts, nor give to the engineer the power to ascertain what the contract is, or even if there be a contract. If the engineer's decisions be confined to the materials, their quantities and classifications, the character, quality, and progress, etc., of the work, to the interpretation and explanation of the plans and specifications, the contract terms remain intact and as the parties adopted them; but if the engineer's powers are extended to the meaning and interpretation of the contract, and his decision be made final, without recourse or appeal, then what object or use of a contract. The engineer might determine that black meant white, that by the term rock was intended earth, that to build a brick house was only complied with by building a brick house with a marble front. Such a compact would be merely an attempt to keep out of the courts, and would create no mutual obligations relating to engineering operations.

Redfield, in his excellent book on Railways, says of this question: "This subject is very elaborately discussed by the judges before the House of Lords,[2] and it is remarkable how wide a difference of opinion was found to

Briggs, 3 Denio 73; Smith *v.* Brady, 17 N. Y. 173; McMahon *v.* N. Y. & E. R. Co., 20 N. Y. 463. Scott *v.* Avery, 5 H. L. Cas. 811, was discussed and considered in Braunstein *v.* Accdt. Ins. Co., 101 Eng. Com. Law R. 783; *and* Tredman *v.* Holman, 1 Hurls & Colt. 72. The following cases were reviewed and considered: Hurst *v.* Litchfield, 39 N. Y. 377; Wood *v.* Lafayette, 46 N. Y. 484; Kill *v.* Hollister, 1 Wils. 129; Thompson *v.* Charnock, 8 T. R. 139; Gray *v.* Wilson, 4 Watts 39; *and other cases; see also* Richardson *v.* Mahon, L. R. 4 Ir. C. P. 486; Jackson *v.* Cleveland, 19 Wis. 400; Fox *v.* Railroad Co., 3 Wall. Jr. (C. C.) 243; Reynolds *v.* Caldwell, 51 Pa. St. 298

[1] D. & H. Co. *v.* Pa. Coal Co., 50 N. Y. 250 [1872].

[2] The case of Scott *v.* Avery, 5 H. L. Cas. 811.

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exist upon a question which might seem at first blush so simple. Of the nine judges who gave formal opinions, three were opposed to allowing any force whatever to such a stipulation, and of the other six, four held that only the question of damages can properly be made to depend, as a condition precedent, upon the award of an arbitrator, while two held that the award may be made to include all matters of dispute growing out of the contract, which it seems to us must be regarded as equivalent to saying that no action at law or in equity shall be brought to determine any controversy growing out of the contract, which all the judges agreed is a void stipulation. We therefore feel compelled to adopt the view that upon principle, and the fair balance of authority, such a stipulation in regard to estimating labor or damages under a contract for construction is valid, and may be treated as a condition precedent, but that beyond that the present inclination of the English courts is to hold that it is repugnant to sound policy and subversive of the legal obligation of the contract, as being equivalent to a stipulation that no action at law shall be brought upon the contract, but only upon the award, if not paid."

"The balance of authority in this country seems to be in favor of allowing such a condition precedent in this class of contracts to extend to the quality of the work as well as the quantity, and to the question whether the work is progressing with sufficient rapidity, and whether the company on that account are justified in putting an end to the contract. It seems reasonable to us on many grounds that contracts of this magnitude and character should receive a somewhat different interpretation in this respect from that which is applied to the ordinary commercial transactions of the country, as has been held in regard to pecuniary penalties. Under the English statute, the Railway Arbitration Act, agreements between companies to refer all disputes between them to arbitration, are peremptorily enforced by the courts.[1] We should not therefore feel justified in intimating any desire to see the American cases on this subject qualified."[2]

It is impossible to predict what an American court would decide in a case where an engineer had been given the determination of questions relating to the meaning and interpretation of the contract terms; and the doubt that exists is enough of itself to discourage the use of such a clause in a well-drafted contract. If the parties are so very desirous of keeping out of the courts, let them provide for the interpretation and construction of the contract by some disinterested third person, other than the engineer, a tribunal of their own selection, to which the objections herein offered will not apply. The defining of one's powers at least should be left a matter for outside adjudication, whether for an umpire or for the courts. It has been held that an agreement between an ice company and one of its deliverymen that the bookkeeper of the company shall settle all disputes as to the

[1] Llanelly Railway & Dock Co. *v.* London & N. W. R'y Co., 20 W. R. 898.

[2] 1 Redfield on Law of Railways (6th ed.) 448.

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amounts of money due, shortages, etc., on the part of the deliveryman, does not authorize the bookkeeper to construe the contract of employment, and to charge to the deliveryman uncollected accounts for ice delivered to him.[1]

To the engineer should be left matters peculiarly within his province, which he should be eminently qualified to determine, and which a court or jury is quite unfit to undertake. He should be authorized to decide all questions as to the execution of the work, its sufficiency, stability, and utility, all questions of the character, kinds, and quality of materials, their appropriateness and conformity to the specifications, the application, interpretation, and explanation of the specifications and drawings, especially on all cases of doubt or dispute, all questions of amount and quantity of either work or materials, question of extra work, and alteration, and questions of damages due to delays, breach, etc., but the determination of the intention of the parties, as expressed in the contract, the interpretation of its terms, and especially those parts defining the engineer's powers and duties, should be left to the court, or to some other tribunal.

409. Payment by Owner Made Contingent on Engineer's Certificate.

"And it is further expressly agreed and understood, that such decisions, determinations, and estimates by the engineer, with regard to any and every question, doubt, dispute, and difference as to the quantities, qualities, description, and classification of materials and work, or in respect to any additions, deductions, omissions, alterations, or deviations, or in regard to the meaning or intention of [this contract, or] the specifications and plans, or pertaining to the instructions, drawings, or directions given or furnished, or as to the value, or sums due and to be paid under this contract shall be and are a condition precedent to any right whatever of the contractor to receive, demand, or claim any money or other compensation under this agreement, and a condition precedent to any liability on the part of the owner, or company, or city to the contractor under or on account of this contract, or for any labor or materials furnished in connection therewith."

The use and binding effect of this clause has been discussed in a previous chapter in a general way, but some of the statements, it is believed, may be repeated again with good effect.

On whatever principle its binding effect may be placed, whether of logic, or of law, or of necessity, or of public policy, its validity cannot be questioned. However much doubt there may be that a contractor can agree to abide the decision of an engineer, and that his decision shall be final and conclusive as to all matters comprised in the contract, it is fully settled that he can make the payment for his work dependent upon the occurrence of some event; and notwithstanding the principle that parties can not by contract oust the courts of their jurisdiction, a person may covenant that no right to payment shall accrue to the contractor and no liability attach to the owner or company until a third person [engineer or architect] has de-

[1] Knickerbocker Ice Co. *v.* Smith (Pa.), 23 Atl. Rep. 563 [1892].

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cided the amount due and any differences that may arise between himself and the other party to the covenant.[1] An employee may make the performance of his work and services a condition precedent to his right to receive any pay for either of them.[2]

Mr. Leake in his valuable Digest of the Law of Contracts says:[3]* "A reference to arbitration of differences arising upon a contract and the award of the arbitrator may be agreed upon in the contract as a condition precedent to the existence of any claim or liability; so that no action can be brought respecting the same matter until arbitrators have made an award, and only according to the result of the award. There is no principle or rule of law which prevents parties from agreeing that there should be no breach of the contract between them until after there had been a reference to arbitration, although there may be a rule preventing them settling by arbitration alone any breach of contract. Parties may agree that no rights or liability shall arise between them until the engineer has determined whether the contract has been fulfilled, and what damages have been sustained by its breach; and, if they do so agree, no right of action will exist until the engineer has so decided."[4]

410. Indebtedness should Be Created by Promise Only and Not by Performance of Work.—Ordinarily, under simple contracts for work, the company's or owner's indebtedness for the price agreed upon is not created by the promise to pay it, but by the performance of the work. Such indebtedness will arise, therefore, and become payable the moment the work is completed unless it be expressly provided that the payment of it be postponed. It does not necessarily follow because the proprietor promises to pay the debt upon a condition, as the production of the engineer's or architect's certificate, that the debt itself is subject to the same condition. That would only make the payment for the work done dependent upon an event which has no necessary connection with the merit of the work, but upon an event which is absolutely within the power of a person [the architect or engineer] employed and paid by the party who makes the condition.*

This may seem a hardship imposed upon the contractor, but experience has demonstrated its necessity, at any rate to companies and proprietors having works to be constructed and to the architectural and engineering professions having such work in charge. The stipulation has been considered so necessary to the successful prosecution and completion of public works that it has been made the subject of special legislation, and is required by some acts before payments can be demanded for public works.

The Public Works Acts of Great Britain (31 Vict., chap. 13, sec. 18)

[1] Scott *v.* Avery, 5 H. L. Cases 811 [1855]; *many cases*, 29 Am. & Eng. Ency. Law 929.

[2] Keller *v.* Overreich, 30 N. W. Rep. 524.

[3] Pages 953-5 [1878].

[4] Per Cranworth in Scott *v.* Avery, 5 H. L. C. 811; *and see* per Mellish, L. J., in Sharpe *v.* San Paulo Ry., L. R. 8 Ch. 612.

* *See* Secs. 342-343, *supra*, and 760-781, *infra*.

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require that "no money shall be paid to any contractor until the chief engineer shall have certified that the work for or on account of which the same shall be claimed has been duly executed, nor until such certificate shall have been approved by the commissioners of public works.[1]

411. Courts Unwilling to Construe the Stipulation a Condition Precedent.—The courts have been slow to admit the need of such a stipulation, and have not construed it as a condition precedent when they could fairly avoid doing so.[2] Accordingly, where a clause of a contract provided that any dispute as to the true meaning of the drawings and specifications should be decided by the engineer, but neglected to make the engineer's final estimate and certificate a condition precedent to payment, it was held that the clause furnished no defense unless there had been a dispute. That the decision of the architect was not to be invoked unless a dispute should arise "respecting the true construction or meaning of the drawings and specifications," and the contractor was not obliged to submit to such decision unless there was such a dispute.[3]* Unless compelled by the express language of the contract, courts are not inclined to construe such stipulations in a contract to do work within a certain time in consideration of the payment of money by the other party as a condition precedent to the right to recover.[4]

To make the decision of the engineer final and conclusive and keep the contractor out of the courts the contract must provide that no action shall be brought until after the award,[5] or, *better*, that the engineer's award shall be a condition precedent to payment or recovery.[6] If the contract does not make the procurement of the engineer's certificate or the engineer's estimate and decision a condition precedent to payment or to any right of action, then the stipulation may be held not binding and against the policy of the law as having a tendency to exclude the jurisdiction of the courts, which are considered to have ample means to entertain and decide legal controversies.[7]

When, therefore, in a contract, payment was made conditional upon the architect's certificate, but the *promise to pay* was on completion of the work, without any requirements as to the production of the certificate, the contractor was allowed to recover for the work he had done without the architect's certificate.[8] And an agreement that a fair compensation should be

[1] *See* Berlinquet *v.* The Queen, 13 Canada Sup. Ct. 26 [1877]; *see also* Laws of New New York State, chap. 278, § 11, and People *v.* Benton, 7 Barb. 208 [1849].

[2] Langdell's Summary of Contracts, 1005; Front St. R. Co. *v.* Butler, 50 Cal. 574.

[3] Johnson *v.* Varian, 108 N. Y. 645 [1888]; *accord* Sinclair *v.* Tallmadge, 35 Barb. 602; Smith *v.* Aiken, 102 N. Y. 87; Greene *v.* State, 8 Ohio 310.

[4] Front St., M. & O. R. Co. *v.* Butler, 50 Cal. 574 [1875]; Britton *v.* Turner, 6 N. H. 481 [1834]; The M. C. & L. R. Co. *v.* Wilcox, 48 Pa. St. 161 [1864], *and cases cited; and see* Bigler *v.* Mayor, 9 Hun 253; Glaucus *v.* Blake, 50 N. Y. 145.

[5] Hamilton *v.* Home Ins. Co., 137 U. S. 370 [1890]; Schulere *v.* Eckert (Mich.) 51 N. W. Rep. 198 [1892]; McCay *v.* Able (Ind.), 30 N. E. Rep. 528.

[6] Hamilton *v.* Liverpool, L. & G. Ins. Co., 136 U. S. 242 [1889].

[7] Hurst *v.* Litchfield, 39 N. Y. 377 [1868].

[8] Flaherty *v.* Miner, 123 N. Y. 382 [1890].

* *See* Sec. 369, *supra*.

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paid for any damages suffered, and that such damages should, unless the parties could agree, be appraised and fixed by arbitrators, does not make the award of the arbitrators a condition precedent to the right to recover, but is held merely collateral to the stipulated right of compensation.[1]

Stipulations in the following terms have been held not to create a condition precedent to the right of the contractor to bring an action in the courts "to decide all disputes as to manner of connecting the sewers or otherwise;"[2] "That the engineer shall certify that the contract is performed to his satisfaction," he having certified that it was not so performed.[3] Work to be "according to certain specifications and to the satisfaction of court" was held to require work to be done according to specifications, which would be to the satisfaction of court, and that the contractor need not allege that he had completed work to satisfaction of the courts.[4]

A provision "that in case any difference should arise as to the quality of work or materials or any other question, the same shall be settled by arbitration, each party selecting a good man, and in the event of their disagreeing these two to select a third party, and their decision to be final," was held not a condition precedent to the bringing of an action by the contractor.[5]

The following case shows the attitude of the courts more forcibly than any other given: The contract provided "that part of the contract price should be paid as the work progressed, and the balance when the work was completed and accepted, and that payments should be made in accordance with the architect's certificate." It was held that the architect's certificate was required only as to the payments to be made as the work progressed, and not to the final payment after completion of the work,[6] as if the final payment was not a "*payment.*"

The language employed to make a condition precedent must be conclusive.[7]

412. Make the Engineer's Certificate a Condition Precedent to the Promise to Pay by Owner.—The stipulation should be clearly and plainly expressed that there can be no mistaking the parties' true intention, and it should be remembered that there is a difference between a promise to pay a debt *upon* a certain condition and a provision that the debt shall be payable *only upon* a certain condition, or when a certain event is made a condition precedent to its payment. The latter clause necessarily renders the debt itself conditional, and is the proper one to use.[8]

[1] Seward *v.* City of Rochester (N. Y.), 16 N. E. Rep. 348 [1888]; *and see* German Ins. Co. *v.* Morris (Ky.), 37 S. W. Rep. 267.

[2] Delameter *v.* Folz, 3 N. Y. Supp. 711 [1889].

[3] Mackinson *v.* Conlon (N. J.), 27 Atl. Rep. 930; s. c., 55 N. J. Law, 564.

[4] Kinsley *v.* Monongahela Co. (W. Va.), 7 S. E. Rep. 445 [1888].

[5] Cole Manuf'g Co. *v.* Collier (Tenn.), 19 S. W. Rep. 672.

[6] Oberlies *v.* Bullinger (Sup.), 27 N. Y. Supp. 19.

[7] Lawson *v.* Wallesly Local Bd., 11 Q. B. Div. 229, *and* 52 L. J. Q. B. 309, *note.*

[8] Langdell's Summary of Contracts, 1005–6.

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Such a clause has been held to be a complete bar to the contractor's recovery until the condition is performed or the event has transpired,[1] notwithstanding the building had been completed, and further that it was proved that the architect had in a private letter to the owner expressed his approval of the contractor's charges; it was held that the certificate must be produced as required by the terms of the contract.[2] It was held not to be enough that everything had been done necessary to entitle the contractor to have the engineer's certificate, and that the entire work had been duly and efficiently performed and completed according to the plans, specifications, and contract. If the contract required that the work should be to the satisfaction of the engineer, or that his certificate should be produced before payment, nothing else would suffice.[3] Many contracts are so made. Every man is the master of the contract he may choose to make, and it is of the highest importance that every contract should be construed according to the intention of the contracting parties. The peculiarities of engineering and architectural construction render it important that the owner should not be called upon to pay for work until some competent person shall have certified that the work has been properly done according to the contract and specifications.

Chief Justice Rothrock of the supreme court of Iowa has recently said: "It may be correct that the provision of the contract which makes the chief engineer an arbitrator or umpire between the parties, and by which all rights of action [or appeal to the courts] under the contract are waived, is void; but contracts by which parties bind themselves to make payment or settlement upon the certificate or estimate of some third person, such as an engineer, architect, or the like, have uniformly been upheld by the courts.[4]

The work being done *under contract*, there is no evidence of a parol agreement to vary the written instrument and enable the contractor to sue in *assumpsit*. The parties cannot seek redress from any other tribunal than that provided in the contract, viz., the engineer.[5]

413. The Condition Precedent may be Waived.[6]*—The provision in a

[1] Condon *v.* South Side R. Co., 14 Gratt. 302.

[2] Morgan *v.* Birnie, 9 Bing. 672.

[3] Coey *v.* Lehman, 79 Ill. 173 [1875]; Packard *v.* Van Schaick, 58 Ill. 80; Ball *v.* Doud (Oreg.), 37 Pac. Rep. 70; Birney *v.* Giles, 120 Ill. 154.

[4] McNamara *v.* Harrison, 81 Iowa 486 [1890]; *citing* 1 Amer. & Eng. Ency. Law 668; Loup *v.* R. R. Co., 11 Amer. & Eng. Ry. Cas. 589; Holmes *v.* Richie, 56 Cal. 307; McMahon *v.* R. Co., 20 N. Y. 463; R. Co. *v.* McGrann, 33 Pa. St. 535; 29 Amer. & Eng. Ency. Law 929.

[5] O'Reilly *v.* Kerns, 52 Pa. St. 214 [1866]; *citing* Monongahela B'dge Co. *v.* Fenlon, 4 W. & S. 205; Lauman *v.* Young, 7 Casey 306–309; Fox *v.* Hempfield R. 14 Leg. Int. 148; Faunce *v.* Burke, 4 Harris 469–480; Snodgrass *v.* Gavitt, 4 Casey 221–4; Lubrick *v.* Lyter, 3 W. & S. 365; McGehen *v.* Duffield, 5 Barr 597; N. Lebanon R. Co. *v.* McGrann, 7 Casey 530; McCahan *v.* Reamey, 9 Casey 535; Irwin *v.* Shultz, 46 Pa. St. 74 [1863]; Hardie *v.* Belger, 11 Wright 60; Memphis R. Co. *v.* Wilcox, 12 Wright 161; Mason *v.* Bridge, 2 Shipley 468; Mercer *v.* Harris, 4 Neb. 82; School Dist. *v.* Randall, 5 Neb. 408; Dubois *v.* The D. & H. C. Co., 4 Wend. 285; s. c. 12 Wend. 384; s. c. 15 Wend. 89.

[6] Martin *v.* Leggett, 4 E D. Smith (N. Y.) 255; Batterby *v.* Vyse, 2 H. & C. 42; Byrne *v.* Sisters of Ch., 45 N. J. Law 213.

* *See* Sec. 417, *infra*.

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contract with a railroad company for the construction of its road to the satisfaction and acceptance of their engineer, has reference, no doubt, as to its final acceptance, to the chief engineer,[1] but when an architect with the acquiescence of the owner has authorized his assistant to prepare specifications, superintend the work, and issue certificates, and the owner conducted all the business with such assistant and received the final certificate issued by him to the contractor without objection, but only solicited a delay in making the final payment, the owner will be held to have waived the architect's certificate as provided by the contract.[2] *

The payment of progress certificates stating that the work was satisfactory to the engineer is not a waiver of defects discovered before the final certificate is awarded.[3]† The fact that principal contractors have adopted the final estimates of a subordinate engineer, and have paid their subcontractors on such final estimate, does not constitute a waiver of a provision that the amount due to the subcontractors shall be paid only on the certificate of the chief engineer.[4]

A statement by the owner that he is pleased with the work, that he is dissatified with his architect and an arrangement to give the contractor a release of the payment of a loan in payment of the balance due him, do not create a waiver of the condition precedent.[5] On appeal, however, it was held that the owner had waived his right to a final certificate, he having threatened "to throw the whole matter into the hands of his architect" because the contractor would not release a claim which he held against the owner.[6] Payments from time to time without requiring certificates will not amount to a waiver of the right to require a certificate of approval.[7]

It is nevertheless advisable to always insist that the conditions of a contract be carried out literally, if for no other purpose than for the sake of form and to avoid complications of waiver and other conditions not anticipated nor provided for; and if circumstances require a departure from the provisions made, to have it distinctly understood that it is a departure for that occasion only, and shall not establish a precedent to be followed thereafter, nor act as waiver of any rights or privileges of either party under the contract. Whether or not a stipulation has been waived is usually a question of fact for the jury,[8] but a waiver of the conditions of a contract cannot be predicted on conduct of which the other party had no knowledge.[9]

[1] Barker *v.* Troy & R. R. Co., 27 Vt. 766.

[2] McEntyre *v.* Tucker (Com. Pl.), 31 N. Y. Supp. 672; Hartley *v.* Martha (Sup.), 39 N. Y. Supp. 212; *and see* Blethen *v.* Blake, 44 Cal. 117; Barton *v.* Herrman, 11 Abb. Pr. N. S. (N. Y.) 382; Clark *v.* Pope, 70 Ill. 128; Bannister *v.* Patty, 35 Wis. 215.

[3] Hartupee *v.* Pittsburgh, 97 Pa. St. 107 [1881]; *and see* Cooper *v.* Uttoxeter Bur. Bd. 11 L. T. N. S. 565.

[4] McNamara *v.* Harrison, 81 Iowa 486.

[5] Haden *v.* Coleman, 42 N. Y. Superior Ct. 256 [1877].

[6] Haden *v.* Coleman, 73 N.Y. 567, *overruling* Bell *v.* Sun Print. Co., 42 N. Y. Super. Ct. 567.

[7] Brown *v.* Winehill, 3 Wash. 524; Barton *v.* Herrman, *supra; but see* Bannister *v.* Patty, 35 Wis. 215; Flaherty *v.* Miner, 123 N. Y. 382, *contra*.

[8] Keller *v.* Oberrich, 30 N. W. Rep. 524 [1886].

[9] Benson *v.* Shotwell (Cal.), 37 Pac. Rep. 147.

* *See* Secs. 463–5 and 482, *infra*.

† *See* Secs. 463–470 and 482 *infra*.

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To permit a recovery without the production of such a certificate would take from the owner the protection of his engineer, and substitute for his opinion that of a jury, which is not the contract into which the parties have entered.[1] Or in the terms of another case the courts are powerless to disregard the terms of a contract plainly expressed, but it is their duty to enforce them according to the intent of the parties as shown by the language of the contract.[2] "It is a fundamental principle of conditions," says Professor Landell, in his Summary of Contracts, "that the court has no power to modify them or to dispense with their complete performance and fulfillment; for the exercise of such a power would involve the enforcement against a party of a covenant or promise which he had never made himself."[3]

The fact that the contractor has not or did not obtain the engineer's certificate as required by the contract must be pleaded, in an action for work done, or the defense that the contract provided that payment should be made on the certificate of an engineer, and that his decision and estimate should be final and conclusive, is not available.[4]

414. If Payment of Contract Price is Conditional on Procuring Engineer's Certificate, It will Hold.—The contractor cannot compel the payment of the amount agreed for the work unless he procures the kind of evidence required by the contract, or shows that time or accident has prevented him from securing it.[5] The rule applies as well to proceedings in equity as to those in law.[6] When a contractor has agreed to furnish materials and execute work in a specified manner to the entire satisfaction of an engineer or architect and to be paid upon his certificate he is bound by his contract. If he will recover for what he has done, it is not enough for the contractor to say that he has performed the agreements in other respects without also alleging that he has done it to the satisfaction of the arbiters agreed upon by the parties.[7] The fact that the suit is on a *quantum meruit* does not dispense with the production of the engineer's certificate.[8]* In the

[1] Clark *v.* Watson, 18 C. B. (N. S.) 278; Hudson *v.* McCartney, 33 Wis. 331 [1873].

[2] Coey *v.* Lehman, 79 Ill. 178 [1875]; *to the same effect*, Faunce *v.* Burke, 16 Pa. St. 469

[3] *See* Haden *v.* Coleman, 42 N. Y. Super. Ct. 256 [1877].

[4] Everard *v* City of New York (Sup.), 35 N. Y. Supp, 315; Hartley *v.* Murtha (Sup.), 39 N. Y. Supp. 212; Chamberlain *v.* Hibbard (Oreg.), 38 Pac Rep. 437.

[5] United States *v.* Robinson, 9 Peters 319; Loup *v.* Cala. S. R. Co., 63 Cal. 97; Finnegan *v.* L'Engle, 8 Fla. 413; B. & O. Ry. Co. *v.* Polly Woods Co., 14 Gratt. 448 [1858]; Barney *v.* Giles (Ill.), 11 N. E. Rep. 206 [1887]; Jones *v.* Reg., 7 Can. Sup. Ct. 570; Reg. *v.* Starrs, 17 Can. Sup. Ct. 118; Kirtland *v.* Moore, 1 Cent. Rep 466.

[6] Scott *v.* Liverpool, 3 De. G. & J. 334; Michaelis *v.* Wolf, 136 Ill. 68; Barney *v.* Giles, 120 Ill. 154; Downey *v.* O'Donnell, 86 Ill. 49.

[7] Matthews *v.* Rice, 4 Bradw. 90 [1879]; Butler *v.* Tucker, 24 Wend. 449; Worsley *v.* Wood, 6 T. R. 710; D. & H. C. Co. *v.* Dubois, 15 Wend. 89; Morgan *v.* Birnie, 9 Bing. 672; The United States *v.* Robison, 9 Peters 319; Langdell's Summary of Contracts, 1006; Byron *v.* Low (N. Y.), 16 N. E. Rep. 45 [1888]; *see* Atkins *v.* Barnstable, 97 Mass. 428 [1867]; Kirtland *v.* Moore, 1 Cent. Rep. 466; Hanley *v.* Walker (Mich.) 45 N W. Rep. 57 [1890]; *many cases* in 29 Amer. & Eng. Ency. Law 929; *but see* Williams *v.* Chicago, S. F. & C. Ry. Co. (Mo.), 20 S. W. Rep. 631, which held that it was not necessary to call the engineer to establish their case before a jury.

[8] Gillies *v.* Manhattan B. J. Co., 26 N. Y. Supp. 381.

* *See* Sec 412, *supra.*

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frequent case of a contract for buildings or engineering works, in which it is provided that the contractor shall be paid only what the architect or engineer may certify he is entitled to, it is held that there is no claim or right of action at law or in equity until the certificate is given.[1] Monthly estimates or progress certificates are necessary to recover partial payments when the contract provides for them.[2] The motives of a party in requiring a strict compliance with the condition precedent to his liability are immaterial,[3] so long as they are not shown to be unlawful.

The English courts have been very strict in the construction and maintenance of contract rights, and have refused a recovery on a contract under any circumstances without the production of the engineer's certificate as required by the agreement. This rule was laid down in a case where the owner had appointed his father the engineer, and the contractor offered to prove fraud and collusion between the father and son. The evidence was held inadmissible, and although the fraud might be a subject for a cross-action, the court would not permit the contractor to recover until he produced the father's certificate.[4] This is an extreme case and will not be followed to-day. It has been practically overruled by more recent English cases,[5] and by the practice of courts to-day in many state jurisdictions it would be assumed a case of fraud (though there is doubt if a court of law would take jurisdiction in some states, some cases having held it was necessary to go into a court of equity);[6] yet the case shows the disposition of the courts to maintain contractual rights and obligations.

If the contract requires the engineer's certificate or estimate of the work before payment, the contractor must make a demand for such certificate or estimate.[7] It is no excuse for failure to procure such certificate that the contractor feared to apply for it because he believed the architect to be wrongfully prejudiced against him.[8]

If the contractor has agreed to submit differences and disputes to an engineer, it has been held that he could not recover damages for breach of contract unless he has offered to submit such differences.[9] So if materials are to be approved before being used, the contractor should apply to have them

[1] Leake's Digest of Law of Contracts, 955; Wolf *v.* Michaelis, 27 Ill. App. 336 [1888]; Godefroi and Short on Railways 94; Scott *v.* Liverpool, 3 D. & J. 334; s. c., 1 Giff. 216; Sharpe *v.* San Paulo Ry. Co., L. R. 8 Ch. App 597; Wadsworth *v* Smith, L. R. 6 Q. B. 332; Milner *v* Field, 5 Exch. 829; Glenn *v.* Leith, 1 Com. Law Rep. 569; Dobson *v* Hudson, 1 C. B. (N. S.) 659; Parkes *v.* Gt. Western Ry. Co., 3 Ry Cas. 17; Phelan *v.* Albany R. Co. 1 Lans. (N. Y.) 258.

[2] Martin *v.* Leggett, 4 E. D. Smith (N. Y.) 255; Braun *v.* Winans, 37 Ill. App. 248.

[3] Benson *v.* Shotwell (Cal.), 37 Pac. Rep. 147.

[4] Milner *v.* Field, 5 Exch. R. 829 [1850].

[5] Butterby *v.* Vyse, 2 H. & C. 42.

[6] Godefroi and Short on Railways 94; Wood *v.* Chicago, S. F. & C. R. Co., 39 Fed. Rep. 52.

[7] Byron *v.* Low (N. Y.), 16 N. E. Rep. 45 [1888]; Newton *v.* Highland Impr. Co. (Minn.), 64 N.W. Rep. 1146.

[8] Gilmore *v.* Courtney (Ill. Sup.), 41 N. E. Rep. 1023. *And see* Rusling *v.* Union Pipe Co. (Sup.), 39 N. Y. Supp. 216

[9] United States *v.* Ellis (Ariz.), 14 Pac. Rep 300 [1887]; Snodgrass *v.* Gavit, 28 Pa. 221 [1857]; Ball *v.* Daud (Oreg.), 37 Pac. Rep. 70.

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approved or he uses them at his peril.[1] Therefore when a contract provided that the architect should decide whether alterations asked for by the owner were within its terms, and the contractor, knowing that the owner understood the contract terms to so provide, made alterations without securing a decision from the architect, it was held that he could not recover any extra compensation for such alterations.[2] *

415. Language that Makes a Condition Precedent.—The words "condition precedent" themselves are not necessary to create a condition precedent and to postpone the company's indebtedness; yet the intention of the parties to make the engineer's estimate and decision an absolute prerequisite to the contractor's right to recovery must be couched in such language as to leave no doubt, to make sure that the court shall so construe it. If the condition be annexed to the promise to pay a debt, it will commonly, upon the true construction of the contract in which it is contained, extend to the debt itself.[3] This is usually the construction adopted by the courts. Therefore when the agreement was "to pay only what the architect or engineer should certify the contractor was entitled to,"[4] to pay "*when* and *not before* the architect shall have certified";[5] or the covenant was "to pay according to the conditions of the contract," which provided that the amount, quality, classification, and value of the work should be determined by the engineer, whose determination should be binding, final, and conclusive on the parties;[6] or the owner agreed "to pay upon the certificate and estimate of the architect," and the builder agreed that he would demand no pay except so much as the architect should certify was due to him;[7] or under a stipulation in the contract that "no action at law or suit in equity should be brought or maintained until the matters in dispute had been decided by arbitrators, and then only for such sum as the arbitrators should award";[8] or a covenant "to pay when the contractor should receive from the architect his certificate";[9] or even when the promise is "to pay upon the architect's acceptance and on the presentation or production of his certificate";[10] or "to pay for extra work at or on the estimate of an architect" named;[11] or "that the value of all extras shall be ascertained by arbitration";[12] or that the price shall be payable "after a certificate of approval by the engineer shall have been issued";[13] or "to pay on acceptance and approval by the engineer and owner"[14]—in each

[1] Higgins *v.* Lee, 16 Ill. 495 [1855].
[2] Evans *v.* McConnell (Iowa), 68 N. W. Rep. 790; Hughes *v.* Brabinder (Wash.), 38 Pac. Rep. 209.
[3] Langdell's Summary of Contracts 1005.
[4] Leake's Digest of Contracts 953–955.
[5] Milner *v.* Field, 5 Exch. 829; Glen *v.* Leith, 1 Com. Law Rep. 569; Scott *v.* Liverpool (Eng.), 1 Giff. 216.
[6] Taylor *v.* Renn, 79 Ill. 181.
[7] Scott *v.* Avery, 5 H. L. Cas. 811 [1855].
[8] Smith *v.* Briggs, 3 Denio 73 [1846].
[9] Barney *v.* Giles (Ill.), 11 N. E. Rep. 206 [1887]; Clark *v.* Watson, 18 C. B. (N. S.) 278 [1865].
[10] Baasen *v.* Baehr, 7 Wis. 517; Edwards *v.* Louisa Co. (Ia.), 56 N. W. Rep. 656.
[11] Ball *v.* Doud (Oreg.), 37 Pac. Rep. 70.
[12] N. Y. & N. H. A. Sprinkler Co. *v.* Andrews, 23 N. Y. Supp. 998.
[13] Hanley *v.* Walker (Mich.), 45 N. W. Rep. 57 [1890].

* *See* Secs. 437, 595, *infra.*

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case the promise to pay was held subject to a condition precedent, and to require the production of the architect's or engineer's certificate, decision, estimate, or award before the contractor could bring any suit to recover under the contract.[1]

When materials are purchased subject to inspection by the company's engineer, they need not be accepted nor paid for if rejected by the engineer, and it is not necessary that the contract should in express terms make the engineer's decision final and conclusive.[2]

In all these cases it should be noticed that the condition is attached to the promise, as it should be; and if the condition is put in a separate clause, the promise to pay must refer back to or incorporate the condition in order to have it attach and become a condition precedent to payment.[3] If this is done, it is not necessary (though it is advisable) that there shall be a provision for arbitration or an express waiver of the right to sue at law, for the estimate of the engineer is a condition that is an essential prerequisite to an action for the work done.[4]

Full effect has usually been given to the stipulation if it provides that the engineer shall determine the sum due, or amount to be paid, or value, and his determination is made final and conclusive, and without appeal. Such are provisions for the engineer to determine the quantities, quality, classification and value of work done and to be paid for. They have been held binding upon the parties,[5] and to be conditions precedent to recovery, for the amount of a debt must be known before a recovery therefor can be had.[6]

In Pennsylvania the courts have been more liberal in enforcing similar

[1] *Other cases in point:* Cooke *v.* Cooke, L. R. 4 Eq. 77; Elliott *v.* Royal Exch. Ass. Co., L. R. 2 Ex. 237; Dawson *v.* Fitzgerald, L. R. 1 Ex. Div. 257; Edwards *v.* A. Mut. Ins. Soc., L. R. 1 Q. B. D. 563; Scott *v.* Corpn. of L., 1 Giff. 216; Grafton *v.* E. C. Ry. Co., 8 Exch. 699; Kane *v.* Wilson Stone Co., 39 Ohio St. 1; Sweeny *v.* United States, 109 U. S. 618; Packard *v.* Van Schoick, 58 Ill. 79; Parsons *v.* Sexton, 4 C. B. 899; Moffatt *v.* Dickson, 13 C. B. 543.

[2] Chapman *v.* Kansas City, etc., R. Co. (Mo.), 21 S. W. Rep. 858. *See also* Park Fire Clay Co. *v.* Ott (Pa.), 30 Atl. Rep. 1040; Higgins *v.* Lee, 16 Ill. 495

[3] Flaherty *v.* Miner, 123 New York 382 [1890].

[4] Reynolds *v* Caldwell, 51 Pa. St. 298 [1865].

[5] Herrick *v.* Belknap, etc., 27 Vt. 673 [1854]; Brown *v.* Decker (Pa.), 21 Atl. Rep. 903 [1891].

[6] Williams *v.* Chicago, etc, R. Co. (Mo.), 20 S. W. Rep. 631; Lewis *v.* Chicago, etc., R. Co., 49 Fed. Rep. 708, 714; Fulton *v.* Peters and Fulton *v.* Metzgar, 137 Pa St. 613 [1890]; *but see* Cole Mfg. Co. *v.* Collier, 91 Tenn. 525. A condition inserted in a contract for work that in case of difference or dispute about the work performed, a reference to an engineer or expert shall be made before payment or a suit can be brought, will be upheld as a "condition precedent" to recovery by suit,—Monongehela Nav. Co. *v.* Fenlon, 4 Watts & S. (Pa.) 205; Howard *v.* Alleghany Valley R. Co., 69 Pa. St. 489; Hartupee *v.* Pittsburgh, 97 Pa. St. 107; Railroad Co. *v.* McGrann, 33 Pa. St. 530; Faunce *v.* Burke, 16 Pa. St. 469; Condon *v.* Southside R. Co., 14 Gratt. (Va.) 302; Butler *v.* Tucker, 24 Wend. (N. Y.) 447; Smith *v.* Brady, 17 N. Y. 173; Smith *v.* Briggs, 3 Den. (N. Y.) 73; Herrick *v.* Belknap, 27 Vt. 673; Low *v.* Fisher, 27 Fed. Rep. 542; Haden *v.* Coleman, 42 N. Y. Super. Ct. 256 [1877]; Wolf *v.* Michaelis 27 Ill. App. 336 [1888]; Adams *v.* Mayor, 4 Duer (N. Y.) 295 [1855]; United States *v.* Robison, 9 Pet. 319; 2 Story Eq. Jur., § 1457*a*; Leake's Digest of Contracts 953–5, *and cases cited.*

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conditions in contracts than in other states, and they have generally held the parties strictly to them.[1]

It is sometimes held that the satisfaction of the superintendent and the execution of his certificate are a condition precedent to contractor's right of action; and he cannot recover until the occurrence of such condition precedent, even though the superintendent withheld his satisfaction and certificate obstinately, or from prejudice, or in bad faith.[2]

416. A Condition Precedent Must be Expressed; It will Not be Implied. —To have the condition precedent attach to any obligation it must be clearly expressed; it cannot be connected with agreements or promises by implication. Therefore where by the contract the balance of the contract price is made payable on the completion of the works, and when the architect shall have given his final certificate of approval, and it is further agreed that the decision of the architect shall be final and without appeal with respect to the quality and state of the works executed, and to the time within which they shall have been executed, it was held that the decision and certificate of the architect was not a condition precedent to the company right to retain a certain amount per day for delay in completion, as liquidating damages pursuant to the contract, even though the delay was caused by additions and alterations ordered by the architect, according to contract.[3]

A provision in reference to manner of performance, by which the contractor covenanted "to furnish and perform in a complete manner, and in accordance with the specifications, * * * and to the entire satisfaction of H. & S., superintendents, * * * the entire," etc. The specifications provided that the contractor should be held strictly to execute the work, use the materials described, submit, as to the character of material and work, to the judgment of the superintendents, and replace any material not, in their judgment, in accordance with the specifications, was held *not* to require the contractor to prove acceptance by the superintendents of the work done and materials furnished as a condition precedent to a recovery on the contract.[4]

The production of the engineer's certificate has been held not a condi-

[1] 1 Amer. & Eng. Ency. Law 671; O'Reilly *v.* Kerns, 52 Pa. St. 214; Reynolds *v.* Caldwell, 51 Pa. St. 298; Snodgrass *v.* Gavit, 28 Pa. St. 221; Faunce *v.* Burke, 16 Pa. St. 469; Monongahela Nav. Co. *v.* Fenlon, 4 Watts & S. (Pa.) 205; Fox *v.* The Railroad, 3 Wall. Jr. (U. S.) 243.

[2] Hudson and another *v.* McCartney, 33 Wis. 331 [1873]; Milner *v.* Field, 5 Exch. 829; Clarke *v.* Watson, 18 C. B. (N. S.) 278; Batterbury *v.* Vyse, 2 Hurls & Colt 42; Morgan *v.* Birnie, 9 Bing. 672; Grafton *v.* Eastern Counties R. R. Co., 8 Exch. 699 Langdell's Cases on Contracts 589, 598, 850, 506, 550; Werslen *v.* Wood, 6 Term R. 710; Glen *v.* Leith, 22 Eng. L. & E. 489; Butler *v.* Tucker, 24 Wend. 447; Canal *v.* Dubois, 15 Wend. 80, 90, 92; Smith *v.* Brady, 17 N. Y. 173, 175-6; McCarren *v.* McNulty, 7 Gray 139; United States *v.* Robenson, 9 Pet. 319; McAvoy *v.* Long, 13 Ill. 147, 1 Hilliard on Con. 127, 128; *and see* Thomas *v.* Fleury, 26 N. Y. 26; Kerns *v.* O'Reilly, Leg. Int. [Aug. 31, 1866].

[3] Jones *v.* St. John's College, L. R. 6 Q. B. 115 [1871]; *and see* Memphis R. Co. *v.* Wilcox, 48 Pa. St. 161.

[4] Gubbins *v.* Lautenschlager (C. C.) 74 Fed. Rep. 160; Nevin *v.* Craig (Minn.), 65 N. W. Rep. 86.

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tion precedent to recovery on a collateral contract or guarantee by the owner to pay a third party a sum advanced by him to the contractor "on the completion of the houses in accordance with the contract," although the contract referred to does require the certificate as a condition precedent to the contractor's recovery.[1]

417. Right to Require Engineer's Certificate may be Waived.*— Although it is well settled that when the architect's or engineer's certificate or award is made a condition precedent to payment by the company, the company is not obliged to accept or pay for work done until the condition is performed,[2] yet it may waive the privilege of requiring it,[3] and the fact that the agreement is under seal does not prevent its being waived by parol, or even by a party's acts and behavior.[4] † Such a clause is for the benefit of the owner or company, and may be waived at his or its option. Other proofs of the required fact may be accepted.[5] If one possessed of a right conferred either by law or contract, knowing his rights and all the attendant facts, does not forbear to do something inconsistent with the existence of the right, or of his intention to rely upon it, he is said to have waived it. No man is compelled to stand on a right which the law or his contract gives him. Parties have the same right to add to, or vary a contract, after it is made that they had to make it originally. The burden is on the party asserting a waiver, or any modification or alteration of a contract, to prove it. It is not necessary to show an express agreement for the waiver or modification, but, like any other fact, it may be proved by circumstances, such as the acts or language of the parties, which, of course, includes their correspondence, and any other facts which throw light on the question.[6] The waiver may be expressed or proved by acts and conduct of the party entitled to demand it, and less evidence of waiver will be required when it clearly appears that the contract has been more fully performed than would be otherwise.[7]

As to what acts and conduct will amount to a waiver may be illustrated by a few cases. The mere taking possession by the owner after the contractor has quit does not constitute a waiver of the condition requiring the engineer's certificate before payment.[8] An acceptance of the building so far as completed by the owner and architect, and an unconditional promise to pay the balance when house is completed, by the owner, in consideration

[1] Lewis *v.* Hoare, 44 L. T. 66 [1881].

[2] Phelan *v.* Mayor, 56 N. Y. Sup. Ct. 523 [1889].

[3] Clarke *v.* Pope, 70 Ill. 128 [1873].

[4] Randel *v.* Chesapeake & Del. Canal, 1 Harrington (Del.) 233 [1833]; Byrne *v.* Sisters of Charity, 45 N. J. Law 213 [1883].

[5] Blethen *v.* Blake, 44 Cal. 117 [1872]; Estell *v.* St. Louis, etc., R Co., 56 Mo. 282 [1874].

[6] Texas, etc., Ry. Co. *v.* Rust (Ark.), 19 Fed. Rep. 239.

[7] Byrne *v.* Sisters of Charity, 45 N. J. Law 213 [1883], *and cases cited; see* Sinclair *v.* Tallmadge, 35 Barb. 602 [1861].

[8] Hanley *v.* Walker (Mich.), 45 N. W. Rep. 57 [1890]; Smith *v.* Brady, 17 N. Y. 173 [1858]; nor is a taking possession before completion, Bradley Currier Co. *v.* Bernz (N. J. Ch.), 35 Atl. Rep. 882.

* *See* Secs. 701, 721, and 726, *infra.* † *See* Secs. 122–131, *supra*, and 560–568, *infra.*

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of the contractor's permitting him to occupy it by a tenant, has been held a waiver of the architect's final certificate on the part of the owner.[1] If the contractor be prevented from completing his contract, then the right to demand a certificate from the engineer that the work has been completed is waived.[2] *

When more than one-half of the contract price of a job has been paid without requiring the production of the architect's certificates, as stipulated for in the contract, and the final certificate for the residue of the work had not been demanded, it was held that the right to demand the production of such certificates had been waived.[3] An acceptance of a building as under a completed contract was held such a waiver as entitled the contractor to recover, though no certificate had been given, and even though the architect was not satisfied.[4] Where installments had been paid without a demand of certificates, and after the work was finished the owner paid without objection three-quarters of the contract price, and it was proved that when the builder made application for the payment of the balance, the owner asks "Does that settle up everything?" to which the builder replied, "No; there is that $1000," referring to a loan he had made to the owner in cash; and the owner then said, "Oh, if you are going to ask for that $1000 I will throw the whole thing into my architect's hands," it was held sufficient evidence of a waiver of the certificate to submit the question to a jury.[5] Payment of some of the installments for work without requiring the production of the architect's certificates, of itself has been held not to operate as a waiver of the final certificate upon the completion of the work.[6] Partial payments on certificates signed by the architect's assistant are not a waiver of the right under the contract to a final certificate signed by the architect himself.[7]

If the company will make use of the protection of the condition it must be pleaded, or the company may be held to have waived it. If the case be allowed to go to trial and before the jury, on the merits of the controversy and on the issues presented, without insisting on the decision of the architect, and without raising any objection to plaintiff's testimony, the

[1] Duell *v.* McCraw, 33 N. Y. Supp. 528; *see also* Coon *v.* Citizens' Water Co. (Pa.), 23 Atl. Rep. 505.

[2] Justice *v.* Elwert (Oreg.), 43 Pac. Rep. 649; *and see* Velsor *v.* Eaton (Sup.), 14 N. Y. Supp. 467.

[3] Bannister *v.* Patty's Exec'rs, 35 Wis. 217 [1874]; Vermont St. Ch. *v.* Brose, 104 Ill. 206; Goldsmith *v.* Hand, 26 Ohio St. 101.

[4] Smith *v.* Alker, 102 N. Y. 87 [1886]; *citing* 1 Russell on Arb. 115; Morse on Arb. 99; Evans *v.* Ives, 15 Phila. (Pa.), 633; Dickinson *v.* Railroad, 7 W. Va. 390; *see also* Katz *v.* Bedford (Cal.), 19 Pac. Rep. 523 [1889]; Mitchell *v.* Wiscotta Land Co., 3 Iowa 209.

[5] Haden *v.* Coleman, 73 N. Y. 567 [1878].

[6] Barton *v.* Herman, 11 Abb. Pr. (N. S.) 378 [1872]; Bradley Currier Co. *v.* Beinz (N. J. Ch.), 35 Atl. Rep. 832; *and see* Flaherty *v.* Miner, 123 N. Y. 382; Texas, etc., R. Co. *v.* Rust, 19 Fed Rep. 239; Haden *v.* Coleman, 42 N. Y. Super. Ct. 256 [1877]; Brown *v.* Wine Hill (Wash.), 28 Pac. Rep. 1037; *and see* Hattin *v.* Chase, 88 Me. 237.

[7] McEntyre *v.* Tucker (Com. Pl.), 25 N. Y. Supp. 95.

* *See* Sec. 397, *supra*.

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right to an adjustment of the differences by the architect will have been waived.[1] It is not always necessary to allege the performance of the condition precedent on the part of the contractor.[2]

Acceptance of monthly payments by the contractor, according to engineer's estimate, and giving a receipt in full, precludes the contractor from obtaining further compensation even though he did dispute its correctness at the time it was rendered.[3] An action by the contractor on an award of an engineer will affirm its validity, and he cannot thereafter make a defense that the exact terms of a stipulation were not complied with.[4]

[1] Summerlin *v.* Thompson, 31 Fla. 369.
[2] Wilcox *v.* Stephenson (Fla.), 11 So. Rep. 659.
[3] Case *v.* United States, 11 Ct. of Cl. 273; *and see* Green *v.* Jackson, 66 Ga. 250; Hennegan *v.* United States, 17 Ct. of Cl. 273.
[4] *Semble.* Anderson *v.* Miller (Ala.), 19 So. Rep. 802.

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CHAPTER XIV.

RECOVERY BY CONTRACTOR WITHOUT PRODUCING ENGINEER'S CERTIFICATE.

CONDITION PRECEDENT EXCUSED.

418. Provision that the Engineer's Decision, Determination, or Estimates shall Not be Questioned or Impeached upon Any Ground Whatsoever.

Clause: "It is hereby further agreed and understood that the directions, decisions, admeasurements, valuations, certificates, orders, and awards of the engineer which may be made from time to time shall not be set aside, nor be attempted to be set aside, nor be objected to on account of any technical or legal defects or errors therein, or in the specifications, or in the contract founded thereon, or on account of any informality, omission, delay, or error of proceeding, in or about the same, or any of them, or in relation thereto, or on any other ground, or for any other reason, or for any pretense, suggestion, charges, or insinuation of fraud or collusion, or confederacy, or otherwise howsoever; and it shall not be competent for the contractors or the company to except to any hearing or determination before or of the engineer, nor of any certificate, order, or award had, proposed, made, or executed by the engineer, on the ground of any want of jurisdiction, or excess of authority, or irregularity of proceeding, or otherwise howsoever; but any and all matters made the subject of any such hearing or determination, or included in any certificate, order, or award, and whether of retrospective or prospective operation or effect, shall be deemed to have been properly submitted to the engineer, and to be taken to have been properly adjudicated upon."

419. The Contract must Not Be an Instrument of Fraud.—The adoption of such a clause as that given is unusual, it having been taken from an early English contract. The reasons for inserting such a stipulation will be found in the following sections, but the propriety of inserting it may be doubted. If the clause is intended to waive any and all kinds of injustice, such as frauds, conspiracies, and impositions, it may well be doubted if it would be worth the writing. The courts are not disposed to allow a man to be made a fool, or to sacrifice or forfeit certain inalienable rights which his citizenship and the constitution of the state and of the United States guarantee him. Such an express waiver is in itself evidence of imposition and fraud which a court could not well overlook. However, as late as 1892 an English court held that such a clause as that given was not contrary to public policy,

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in the absence of fraud on the part of the parties to the contract, and that the parties could agree not to raise any question as to the arbitrator.[1] An American court has held a stipulation in a contract that false representations or fraudulent practices employed in procuring it shall not affect its validity is itself invalid.[2]

420. Under what Circumstances may Contractor Recover without Procuring Engineer's Certificate.—It being settled that such a condition precedent will be upheld by the courts, and is obligatory upon the parties according to the terms of their contract,[3]* it remains to inquire under what circumstances, if ever, the contractor can recover payment for his work without first producing the engineer's certificate, or showing performance to his satisfaction. Of course the right to require a certificate as a condition precedent may be waived by the owner,† but there are certain circumstances which, if alleged in the contractor's claim and fully set forth in his declaration, will entitle him to come into court and to bring suit for the recovery for his work.

421. Company or Owner must Furnish Competent and Honest Engineers.—Every contract should be read as a whole, and the intentions expressed and the obligations assumed by the parties should be gathered from all the parts taken together.[4] In construing a contract, a material clause cannot be disregarded.[5] From every engineering or architectural contract it may be clearly understood that when certain important questions and matters are left to the determination or decision of the engineer or architect, they are left to his best judgment, skill, and integrity, and it cannot be denied that both parties contracted with reference to an *honest*, if not an *impartial*, determination of the questions submitted.[6] When this is the evident intention of the parties it should be and is considered with the fact that the engineer's decision, determination, or certificate is made a condition precedent to recovery by the contractor. It cannot be contended that the parties ever intended to be bound by the decision of a dishonest, fraudulent, or even ignorant engineer,[6] or that they assumed obligations and undertook tasks which might be rendered nugatory by the arbitrary and unreasonable refusal of the engineer to act, or by insuperable difficulties that might intervene. Courts have therefore given these conditions and stipulations a liberal construction, and have held that an agreement on the part of the company to pay for work which their engineer should certify as having been done was a covenant by the company that their engineer should make the certificates;[7]

[1] Tullis *v.* Jackson, 3 Ch. 441 [1892]

[2] Hofflin *v.* Moss (C. C. A.), 67 Fed. Rep. 440.

[3] McMahon *v.* N. Y. & Erie R Co., 20 N. Y. 463 [1859]; Sweeney *v.* United States, 109 U. S. 618 [1883]; Martinsburg & P. R. Co. *v.* March, 114 U. S. 549; *many cases collected in* 29 Amer. & Eng. Ency. Law 929.

[4] Starkey *v.* De Graff, 22 Minn. 431; Wallis Iron Works *v.* Monmouth Park Ass'n (N. J.), 26 Atl. Rep. 140.

[5] World's Fair Hotel *v.* Courtright, 57 Ill. App. 281.

[6] Atlanta & R. Ry. Co. *v.* Manghan, 49 Ga. 266 [1873].

[7] Randel *v.* Ches. & Del. C., 1 Harrington (Del.), 233 [1833]; *accord*, B. & O. Ry.

* *See cases cited*, Sec. 414, *supra*.

† *See* Secs. 413 and 417, *supra*.

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that an agreement that some competent engineer, to be selected by the company, should inspect, estimate, etc., the work, which estimates, etc., should be final and conclusive, was a covenant by the company to select an engineer, and that he should inspect, estimate, etc., the work;[1] that whenever it was mutually agreed between the contractor and company that such arbitrary and extended powers should be given to the engineer of the company, such as inspecting, superintendence, and the determination of quantity, quality, and classification of work and materials, there was an implied undertaking or agreement on the part of the company that such engineer should be competent, honest, and reasonably careful;[2] that he should be free to exercise a sound, disinterested, and impartial judgment, and that the company[3] should see to it that the engineers employed by it performed the service expected of them at a proper time and in a proper manner;[4] that if false quantities and classifications are returned by an engineer whom the company has clothed with authority to make the classifications and calculate the quantities, and either the contractor or the company must suffer for his errors, the loss should fall upon the company who has placed it in the power of the engineer to make the mistake.[5] "There is," says the court in another case, "more reason for holding a company responsible for the mistakes and bad faith of its own officers [engineer], than there is for making the contractor suffer for the fraud or error of the engineer, over whom he has no control or direction, and who is an entire stranger to the contract."[6]

In sympathy with these views and circumstances the courts undertake to watch with zealous care the exercise of the engineer's approval, and consider it their duty to scrutinize his estimates with great care, and require on his part the utmost diligence and good faith.[7] Under such reasonable constructions of the stipulations of a contract the cases are numerous in which the full performance of conditions precedent has been dispensed with. If the company has not performed its part of the agreement, or if the implied undertaking on its part to furnish honest and skillful engineers has not

Co. *v.* Polly Woods Co., 14 Gratt. 448 [1858]; Kistler *v.* Ind. & St. L. R. Co. 12 Amer. & Eng. Ry. Cas. 314.

[1] Randel *v.* Ches. & Del. C., 1 Harrington (Del.) 233 [1833]; *accord* B. & O. Ry. Co. *v* Polly Woods Co. (Va.), 14 Gratt 448 [1758]; Guidet *v* Mayor, 36 N. Y. Supr. Ct. 557 [1873]; Rusking *v.* Union Pipe & C Co (Sup.), 39 N. Y Supp 216; *accord* McMahon *v.* Erie R. Co., 20 N. Y. 468; Combe *v.* Greene, 2 Dowl. (N. S.) 1023; St. Louis & P. R. Co. *v* Kerr (Ill.), 38 N. E. Rep. 638; *but see* Green *v.* State, 8 Ohio 310.

[2] Price *v.* C. S. F. & C. Ry. Co., 38 Fed. Rep. 307 [1889]; Louisville E. & St. L. Ry. Co. *v.* Donnegan (Ind.), 12 N. E. Rep. 158 [1887]; Smith *v.* B. C. & M. Ry., 36 N. H. 459 [1858]; *see also* Merril *v.* Ithaca & Oswego R. Co., 16 Wend. 586; *and see* Pauly Co. *v.* Hemphill Co. (C. C. A.), 62 Fed. Rep. 698.

[3] Mansfield, etc., Ry. Co. *v.* Veeder, 17 Ohio 385.

[4] Herrick *v.* Belknap, 27 Vt. 673 [1854]; Louisville, E. & St. L. Ry. Co. *v.* Donnegan (Ind.). 12 N. E. Rep. 158 [1887]; *accord*, Chism *v.* Schipper, 51 N. J. Law 1 [1888].

[5] Price *v.* Chicago, S. F. & C. Ry. Co., 38 Fed. Rep. 307 [1889].

[6] Reynolds *v.* Caldwell, 51 Pa. St. 308; *and see* Lynn *v.* B. & O. R. Co., 60 Md. 404.

[7] Wood *v.* C. S. F. & C. R. Co., 39 Fed. Rep. 52; Pierce on Railroads, 382.

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been performed, or if the conditions under which both parties have contracted do not exist, then the performance of the condition precedent may be excused, and the contractor be permitted to recover without furnishing the required certificate.[1]

422. Circumstances which may Excuse the Contractor from Producing Engineer's Certificate.—The reasons usually assigned for relieving a contractor from producing the engineer's or architect's certificate are those enumerated below, which are arranged in the order of frequency in which the cases occur in the books. The same order will be followed in discussing them in this work. They are: (1) Fraud, collusion, bad faith, or gross error amounting to bad faith;[2] (2) impossibility of performance rendered by time or accident or measures beyond control;[3] (3) hinderance or prevention by the company; (4) secret interests of, or inducements to, the engineer; (5) refusal to act on part of the engineer.[4] Each and all of these reasons have been declared sufficient to excuse the contractor from performance of the condition precedent to his recovery.

423. Decision is Not Final and No Certificate is Required if there Has Been Fraud and Collusion.—Fraud and collusion between the company and its engineer or an owner and his architect will relieve the contractor from producing the certificate, or from showing that it was done to their satisfaction, in all cases.[5]

424. Fraud Without Connivance or Collusion of Owner or Company.—There has been some doubt expressed, in the cases, whether fraud of the engineer alone without procurement, collusion, or connivance of the company or owner would be sufficient excuse for the nonperformance of the condition and to allow recovery by the contractor by an action in a court of law, and contrary decisions have been rendered;[6] but it is well settled that a court of equity will take jurisdiction in case of *fraud* of the engineer *alone*, and will give relief to the contractor.[7]

425. Courts of Equity Have Jurisdiction where Fraud Alone Is Alleged, and in Some States Courts of Law Have Jurisdiction.—In states where courts of law and courts of equity exist independently it may be doubted if fraud alone would entitle the contractor to recover in a court of law. It is believed not generally; not if the final estimate and certificate

[1] Chism *v.* Schipper, 51 N. J. Law 1 [1888]; B. & O. Ry. Co. *v.* Polly Woods Co., 14 Gratt. 448 [1858]; Godefroi and Short on Ry Cas. 94.

[2] *See* Hanley *v.* Walker (Mich.), 45 N. W. Rep. 57 [1890].

[3] *See* Wolf *v.* Howes, 20 N.Y. 197 [1859]; Jones *v.* Judd, 4 Comstock (N. Y.) 412 [1850].

[4] *See* Phelan *v.* Mayor, 56 N. Y. Supr. Ct. 523 [1889].

[5] Kidwell *v.* B. & O. Ry. Co., 11 Gratt. 676; Clark *v.* Watson, 18 C. B. (N. S.) 278; Downey *v.* O'Donnell, 92 Ill. 559; *cases in* 29 Amer. & Eng. Ency. Law 930 and 935.

[6] Leake's Digest of the Law of Contracts, p. 640; Barker *v.* Belknap, 27 Vt. 700 [1855]; *but see contra*, Bannister *v.* Patty's Exc'rs, 35 Wis. 215 [1874].

[7] Scott *v.* Corporation of Liverpool, 3 D. & J. 334; *and see* Price *v.* Chicago, etc., Ry. Co., 38 Fed. Rep. 308 [1889]; *cases in* 29 Amer. & Eng. Ency. Law 935.

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be considered an award.[1] The suit should be in equity by a bill in order to obtain relief on ground of fraud and corruption alone.[2]

It has been held that an engineer's estimate was not strictly an award;* that the analogy was not complete because the engineer was not an indifferent and disinterested person, but an officer and agent of the company, and that a company could not take advantage of its agent's wrong, though it did not participate in its perpetration. In case of award the cause of action is supposed to exist already, which is referred to the decision of arbitrators instead of a court, and the decision is like a judgment; while in the case of a certificate or final estimate the estimate itself is a part of the cause of action, the performance or a sufficient excuse for the nonperformance of which must be proved by the contractors to maintain the action. Furthermore, the performance of the condition precedent devolves upon the company or its agent, not on the contractor; it is only necessary that he create the obligation. If the company's engineer has made a fraudulent certificate or final estimate it is not a good performance, and is therefore legally insufficient. The question of the engineer's fraud should be left to the jury for its determination.[3] "The complaint is not that something has been done and done wrongfully, but that there has been an improper refusal to do that which ought to have been done," said a judge in answer to an averment that the action could not be brought in a court of law.[4]

426. Difficulties Met in an Action at Law.—The question as to whether an action should be allowed in a court of law is taken up and discussed at great length in a New Jersey case in a court of law[5] by the chief justice, associate justice (dissenting), and the attorneys. The action was on the contract, and, after a general review of pretty nearly all the decisions for and against a recovery at law, judgment was given to the contractor. The difficulties presented were numerous, and the case seems to have been decided more upon the principles of justice and equity than those of common-law pleading and practice. The element of agency was not brought out, but the engineer was regarded as an arbiter between the parties.

When fraud alone is charged, and collusion of the company is not alleged, one serious difficulty presents itself in pleading The contractor then seeks to recover against the company for the fraud of the engineer without offering to show the company's participation; and the difficulty is, how can he be allowed to recover against one person [company] and charge

[1] B. & O. Ry. Co. *v* Polly Woods Co. (Va.), 14 Gratt. 459.

[2] Wood *v* Chicago, S. F. & C. R. Co., 39 Fed. Rep. 52; Alton, etc., R. Co. *v.* Northcott, 15 Ill. 49; Herrick *v.* Vt. Cent. R. Co., 27 Vt. 673; B. & O. R. Co. *v.* Polly Woods Co., 14 Gratt. 459; *In re* Wansbeck Ry. Co., L. R. 1 C. P. 269; Waring *v.* Manchester Ry. Co., 7 Hare 482; Nixon *v* Taff Vale R. Co., 7 Hare 136; M'Intosh *v.* Midland Cos. Ry. Co., 14 M. & W. 548.

[3] B. & O. Ry. Co. *v.* Polly Woods Co., 14 Gratt. 459; Anderson *v.* Imhoff (Neb.), 51 N. W. Rep. 854 [1892].

[4] Batterby *v.* Vyse, 2 H. & C. 42.

[5] Chism *v* Schipper, 51 N. J. Law 1 [1888].

* *See* Secs. 348, 408, *supra*, 485, 521 and 525, *infra*.

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the fraud of another person [the engineer], who is not a party to the action, unless the engineer is regarded as the company's agent and servant, and the company responsible for his acts.

Either collusion must be charged or the engineer must be regarded as the agent of the company.[1] Many actions are maintained at law without alleging and proving collusion of the company upon the ground of agency; the fraudulent acts of the engineer being charged to the company, the courts holding that the relations between the parties imposes upon the company an implied contract that the engineer will do his duty and act fairly.[2] *

The New York courts have declared that a contractor might recover upon giving proof of performance of the work and proving bad faith and an unreasonable refusal on the part of the engineer to give his certificate, as well upon an action of contract as upon a *quantum meruit*. It seems to have been put upon the ground of justice, and the judge declared that "to defeat a recovery in such a case, because of the nonproduction of the architect's certificate would be manifestly unjust to the contractor and a reproach to the law."[3] The fact that in New York the "code practice and pleading" prevails may account for the decision, for it is not always followed in other jurisdictions.[4]

Another argument against recovery at law without the certificate stipulated for, is that the contractor has other remedies. He can, by bill in equity, compel the engineer to deliver the certificate.[5] Mandamus will lie to compel a surveyor, appointed to superintend work on a ditch under the Indiana Drainage Act, to issue certificates for work done by the contractor,[6] but not until he has completed his contract according to specifications and within the time limit,[7] or he may sue the engineer for damages caused by his fraud.[8]

It must be answered on behalf of the contractor that both these remedies are impracticable. First, because a court of equity requires the most convincing proofs of corruption and fraud to decree a specific performance of an act requiring the exercise of the judgment of the engineer, which, as every contractor knows, are almost impossible to obtain; and secondly, that though an action against the engineer or architect might give him a judgment for damages, that is not what the contractor seeks; for judgments

[1] Byrne *v.* Sisters of St. E., 16 Vroom. 213.

[2] Batterby *v.* Vyse, 2 H. & C. 42; Anderson *v.* Imhoff (Neb.), 51 N. W. Rep. 854 [1892].

[3] Thomas *v.* Flurry, 26 New York 26.

[4] Byron *v.* Low (N. Y.), 16 N. E. Rep. 45 [1888].

[5] Sharpe *v.* San P. Ry. Co., 8 Ch. App. 606; *and see* Wren *v.* Indianapolis, 96 Ill. 206; *and see also* Indianapolis *v.* Patterson, 33 Ind. 157.

[6] State *v.* Bever (Ind.), 41 N. E. Rep. 802.

[7] State *v.* Bever (Ind.), *supra*. Mandamus lies to compel a city engineer to furnish lines and levels in accordance with a contract entered into with with relator by the city, State *v.* Bell (La.), 21 So. Rep. 724.

[8] Randel *v.* Trimen, 18 Common Bench, 786 [1856].

* *See* Sec. 438, *infra*.

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against engineers with such corrupt and fraudulent records are not likely to prove much satisfaction for the performance of engineering works.

On the other hand, permitting the contractor to recover at law in one action prevents a multiplicity of suits and cross-actions which is in keeping with the policy of the American jurisprudence. The New Jersey case cited bears out this assertion, which proceeded upon the view that the engineer's certificate was an award, and yet sustains the contractor's right to recover in a court of law without the production of the certificate. The opinion concludes by saying that "the awards authorized by the parties will for all useful purposes be in truth finalities; they cannot be impeached for lack of skill or want of knowedge of the arbiter [engineer], nor on the ground that his judgments do not square [agree] with the judgments of other persons; such awards can be vitiated by fraud alone, which must be proved to the satisfaction of a jury under a watchful judicial supervision;" and finishes by expressing the opinion "that such a construction rests upon the triple ground of legal principle, authority, and public policy."[1]

Though courts of law frequently assume jurisdiction over such cases when the engineer is in the employ of one of the parties, yet it is submitted that they would not if the engineer were a professional man, as a consulting engineer acting strictly in the capacity of an arbitrator, but the contractor would then have to appeal to a court of equity. The position that courts of law take depends often upon whether they regard the estimate and certificate of the engineer an award, or whether they merely regard it as the performance of an obligation by the company by or through its agent upon the completion of the work by the contractor, the honest and faithful execution of which devolves upon the company.

In New Jersey,[2] New York,[3] Massachusetts,[4] Vermont,[5] New Hampshire,[6] Georgia,[7] Missouri,[8] and in other jurisdictions recovery has been allowed in courts of law, but in a recent case in the circuit court of Illinois it was held that on general principles whether the estimates and certificate were, or were not, technical awards, courts of equity alone had authority to vacate them on the ground of mistake, fraud, or gross error amounting to fraud when such estimates have been made in pursuance of contract provisions; but that if the engineer failed to act, and make his decision and estimate, that a suit at law might be maintained on the contract to recover what was due.[9] The judge said: "When the gist of the cause of action is the fraud

[1] Chism v. Schipper, 51 N. J. Law 1 [1888]; *but see also* the dissenting opinion; *accord*, Wolf v. Hawes, 20 N. Y. 197 [1859.]

[2] Chism v. Schipper, *supra*.

[3] Thomas v. Flurry, 26 N. Y. 26; Wolf v. Hawes, 20 N. Y. 197 [1859].

[4] Cleary v. Sohier, 120 Mass. 210 [1876].

[5] Herrick v. Vermont C. R. Co., 27 Vt. 673.

[6] Smith v. B. C. & M. Ry., 36 N. H. 459 [1858]; Britton v. Turner, 6 N. H. 481 [1834].

[7] Atlanta & R. A. L. Co. v. Manghan, 49 Ga. 266.

[8] Williams v. Chicago, etc. R. Co., 112 Mo. 463 [1892].

[9] Starkey v. De Graff, 22 Minn. 431; *see also* B. & O. Ry. Co. v. Polly Woods Co., 14 Gratt. 459.

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or mistake of the engineer, the question whether such errors exist in the estimates and their probable amount, and whether the estimate ought to be disregarded, are questions for the chancellor and not for a jury."[1]

In another case decided by the Illinois supreme court may be found a somewhat different statement of the law. This case holds that fraud in an award may be shown either at law or in equity, but that mistake is cognizable only in chancery; and the court goes on to say that "even if mistake could be corrected in an action at law, it would have to appear that the engineer in making the mistake had been misled, deluded, or misapprehended the facts."[2]

426. Courts of Equity Will Grant Relief in Case of Fraud or Collusion.—A court of equity will not hesitate to take hold of a case where there is fraud or collusion[3] between the company and the engineer to injure the contractor, or where the accounts are too complicated to be taken at law. In England an equity court will give relief if it can be shown that the engineer has wrongfully withheld or deferred the granting of certificates for work actually done according to the contract.[4] An English court has even gone so far as to declare that when a contractor's inability to obtain adequate relief at law has arisen from the acts of the company or its engineer, whether such acts arose originally from a fraudulent motive or not, a court of equity will not permit such acts to defeat the rights of the contractor.[5] In this case the company had agreed to advance money to contractor as work progressed, such progress to be certified by the engineer.

Whatever doubt may exist as to the recovery of the contractor in a court at law, there is no doubt but that the condition precedent is as good a bar to an action at law as it is to a suit in equity, and on that ground courts of equity have refused an injunction to restrain the contractor from bringing an action at law.[6] They have also, in the absence of an allegation of fraud, refused an order for payment and an accounting of the amount due the contractor on the ground that there was an adequate remedy at law.[7]

427. Fraud and Collusion must Be Alleged and Proven.—The fraud and collusion must be specifically alleged in the declaration or complaint, and the contractor must be prepared to prove his allegations.[8] If they are not set forth in the complaint, evidence cannot be introduced of fraud or mistake of the architect or engineer in an action on the contract,[9] or to show the amount of work done.[10] The fraud, misconduct, or mistake must be

[1] Wood *v.* C. S. F. & C. R. Co., 39 Fed. Rep. 52 [1889].

[2] Newlan *v.* Dunham, 60 Ill. 233.

[3] Tetz *v.* Butterfield, 54 Wis. 242 [1882]; Herrick *v.* Belknap, 27 Vt. 673 [1854]; M'Intosh *v.* Great Western Ry., 2 Mac. & G. 74; s. c., 14 Jur 819; Bliss *v.* Smith, 34 Beavan 508 [1865].

[4] Godefroi and Short on Ry. Cas. 94, *and cases cited.*

[5] M'Intosh *v.* Gt. Western Ry., 14 Jur. 819 [1851].

[6] Baron de Worms *v.* Mellier, 16 Equity 554 [1873].

[7] Bernz *v.* Marcus Sayre Co. (N. J.), 30 Atl. Rep. 21.

[8] Pucci *v.* Barnsey, 20 N. Y. Supp. 375, 21 N. Y. Supp. 1099.

[9] Hudson *v.* McCartney, 38 Wis 331 [1873]; Perkins *v.* Giles, 53 Barb. 242; Wolf *v.* Michaelis 27 Ill. App. 336 [1888].

[10] Trustees of Canal Co. *v.* Lynch, 10 Ill.

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pleaded even to set aside an appraisal of lands made by appraisers.[1] General allegations are not sufficient; the facts should be specifically set forth as well as the grounds on which the award is to be set aside.[2] The fraud must be proved like any other fact alleged.[3] To set aside an award the contractor must not only show mistake or fraud, and that he was prejudiced thereby, but also that, but for it, the award would have been different.[4]

It has been held that an allegation "that the engineer had failed to measure the work, full compliance with the contract on part of a contractor, and an offer of proofs of these, with the amount and value of the work," were sufficient to admit evidence showing that the engineer had misconstrued the contract, and had not measured the work according to it, and that no allegation of fraud was necessary.[5]

The fraud, or such conduct on the part of the engineer as would necessarily imply fraud, must be specifically charged in the contractor's declaration, though a charge that the engineer "had unfairly, improperly, and contrary to the true intent and meaning of said contract, and had so negligently, in collusion with the company and by their procurement," was held to be a sufficient declaration of fraud. The term collusion was defined as a secret agreement for fraudulent purposes, which saved the declaration.[6] And in another recent case it was held that a declaration which charged the conduct of the engineer as being "arbitrary, unreasonable, wrongful, and in bad faith," was sufficient to include a charge of fraud.[7]

Equity will entertain a bill which alleges an acceptance by the owner of an order by the contractor subject to the following condition: "If the work should be approved by myself and the architect," and alleging further that the contractor left the work unfinished, and departed from the state; that his whereabouts were unknown; that the work necessary to complete the building was slight; that complainant urged the owner to complete the same according to contract, and pay the balance into court, but that he had failed to do so; that such conduct amounted to a fraud on complainant. The contract provided that, if the contractor at any time refused to supply material or workmen, the owner could supply the same and complete the work according to the contract. It was held to sufficiently allege the fraudulent conduct of the owner.[8] It was also held that the bill was not

521; Dunaberg, etc., Ry. Co. *v.* Hopkins, 36 L. T. 733; *but see* Mansfield *v.* Doolin, 4 Ir. R. C. L. 17, *and* Adams *v.* New York, 4 Duer 295, 1 Hilt. 388.

[1] Guild *v.* Atchison, etc., R. Co. (Kans. Sup.), 45 Pac. Rep. 82; *and see* Williams *v.* The Chicago, etc., R. Co., 112 Mo. 463 [1892].

[2] Bowden *v.* Crow (Tex.), 21 S. W. Rep. 612.

[3] Burton *v.* Willen, 6 Del. Ch. 403; *semble* Robertson *v.* Lion Ins. Co (C. C.), 73 Fed. Rep. 928; Fowler *v.* Deakman, 84 Ill. 130.

[4] Tank *v.* Rohweder (Iowa), 67 N. W. Rep. 106.

[5] Williams *v.* Chicago, etc., Ry. Co. (Mo.), 20 S. W. Rep. 631, *but see* same case in 112 Mo. 463 [1892]; *accord.* Wilcox *v.* Stephenson, 30 Fla. 377.

[6] Batterby *v.* Vyse, 2 H. & C. 42; Stevenson *v.* Watson, L. R. 4 C. P. D. 148; *see also* Johnson *v.* White (Tex.), 27 S. W. Rep. 174.

[7] Fletcher *v.* New Orleans & N. E. R. Co. (La.), 19 Fed. Rep. 731 [1884].

[8] Marcus Sayre Co. *v.* Bernz (N. J. Ch.), 26 Atl. Rep. 911.

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defective because it failed to allege that the buildings were completed to the satisfaction of the architect. An allegation by the contractor that he demanded the certificates from the architect, who fraudulently refused to give them, and that the building had been completed in strict accordance with the specifications, are sufficient, if sustained by proof, to relieve the contractor from procuring the architect's certificate.[1]

The fact, however, that the above allegations sufficed in those cases is no positive criterion that they will get the same liberal construction in all courts. It is essential that the fraud or impossibility, which is the excuse for the nonperformance of the condition precedent, be clearly and fully declared. Thus a declaration that a building had been completed according to the contract, and that the owner or company had accepted it, but that the architect had arbitrarily, unreasonably, and wrongfully refused to give his certificate, without alleging fraud or collusion, or that the owner had received and accepted it as a full performance of the contract, was held to show no right of an action, and the contractor was nonsuited.[2] When the certificate of the architect has been made a condition precedent, it has been held an error to charge that the jury might find the withholding of the certificate fraudulent, notwithstanding material variations from the contract, if such variations did not afford a substantial reason for its withholding.[3] It is error to submit the question of amount of work done or materials furnished to the jury, unless bad faith or palpable mistake on the part of the engineer is shown.[4]

Many cases might be cited for and against a recovery at law for the fraud of the engineer or architect, but they are decided frequently upon rules of practice, which are different in the several states, and are beyond the scope of this book. Suffice it to say, that there is a remedy, and it is well settled that fraud in the engineer will dispense with the certificate, and that the contractor can recover without its production. As to how he may recover, and in what court, is a question to be learned from a careful study of the decisions and rules of practice of each state.

428. When Contractor may Recover Without the Engineer's Certificate.—What will prevent or permit a contractor's recovery is best given in the language of the courts, which is given briefly in the cases cited below. Thus if the certificate has been withheld by fraud and collusion between the company and its engineer, or the owner and its architect, the contractor may recover without it,[5] or if fraud or bad faith be shown.[6]

[1] Michaelis *v.* Wolf (Ill.), 26 N. E. Rep. 384 [1891].

[2] Schenke *v.* Rowell, 7 Daly 286 [1877]; Clarke *v.* Watson, 18 C. B. (N. S.) 278; *but see, contra*, Lewis *v.* Hoar, 44 L. T. 66 [1881].

[3] Bradner *v.* Roffsell (N. J. Err. & App.), 31 Atl. Rep. 387.

[4] Smith *v.* City of New York (Sup.), 42 N. Y. Supp. 522.

[5] In a court of law, Batterby *v.* Vyse, 2 H. & C. 42; Kemp *v.* Rose, 1 Giff. 258; Kimberly *v.* Dick, L. R. 13 Eq. 1; Hartford F. L. Co. *v.* Bonner Mer. Co., 56 Fed. Rep. 378; in equity, M'Intosh *v.* Gt. W. Ry., 2 Mac. & G. 74; Wood *v.* Chic., S. F., etc., Ry. Co., 39 Fed. Rep. 52 [1889].

[6] Lynn *v.* B. & O. R. Co., 60 Md. 404;

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It is more frequently stated conversely, viz., that no recovery can be had without the engineer's certificate or in excess of his estimates, "unless," "only when," "except," "until" it is shown that there was fraud or collusion.[1] * The cases are far more numerous in which it has been declared that the performance of the condition precedent could be avoided only for fraud, collusion, bad faith, etc., of the engineer, or that its performance had become impossible, than they are frequent in which the certificate has been actually dispensed with.†

The same general principles of fraud, or what is equivalent to fraud, have been set forth by the courts in their opinion in all the cases in language whose phraseology has been as varied as the facts and circumstances attending the cases, and many of these it is believed are best given in the language of the justices who delivered them. Thus a common exception made in several cases in the United States courts is "unless there is fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment,"[2] or "unless fraud or mistake or undue influence or want of good faith such as is the subject of relief by the ordinary principles of equity,"[3] or "without the most irrefragible proof of mistaken fact or corruption in the engineer or positive fraud in the company in procuring a wrong estimate,"[4] or "unless there is fraud, bad faith, or clear evidence

Chism *v.* Schipper, *supra;* B. & O. R. Co. *v.* Polly Woods Co., 14 Gratt. (Va.) 447; Bannister *v.* Patty's Exrs., 35 Wis. 215 [1874]; Wilson *v.* York, etc., R. Co., 11 G. & J. 58; B. & O. R Co. *v.* Resley, 7 Md. 297; Hudson *v.* McCartney, 33 Wis. 331 [1873]; Tetz *v.* Butterfield, 54 Wis. 242; Hanley *v.* Walker, 79 Mich. 607; Schenke *v.* Rowell, 7 Daly 286; Snell *v.* Brown, 71 Ill. 133; Whiteman *v.* Mayor, e.c., 21 Hun 117 [1880]; *see also* Williams *v* Chicago, etc., R. Co (Mo.), 20 S. W. Rep. 631; Smith *v.* White, 5 Neb. 408; Dorw'n *v.* Westbrook, 33 N. Y. Supp. 449; Michaelis *v.* Wolf, 136 Ill. 68; Sweeny *v.* U. S., 109 U. S., 618; School Dist. *v.* Randall, 5 Neb. 408; Dabs *v.* Nugent, 13 L. T. N. S. 396; M'Intosh *v.* Gt. Western R, 13 Jur. 92, 14 Jur. 819; Mercer *v.* Harris, 4 Neb. 77; Waring *v* Manchester, etc., R. Co., 7 Hare 482; *affirmed in* 2 H. & Tw. 239.

[1] In equity, Scott *v.* Corporation of L., 3 D. & J. 334; *and see* Grofton *v.* E. L. R. Co., 8 Exch. 699; Monongahela Nav. Co. *v.* Fenlon (Pa.), 4 W. & S. 205 [1842]; Langdon *v.* Northfield, 44 N. W. Rep. 984 [1890]; Gay *v.* Haskins, 30 N. Y. Supp. 191.

[2] Kirchlberg *v.* United States, 97 U S. 398; Sweeney *v.* United States, 109 U. S. 618; s. c., 3 Sup. Ct. Rep. 344; Martinsburg & P. R. Co. *v.* March, 114 U. S. 549 [1884]; Hot Springs Ry. Co. *v.* Maher, 48 Ark. 522; St. P. & N. P. Ry. Co. *v.* Bradbury (Minn.), 44 N. W. Rep. 1; Wilcox *v.* Stephanson (Fla.), 11 So. Rep. 659; Memphis R. Co. *v* Wilcox, 48 Pa. St. 161 [1864]; G. H. & S. A. R. Co. *v.* Henry, 65 Tex. 685 [1886]; Williams *v.* Chicago, etc., R. Co., 20 S. W. Rep. 631; 112 Mo. 463 [1892]; Monongahela Nav. Co. *v.* Fenlon (Pa.), 4 W. & S. 205 [1842]; Elliott *v.* Missouri, K. & T. Ry. Co. (C. C. A.), 74 Fed. Rep. 707; Mackler *v.* Mississippi, etc., R. Co, 62 Mo. App. 677; Northwest Baptist Ch. *v.* Doe (Tex.), 35 S.W Rep. 145; Snaith *v.* Smith, 27 N. Y. Supp. 379; *semble*, Wyckoff *v.* Meyers, 44 N. Y. 145; Schmidt *v.* North Yakima (Wash.), 40 Pac. Rep. 790; Ogden *v.* United States, 60 Fed. Rep. 725; McMalen *v.* New York, etc., R Co., 20 N.Y. 463; Howard *v.* Alleghany Val. R. Co., 69 Pa. St. 489; Fox *v.* Railroad Co., 3 Wall. 243; *and* 19 Amer. & Eng. Encv. Law 874; Grant *v.* Savannah, etc., R. Co., 51 Ga. 348.

[3] Mansfield etc., R. Co *v.* Veeder, 17 Ohio 385; E. Tenn., V. & G. Ry. Co. *v.* Cent Lumb. M. Co. (Tenn.), 32 S. W. Rep. 635.

[4] McCauley *v.* Keller (Pa.), 18 Atl. Rep. 607 [1889]; Vanderwerker *v.* V. C. Ry. Co., 27 Vt. 130 [1854]; Hostetter *v.* Pittsburgh, 107 Pa. St. 433.

* Many other cases cited in Secs. 436-443, *infra.* † *See* Secs. 429-431 *infra.*

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of mistake or the estimate is palpably perverse, oppressive, and unjust,"[1] or "except in case of fraud or plain and palpable mistake,"[2] "in the absence of fraud,"[3] "unless fraudulently made,"[4] "or fraudulently withheld,"[5] "in absence of fraud or mistake,"[6] or fraud, gross error, or mistake,"[7] or "unless fraud or mistake is alleged and proved,"[8] or "fraud or intentional misconduct,"[9] "corruption, partiality, or misconduct,"[10] or "misbehavior,"[11] or "misconduct or prejudice,"[12] or "fraud, partiality, or willful misconduct,"[13] or "unless unfair conduct be alleged and

[1] Hudson *v.* McCartney, 33 Wis. 331 [1873]; Baasen *v.* Behr, 7 Wis. 516.

[2] Faunce *v.* Burke, 16 Pa. St. 469; Adams *v.* The Mayor, 4 Duer (N. Y.) 295 [1855]; Denver, S. P. & P. Ry. Co. *v.* Riley, 7 Colo. 494 [1884], *and see* 8 Colo. 301; *also* D. & N. O. Const'n Co. *v.* Stout, 8 Colo. 61 [1884]; *and* Sewer Commrs. *v.* Sullivan (Sup.), 42 N. Y. Supp. 358.

[3] Mundy *v.* Louisville & N. R. Co., 67 Fed. Rep. 633; Zimmerman *v.* German Church, 31 N. Y. Supp. 845; Palmer *v.* Clark, 106 Mass. 373; Guthal *v.* Gow (Mich.), 55 N. W. Rep. 442; Sharpe *v.* San Paulo Ry. Co., L. R. 8 Ch. App. 597 [1873]; Butler *v.* Tucker, 24 Wend. 449; Wyckoff *v.* Meyers, 44 N. Y. 143; Byron *v.* Low, 109 N. Y. 291; Phelan *v.* Mayor, 119 N. Y. 86; D. & H. Canal Co. *v.* Penna. Canal Co., 50 N. Y. 266; Messner *v.* Lancaster Co., 28 Pa. St. 291; Dorwin *v.* Westbrook, 86 Hun (N. Y.), 363; Darnell *v.* Keller (Ind. App.), 45 N. E. Rep. 676; Zaleskie *v.* Clark, 44 Conn. 218; Gibson *v.* Cranage, 39 Mich. 219; *but see* Leech *v.* Caldwell, Leg. Int. Nov. 16, 1866.

[4] Ross *v.* McArthur (Ia.), 52 N. W. Rep. 125.

[5] Bradner *v.* Roffsell (N. J.), 29 Atl. Rep. 317 [1894]; s. c., 31 Atl. Rep. 387.

[6] Kidwell *v.* B. & O. R. Co. (Va.), 11 Gratt. 676; Edwards *v.* Louisa Co. (Ia.), 56 N. W. Rep. 656; Brady *v.* New York (N. Y. App.), 30 N. E. Rep. 757; Sheffield, etc., Co. *v.* Gordon, 151 U. S. 285; *other cases in* 29 Amer. & Eng. Ency. Law 940.

[7] Lewis *v.* Chicago, etc., R. Co., 49 Fed. Rep. 708–714. Wood *v.* Chicago S. F. & C. R. Co., 39 Fed. Rep. 52.

[8] Taylor *v.* Renn, 79 Ill. 181 [1875]; Coe *v.* Lehman, 79 Ill. 173 [1875]; Baasen *v.* Baehr, 7 Wis. 517 [1859]; Leonard *v.* House, 15 Ga. 473; Jeob *v.* McKiernan, Moody & Malk 340; Reynolds *v.* Caldwell, 51 Me. 298; Prest., etc., Canal Co. *v.* Pa. C. Co., 50 N. Y., 250; Korf *v.* Lull, 70 Ill. 420; Downey *v.* O'Donnell, 86 Ill. 49; s. c., 92 Ill. 559; Dingley *v.* Green, 54 Cal. 333; Snell *v.* Brown, 71 Ill. 133; Finney *v.* Conden, 86 Ill. 76; United States *v.* Ellis (Ariz.), 14 Pac. Rep. 300 [1887]; Anderson *v.* Maislahn, 12 Daly 149; Wyckoff *v.* Meyers, 44 N. Y. 145; Butler *v.* Tucker, 24 Wend. (N. Y.), 449; Smith *v.* Brady, 17 N. Y. 175; Stewart *v.* Keteltas, 36 N. Y. 388; Glaucius *v.* Black, 50 N. Y. 151; Beecher *v.* Shuback, 23 N. Y. Supp. 604; McAuley *v.* Carter, 22 Ill. Rep. 53 [1859]; Trustees of Canal Co. *v.* Lynch, 10 Ill. 521; Sheffield, etc., Coal Co. *v.* Gordon, 14 Sup. Ct. Rep. 343; Barton *v.* Herman, 11 Abb. Pr. (N. S.), 378; Henderson Bdge. Co. *v.* O'Connor (Ky.), 11 S. W. Rep. 957; *accord*, Tetz *v.* Butterfield, 54 Wis. 242; Crumlish *v.* Wilmington & W. R. Co., 5 Del. Ch. 270 [1879]; Classen *v.* Davidson, 57 Ill. App. 106; Moore *v.* Kerr, 65 Cal. 519; Chapman *v.* Kansas City, etc., R. Co., 114 Mo. 542; Fowler *v.* Deakman, 84 Ill. 130; Badger *v.* Kerber, 61 Ill. 328; *accord*, Summers *v.* Chicago, etc., R. Co., 49 Fed. Rep. 714; Robinson *v.* Fiske, 25 Me. 401; Oakes *v.* Moore, 24 Me. 214; Green *v.* Jackson, 66 Ga. 250; Thurber *v.* Ryan, 13 Kans. 453; Bryan *v.* Bell (Comp. Pl.), 10 N. Y. Supp. 693; Patterson *v.* Crowther, 70 Md. 124; Bd. of Ed. *v.* Shaw, 15 Kans. 33.

The fraud or mistake need only be shown by a preponderance of the evidence. B. & O. & C. R. Co. *v.* Scholes (Ind.), 43 N. E. Rep. 156.

[9] B. & O. R. R. Co. *v.* Polly Woods, 14 Gratt. 448 [1858]; Scott *v.* Corp'n of London, 1 Gifford 216 [1858].

[10] Boston W. P. Co. *v.* Gray, 6 Met. 169 [1843]; Hostetter *v.* City of Pittsburg, 107 Pa. St. 419 [1884]; McKinnis *v.* Freeman, 38 Iowa 364 [1874]; Sweet *v.* Morrison, 116 N. Y. 19 [1889]; Kirk *v.* Th. E & W. India Dock Co., 55 L. T. R. (N. S.) 245 [1886]; O'Brien *v.* Mayor of N. Y., 139 N. Y. 543.

[11] Smith *v.* Smith, 28 Ill. 56 [1862].

[12] Combe *v.* Schulters, N. Y. Com. Pleas, Dec. 1871; *accord*, Buckwalter *v.* Russell (Pa.), 13 Atl. Rep. 310 [1888]; Sewer Commrs. *v.* Sullivan (Sup.), 42 N. Y. Supp. 358.

[13] Anderson *v.* Imhoff (Neb.), 51 N. W. Rep. 854 [1892]; *citing* Rand *v.* Redington, 13 N. H. 72; Torrence *v.* Amsden, 3 Mc

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proved,"[1] or "that the engineer was guilty of unfairness or partiality,"[2] or "that the engineer's estimate was not fairly made,"[3] or "not fairly and impartially made,"[4] or "unfairness or fraud,"[5] or "failure to exercise an honest judgment,"[6] or "unless it is arbitrary or dishonestly withheld,"[7] or "capriciously or fraudulently,"[8] or "arbitrarily, capriciously, and unreasonably,"[9] or "wrongfully, arbitrarily, and in bad faith,"[10] or "fraud and bad faith,"[11] or in the absence of "dishonesty, fraud, or sinister motive,"[12] "dishonest or arbitrary action,"[13] or of "accident, fraud, or mistake or illegality,"[14] or "in the absence of collusion,"[15] or "in the absence of fraud or collusion."[16]

Allegations, charges, or evidence tending to prove that "the engineer erred in deciding questions submitted to him,"[17] or "that his estimate is erroneous and too low,"[18] or "that the engineer knew his award to be grossly unjust when he made it, that he was hostile to the contractor, and was receiving a salary from the city,"[19] or "that he had notice that the work was not done according to contract, and refused to take notice of the information,"[20] or "that the engineer has ignored all contracts and written evidence of the contractor, that he has accepted as true the loose and false statements of the adverse party, that he examined no witnesses under oath, and that the award is full of mistakes,"[21] or "that the estimates were less

Lean 509; Smith *v.* Cooley, 5 Daly 401; Newland *v.* Douglass, 2 Johns. 61; Underhill *v.* Van Cortlandt, 2 Johns Ch. 339; Lee *v* Patillo, 4 Leigh 486; Flaharty *v.* Beatty, 22 W. Va. 698; Dickinson *v.* R. Co., 7 W. Va. 390; Spear *v.* Bidwell, 44 Pa. St. 23; Paul *v* Cunningham, 9 Pa St. 106; Emerson *v.* Udall, 13 Vt. 477; Eaton *v.* Eaton, 8 Ired. Eq. 102; Hyeronimus *v.* Allison, 52 Mo. 102; Conrad *v.* Ins. Co., 4 Allen 120. Strong *v.* Strong, 9 Cush. 560; Brown *v.* Bellows, 4 Pick. (Mass.). 179; Bean *v.* Macomber, 33 Mich. 127; Sisk *v* Garey, 27 Md. 401; Cleland *v.* Hedly, 5 R. I. 163; Bash *v.* Christian, 77 Ind. 290; Cothran *v.* Knox. 13 S. C. 496; *and see* 1 Amer. & Eng. Ency. Law 707, *and cases cited*

[1] Pawley *v.* Turnbull, 3 Gifford 70 [1861].

[2] Ormes *v.* Beadle, 2 Giff. 166, 206 [1860].

[3] Smith *v* B. C. & M. Ry., 36 N. H. 459, *and cases cited.*

[4] Ormes *v.* Beadle, *supra.*

[5] B. & O. R. Co. *v.* Polly Woods, 14 Gratt. 448 [1858]; B. & O. R. Co. *v.* Laffertys, 14 Gratt. 478; Rens *v.* Grand Rapids (Mich) 41 N. W. Rep. 263 [1889].

[6] M. & P. Ry. Co. *v.* March, 114 U. S. 549

[7] Bently *v* Davidson, 74 Wis. 420 [1889].

[8] Badger *v.* Kerber, 61 Ill. 328 [1871]; Fowler *v.* Deakman, 84 Ill. 130.

[9] Chapman *v.* Lowell, 4 Cush. 587; N. Y & N. H. Sprinkler Co. *v.* Andrews, 23 N. Y. Supp. 998.

[10] Fletcher *v.* N. O. & N. E. R. Co., 19 Fed. Rep. 731 [1884].

[11] Guthal *v.* Gow, 55 N. W. Rep. 442.

[12] Sharpe *v.* San Paulo R. Co., 8 Chanc. App. 606.

[13] Wendt *v.* Vogel. 87 Wis. 462.

[14] Atlanta, etc., R. Co. . Manghan, 49 Ga. 266 [1873].

[15] Johnson *v.* White (Tex.), 27 S. W. Rep. 174; *see also* M'Intosh *v.* Gt. Western Ry., 14 Jur. 819.

[16] Hanley *v.* Wa ker (Mich.), 45 N. W. Rep 57; Anderson *v.* Imhoff (Neb.), 51 N. W. Rep. 854 [1892]; *accord*, Vermont St. M. E. Church *v.* Brose. 104 Ill. 206; *and see* Scott *v.* Liverpool, 3 De G. & J. 334; Bliss *v.* Smith, 34 Beav. 508.

[17] Whiteman *v.* Mayor, 21 Hun 117 [1880]; Perkins *v.* Giles, 50 N. Y. 228.

[18] Baasen *v.* Behr, 7 Wis. 516 [1859], *and cases cited;* Hot Springs Ry. Co. *v.* Maher, 48 Ark. 522.

[19] Hartupee *v.* City of Pittsburg, 107 Pa St. 419 [1884].

[20] Darnell *v.* Keller (Ind. App),45 N. E. Rep 676.

[21] Thornton *v.* McCormick (Ia.), 39 N. W. Rep. 502 [1888].

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than the actual work done, by mistake, or that they were intentionally made so,"[1] or "that the estimates were erroneous and too low,"[2] or "that the award is excessive,"[3] or "that the court or either party disagrees with the architect,"[4] are not sufficient to avoid the engineer's estimates or to excuse the production of his certificate.[5] Yet each of these conditions may be considered in determining the bias, prejudice, dishonesty, or fraud of an engineer or architect; and while perhaps no one of the allegations cited would be sufficient to avoid an engineer's estimate, yet a combination of circumstances similar to those cited might be very strong evidence of fraud if the case were allowed to go to a jury. The inadequacy of an award may be considered in determining the bias of an arbitrator.[6]

Therefore, where the contract provided that if any discrepancies should be found to exist between the plans, working drawings, and specifications, the decision of the architects as to their meaning should be final, the fact that the architects drew the plans and specifications, and were to receive as their compensation five per cent of the total cost of the building, does not warrant an inference of fraud in their decision as to discrepancies found to exist.[7]

429. Mistake of Engineer in his Decision or Estimate an Element of Fraud.—Another ground upon which the estimates and certificates of an engineer are sometimes attacked is that of mistake, and there are many dicta to the effect that it is sufficient excuse to avoid the engineer's estimates and decisions, but cases in which recovery has been given for mistake pure and simple are not to be found in the books. The ground or theory upon which relief is promised in case of mistake is usually the same as for fraud, and many cases hold that the mistake must be so gross as to imply fraud or dishonesty.[8]* In the language of the United States courts, which has been quoted and followed in many cases in the state courts, "the decisions of the engineer are conclusive in the absence of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment;[9] and in the supreme court of Arkansas it was held an error for a judge to instruct that the engineer's estimates were not binding if there were mistakes in them, the supreme court holding that the errors

[1] Baker *v.* Belknap, etc., 27 Vt. 700.

[2] Baasen *v.* Baehr, 7 Wis. 516 [1859], *citing many cases.*

[3] B. & O. R. R. *v.* Canton Co., 70 Md. 405

[4] Phœnix Iron Co. *v.* The Richmond, 6 Mackey's R 180; Gilmore *v.* Courtney (Ill.), 41 N. E. Rep. 1023.

[5] *But see* Davidson *v.* Provost, 35 Ill. App. 126; *and* Johnson *v.* White (Tex.), 27 S. W. Rep. 174 [1894]; *and* Glaucus *v.* Black, 50 N. Y. 145.

[6] Royal Ins. Co. *v.* Parlin & O. Co. (Tex.), 34 S. W. Rep. 401.

[7] Kelly *v* Public Schools of Muskegon (Mich.), 68 N. W. Rep. 282

[8] Sweeney *v.* United States, 109 U. S. 618 [1883]; Kehlberg *v.* United States, 97 U. S. 398 [1878]; Martinsburg & Pac. R. Co. *v.* March, 114 U. S. 549; Hot Springs Ry. Co. *v.* Maher, 48 Ark. 522; Hartford F. L. Co. *v.* Bonner Mer. Co., 56 Fed. Rep. 378; Palmer *v.* Clark, 106 Mass. 373; Montgomery *v.* New York, 29 N. Y. Supp. 687.

[9] Monon Nav. Co. *v.* Fenlon, 4 Watts & Sergeant 205 [1842].

* *See* Cases Sec. 428, *supra.*

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or mistakes must be so gross or of such a nature as to necessarily imply bad faith on the part of the engineer,[1] and averments that the engineer's estimates "were erroneous and too low," or "were only about one-half what they should have been,"[2] or "were less than the measurement of the work actually done,"[3] or the fact that they were "excessive,"[4] or that in other places excavations of similar materials and of the same character had been classified differently,[5] is not sufficient to imply fraud or bad faith, or to prevent a recovery of more than the amount of the estimate.[6] The engineer's estimate is conclusive upon questions of count, measurement, or distance, even though these questions are capable of accurate measurement.[7] In the absence of fraud or misbehavior the courts will not inquire whether the award of arbitrators is warranted by the evidence submitted.[8]

What is required, is, that the engineer shall have exercised an honest judgment. That is what the parties contracted with regard to, and only that will fulfil the implied, if not the express, conditions of their contract. The decisions are unanimous that "estimates are conclusive when an honest discretion has been exercised and no fraud appears,"[9] or that "an engineer's certificate cannot be impeached for mere errors of judgment, but only for fraud or such mistakes as show that he failed to exercise his judgment on the subject-matter."[10] If he has exercised an honest discretion and decided according to his best judgment, the fact that he has erred,[11] or that his estimate is too low,[12] or is inadequate and unjust,[13] or that the engineer disagrees with the court,[14] or "that in the opinion of others his decision is erroneous,"[15] or that he was not qualified,[16] or "that mistakes have arisen from inadvertence and undue haste,"[17] or "that because his hearing was defective he did not hear and understand the evidence offered,"[18] will furnish no excuse for the non-production of the estimate or certificate when they have been made a condition precedent by the terms of the contract.

[1] Hot Springs Ry. Co. *v.* Maher, 48 Ark. 522.

[2] Ripley Co. *v.* Hill (Ind), 16 N. E. Rep. 156 [1888].

[3] Snell *v.* Brown, 71 Ill. 133 [1873]; *accord*, McCoy *v.* Able (Ind.), 31 N. E. Rep. 453.

[4] Hartford F. L. Co. *v.* Bonner Mer. Co., 56 Fed. Rep. 378.

[5] Dorwin *v* Westbrook, 86 Hun (N. Y.) 363.

[6] Baasen *v.* Baehr, 7 Wis. 516 [1859]; B. & O. R. R. Co. *v.* Canton, *supra; see* Gilmore *v.* Courtney (Ill.), 41 N E. Rep. 1023.

[7] Elliott *v.* M. K. & T. Ry. Co. (C. C. A.), 74 Fed. Rep. 707.

[8] Huckestein *v.* Kaufman (Pa.), 33 Atl. Rep. 1028; *semble*, Bank *v.* Webb (Ky.), 33 S. W. Rep. 1109.

[9] Mitchel *v.* Cavanaugh, 38 Iowa 286 [1874], *citing many cases;* Baasen *v.* Baehr, 7 Wis. 516, *and cases cited.*

[10] Palmer *v.* Clark, 106 Mass. 373; Perkins *v.* Giles, 50 N. Y. 228; Crumlish *v* Wilmington, etc., R. Co., 5 Del. Ch. 270 [1879]; *and see* Moore *v.* Jones (Tex.), 25 S. W. Rep. 98; Russell *v.* Seery (Kans.), 35 Pac. Rep. 812; Chicago, etc., R. Co. *v.* Price, 138 U. S. 185.

[11] Whiteman *v.* Mayor, etc., 21 Hun 117 [1880].

[12] Baasen *v.* Baehr, *supra.*

[13] Hartupee *v.* City of Pittsburgh, 131 Pa. St. 535 [1889]

[14] Phœnix Iron Co. *v.* The Richmond, 6 Mackey's R. 180.

[15] Gillmore *v.* Courtney (Ill.), 41 N. E. Rep. 1023; Zimmerman *v.* Germ. Luth. Ch., 11 Misc Rep. (N. Y. Super. Ct.) 49.

[16] Pauly Jail Co. *v.* Hemphill County, 62 Fed. Rep. 698.

[17] Patton *v.* Garrett (N. C.), 21 S. E. Rep. 679.

[18] McMillan *v.* Allen (Ga.), 25 S. E. Rep. 505.

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430. If Engineer has Acted Honestly and has Exercised his Best Judgment, His Decision will Hold.—To ignore the engineer's estimate and accept any other proof of the completion of the work, or of the materials or quantities employed, would require the court to make for the parties a contract which they themselves did not choose to make. For when neither party has reserved the right to review and revise the engineer's determination for mere errors or mistakes upon his part, it is presumed that both parties had in mind the possibility that the engineer might err, but that they chose to risk his estimates and to rely upon his judgments, depending upon the right to demand that the engineer shall at all times and in respect of every matter submitted to his determination exercise an honest judgment, and commit no such mistakes as under all the circumstances would imply bad faith.[1]

It was therefore held wrong and an error for a judge to instruct a jury that if they found the price and value fixed and returned by the engineer was inadequate and unjust to the contractor, they might presume fraud and disregard the prices fixed by the engineer;[2] and by the same precept instructions that mistakes in an engineer's estimate as to the amount and character of work done would render them not binding, were held to mislead the jury and to be sufficient cause to remand the case for a new trial.[3]

If no fraud nor gross mistake that will necessarily impute fraud can be proven, and the engineer refuses his certificate of completion or underestimates the work or materials, it would seem by these cases that no recovery can be had on the contract.[4] As to recovery on a *quantum meruit*, it is a question.[5] The engineer's determination is like an award of an arbitrator, and cannot be set aside for mistakes. Whether the measurements and proceedings of the engineer are fraudulent are for the court and jury to determine. The only question open is whether the engineer has acted honestly and in the usual way. If he has, his decisions are conclusive whether he has made mistakes or not, and whether the mistakes are on one side or on the other side.[6] The fact that the engineer has failed to decide according to his best judgment, but has been prevailed upon to decide otherwise by his employer, has been held not sufficient proof of fraud when the engineer has allowed all that the contract authorized.[7]

431. Few Cases in which Courts have Allowed a Recovery on Account of a Pure Mistake.—All the courts have not employed the same technical

[1] Martinsburg & P. R. Co. *v.* March, 114 U. S. 549; Elliott *v.* M. K. & T. Ry. Co., 74 Fed. Rep. 707; United States *v.* N. Amer. Com. Co. (C. C.), 74 Fed. Rep. 145; *and see* Dallam *v.* King, 4 Bing. N. C. 105.

[2] Martinsburg & P. R. Co. *v.* March, 114 U. S. 549; *see* Cooper *v.* Uttoxeter Bur. Bd., 11 L. T. (N. S.) 565.

[3] Hot Springs Ry. Co. *v.* Maher, 48 Ark. 522.

[4] Sweeney *v.* United States, 109 U. S. 618 [1883].

[5] *See* Cummings *v.* Bradford (Ky.), 23 S. W. Rep. 548; recovery was allowed. *And see* also Anderson *v.* Burchet, 29 Pac. Rep. 315, where incompetency was claimed, but held to have waived right to object. *And se.* Norfolk & W. R. Co. *v.* Mills (Va.), 23 S. E. Rep. 556.

[6] Palmer *v.* Clark, 106 Mass. 373; Snell *v.* Brown, 71 Ill. 133 [1873].

[7] O'Brien *v.* New York, 139 N. Y. 543.

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phraseology in deciding what sort of a mistake will avoid an engineer's estimate or excuse the production of his certificate. The courts employ different language when deciding what may avoid the estimate and what *will* permit a recovery from what they use in stating conditions that *will not* avoid the determinations of the engineer, or in specifying such conditions only as will permit a recovery without the estimate. Thus dicta by courts that "unless fraud or mistake or undue influence or want of good faith are proved,"[1] or "unless in case of mistake, fraud, or gross error,"[2] or "in the absence of proof of fraud, mistake, or unfair dealing,"[3] the determination of the engineer is final and conclusive is not a statement of the converse, that in case there is a mistake his estimates and decisions will *not* be conclusive. Such a conclusion would be dangerous, and it is the taking of such rules for granted that brings so many cases into the lower courts to be corrected by the higher courts.

432. Fraud or a Failure to Exercise a Fair and Sound Judgment, Alone will Dispense with Certificate.—There must be fraud or a failure on the part of the engineer to exercise his judgment. It must be shown that the engineer has failed to exercise a fair and sound judgment in making his estimate or certificate.[4] If he has exercised an honest discretion,[5] his certificate cannot be impeached for any errors of judgement, whether of fact or fancy.[6] If mistake alone is sufficient to dispense with the certificate, it must be such a mistake as has prevented the exercise of an honest judgment.[7]

A mistake alone is not conclusive evidence of fraud, but an apparent error may be evidence, of greater or less weight, according to the circumstances, in support of fraud or partiality.[8] The fact that more work was done than the certificate gives credit for does not raise a presumption of fraud, though it may be shown as a circumstance tending in some degree to establish fraud. To prove fraud the evidence must show that the engineer knowingly and willfully disregarded his duty, and rejected or condemned work which he knew, or at least should have known, fully conformed in all respects to the contract.[9] Another court says the mistake must be an unintentional misapprehension, or ignorance of some material

[1] Mansfield, etc., Ry. Co. *v.* Veeder, 17 Ohio 385; United States *v.* Ellis (Ariz.), 14 Pac. Rep. 300 [1887]; Downey *v.* O'Donnell, 92 Ill. 559.

[2] Wood *v.* Chicago, etc., R. Co., 89 Fed. Rep. 52.

[3] Tetz *v.* Butterfield, 54 Wis. 242 [1882]; Kidwell *v.* B. & O. R. Co., 11 Gratt. 675.

[4] Palmer *v.* Clark, 106 Mass. 373.

[5] Mitchel *v.* Cavanaugh, 38 Iowa 286 [1874].

[6] Perkins *v.* Giles, 50 N. Y. 228; Snell *v.* Brown, 71 Ill. 133 [1873].

[7] Baasen *v.* Buehr, 7 Wis. 516; Vanderwerker *v.* V. C. Ry. Co., 27 Vt. 180 [1854]; Sweeny *v.* United States, 97 U. S. 402; Crumlish *v.* Wilmington & W. R. Co., 5 Del. Ch. 270 [1897]; Palmer *v.* Clark, 106 Mass 373; Trustees of I. & M. Canal *v.* Lynch, 10 Ill. 521; Lewis *v.* Chicago, etc., Ry. Co., 49 Fed. Rep. 708; Campbell *v.* Weston, 3 Paige 124 [1832].

[8] Goddard *v.* King (Minn.), 41 N. W. Rep. 659 [1889].

[9] Snell *v.* Brown, 71 Ill. 133 [1873]; *see also* Stose *v.* Heisler, 120 Ill. 439, and Palmer *v.* Clark, 106 Mass. 373.

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fact, which must be clearly shown, and be so palpable as to amount to dishonest and arbitrary action.[1] The burden of proving the mistake, or of disproving the correctness of the engineer's estimate, is on the contractor, who may deny its accuracy.[2]

433. Mistake alone May Be a Cause for Correcting an Estimate, or for Requiring a New One to be Made—Mistake that will Set Aside the Engineer's Determination Defined.—It having been agreed to submit to the judgment of a skilled arbitrator or engineer the question whether the work conforms to the contract, neither party can avoid his decision if he has exercised his discretion, nor can the judgment of a jury be substituted. They contracted for the fair and honest judgment of a particular person, or class of persons, and if that has been had and exercised according to their intentions, they cannot alter its obligations or escape its hardships.[3] The mistake must therefore be one which shows that the engineer has been misled, deluded, or so far misapprehended the case or questions to be determined that the parties have not received the benefit of his skill and judgment,[4] with reference to which they have contracted. The most familiar illustration is the use of a false measure, or of a false weight, believing them to be correct.

It is obvious that to allow every mistake in fact to avoid an engineer's decisions, if clearly proved, would be in effect to examine the original controversy upon its merits, and thus render such stipulations nugatory. For that reason it has been held that no mistakes in matters of fact depending upon the misjudgment of the engineer, whether in weighing evidence, or the construction of contracts, or written admissions, were of any avail.[5] The earlier cases went so far as to hold that the estimate was not effected by the inadequacy of the amount or the neglect of the engineer to employ the usual and proper means of informing himself upon the subject, provided his conduct was in good faith, a fact to be submitted to the jury, and that [gross] negligence did not, in the construction of the law, amount to fraud or the want of good faith.[6] Neither can avoid the engineer's decision by showing merely that he was negligent and made mistakes.[7]

The decision, to be conclusive, must be a result of the deliberate and fair judgment of the engineer. To avoid its binding effect the mistake must be in a matter of fact by which the engineer is led to a false conclusion, a mistake in some fact, inadvertently assumed and believed, which can be shown to be otherwise. Such would be the use of a false measure, as a tape or

[1] Wendt *v.* Vogel, 87 Wis. 462.

[2] Pucci *v.* Barnsey (City Ct.), 20 N. Y. Supp. 375; s. c., 21 N. Y. Supp. 1099; *and see* Witz *v.* Tregallas (Md.), 33 Atl. Rep. 718.

[3] Hudson *v.* McCartney, 33 Wis. 331.

[4] Roloson *v.* Carson, 8 Md. 208 [1855]; May *v.* Miller, 59 Vt. 577; Boston W. P. Co. *v.* Gray, 6 Met. 169 [1843]; Newlan *v.* Dunham, 60 Ill. 233.

[5] Vanderwerker *v.* V. C. R. Co., 27 Vt. 130; 2 Amer. & Eng. Ency. Law (2d. Ed.) 779.

[6] Wilson *v.* York & M. L. R. Co., 11 Gill & J. 58 [1839]; *citing* D. & H. Canal Co. *v.* Dubois, 15 Wend. 90.

[7] Bowman *v.* Stewart (Pa.), 30 Atl. Rep. 988; *see also* Stubbins *v.* McGregor (Wis.), 56 N. W. Rep. 641.

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chain, believing it to be correct, or the use of diagrams or tables that are erroneous. Another illustration would be the use of a compass to ascertain bearings, the needle of which had by some accident, or by fraud, been disturbed so that its action was not free and natural, and which circumstance was wholly unknown to the surveyor. It is not a fact or an inference of fact upon which any judgment has been exercised, but a pure mistake, by which the surveyor's judgment, as well as the needle, had been swerved from the true direction which it would have taken had it followed the true law understood to govern it. The mistake must be of a fact upon which the judgment has not passed as a part of his judicial investigation; one of such a nature and so proved as would lead to a reasonable belief that he was misled and deceived by it, and that if he had known the truth he would have come to a different result.[1]

The theory cannot be better explained than by Justice Shaw's own words and illustrations, viz.: "That courts will not set aside an award for mistakes of the arbitrator [or engineer] where the facts were before him and he was competent to judge. The mistake or accident therefore must be of some fact which deceived and misled the arbitrator [or engineer], and not a mistake in drawing conclusions of fact from evidence or observation, or mistake in adopting erroneous rules of law or theories of philosophy. Suppose, for instance, it were referred to an arbitrator [or engineer] to measure a large area, where it was necessary to run lines through woods by the aid of compass, and suppose that through fraud or accident the regular action of the needle of the compass was disturbed by the presence of a piece of steel,[2] and this was wholly unknown to the arbitrator [engineer], who was thus led to adopt false courses as true ones as the basis of his computations." If this fact could have been afterwards proved, the court thought it would be good grounds to set aside the award. "But," continued the justice, "if the arbitrator [or engineer] had adopted a theory of magnetism in regard to the actual variations of the needle, alleged to be erroneous and leading to the adoption of a similar erroneous series of courses, although it should be pronounced erroneous by other philosophers, conversant with all that is known of the science of magnetism, whatever might be their number or weight of authority, it could not be heard by a court and jury, because it would not tend to prove the kind of error or mistake which had misled the constituted judge in the case, but would be an appeal from his decision in a case where he has exercised his judgment.

"So, to put another instance, suppose in making mathematical computations the engineer has used a table of logarithms, believing them to be correct, which are afterwards shown to be erroneous; it would be a mis-

[1] Boston Water Power Co. *v.* Gray, 6 Met. 169 [1843]; Vandewerker *v* V. C. Ry. Co., 27 Vt. 130 [1854]; Roloson *v.* Carson, 8 Md. 208 [1855]; Palmer *v.* Clark, 106 Mass. 373.

[2] Query if the effect of the surveyor's steel spectacles or the steel rim of his derby hat would be a ground for attacking his estimates or decision.

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take that misled him. But, if he has purposely and deliberately adopted a process of mathematical reasoning which he believed to be correct, his award or estimates could not be impugned by the testimony of other mathematicians tending to show it was erroneous."[1]

In an earlier Vermont case the same rules are laid down: "That reports of referees will be set aside only when they have adopted a rule of action and misapplied it, and it is immaterial whether it be a rule of law, or of equity, or of arithmetic, circumstantial errors are not sufficient to avoid their decisions."[2]

434. A Pure Mistake does not Render Award or Estimate Void, but Subject to Correction.—Errors in awards or estimates due to a mistake in computations, and which can be made certain by mathematical calculations, do not render the award or estimate void,[3] nor do mistakes in charging interest furnish a ground for a court of equity to interfere,[4] for an award cannot be attacked on the ground of an error in computing the amount found due.[5] An error of ten (10) feet in the height of a "bench mark" on the line of a railroad, by which erroneous "bench" the excavations had been computed, was held to be such a mistake in the engineer's estimates as a court of equity would correct and relieve against.[6]

Another case has held that a court would relieve from an oversight to measure or estimate a particular part of the work, or from a wrong construction put upon the provisions of the contract by the engineer.[7] The cases in which a contractor has been allowed to recover more than the amount of the engineer's estimate or has been excused from the production of the engineer's certificate on the ground of mistake are extremely rare. Thousands of cases mention mistake as one of the things that will avoid his decisions, but the cases where actual recover has been had are rare indeed.

435. Cases where Contractor has Recovered for Extra Work Required by Reason of Engineer's Mistakes.*—The following cases come the nearest to such a decision, but as will be seen, other circumstances enter into the cases. In Indiana it has been held that a finding by the jury that in many instances the estimates were incorrect owing to the negligence, carelessness, incompetency, and mistakes of the company's engineers was entirely sufficient to entitle the contractors to recover what was due them, notwithstanding such estimates.[8]

[1] Justice Shaw, in Boston Water Power Co. *v.* Gray, 6 Met. 169 [1843]. *See also* Goddard *v.* King (Minn.), 41 N. W. Rep. 859 [1889].

[2] Learned *v.* Bellows, 8 Vt. 79 [1836].

[3] Clement *v.* Foster, 69 Me. 318 [1879].

[4] 3 Jones Eq. 462.

[5] May *v.* Miller, 59 Vt. 577.

[6] Herrick *v.* Belknap, 27 Vt. 673; *and see* Swift *v.* New York, 89 N. Y. 52; Lewis *v.* Chicago, etc., Ry. Co., 49 Fed. Rep. 708.

[7] Lewis *v.* Chicago, etc., Ry. Co., 49 Feb. Rep. 708; *accord* O'Brien *v.* New York N. Y. (App.), 35 N. E. Rep. 323, 139 N. Y. 543.

[8] Louisville E. & St. L. Ry. Co. *v.* Donegan (Ind.), 12 N. E. Rep. 153 [1887]; *citing* 102 Ind. 262 and 104 Ind. 133; *but*

* *See* Sec. 587, *infra*.

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If the architect who is to superintendent and direct the work and who is made the arbitrator as to its proper performance, delay the contractor unreasonably in his work for the benefit of the owner or other contractors, and by allowing other contractors to obstruct the work renders it necessary for the contractor to do it in an unusual manner, which adds largely to its cost, the owner will be liable to the contractor for the loss resulting.[1]

An early New York case is authority for the following dictum: That if a contractor is required by his contract to work under the direction and constant supervision of the company's engineer, to follow his lines and levels, and the engineer makes a mistake or by error is misled so that work is done that is unnecessary and unexpected, it would work great hardship on the contractor if he could not recover for such extra work because the engineer refused to include it in his estimate. For example, in a tunnel where the work is to be so executed as to conform to the lines and levels and sections of the engineer and under his direction, supervision, and control, it cannot be disputed that the contractor is entitled to rely upon the engineer's surveys. If the lines and levels of the company's engineer are incorrect, the loss ought not to fall upon the contractor, but upon the company whose agent he is.* "It cannot," said the court, "be argued that the engineer is the agent of the contractor as well as of the company." The engineer is the special agent of the company, whose directions the contractor is bound to follow and obey. The engineer's science, skill, and training are supposed to furnish safe guides to the contractor. He cannot safely question the correctness of the engineer's operations or measurements, and when a clause is inserted in the contract "that if in any event or from any oversight or other cause the contractor shall excavate any greater quantity than he has undertaken by this agreement, without the written consent, etc.," it must be construed to mean that if in any case the contractor, by oversight neglecting the instruction of the engineer or working without them or other like cause, makes a greater excavation than is called for by the contract, he shall bear the loss. It cannot properly be called an oversight if the contractor is led astray by the erroneous working directions of the engineer.[2]

A city has been held liable for extra work on a public improvement which was made necessary by the mistake of the city engineer.[3] Such a case might be sustained under the term "gross mistake," as distinguished

see comments by the court on the loose and confused mass of evidence, which the Supreme Court declined to search through for errors on appeal.

[1] Genovese *v.* Third Ave R. Co. (Sup.), 43 N Y. Supp. 8

[2] Seymour *v.* Long Dock Co., 20 N. J. Eq. 396.

[3] McCann *v.* City of Albany (Sup.), 42 N. Y. Supp. 94; *but see* Murphy *v.* Liberty Natl. Bk. (Pa. Sup.), 36 Atl. Rep. 283. There can be no recovery in such a case if the terms of the act authorizing the work expressly limit the liability of the city to the contract price: O'Brien *v.* Mayor, 15 N Y. Supp. 520 [1891]; s. c. 139 N. Y. 543, 142 N. Y. 671.

* *But see* Secs. 236–242, *supra.*

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from the ordinary mistakes that may creep into computations of earthworks or that result from the ordinary operations of engineering in the field or the office. Although the element of fraud is not brought out, there is no question if such rank injustice on the part of the engineer as to require the contractor to meet the expenses attending his errors in his calculations would not be sufficient evidence of fraud and bad faith to come within the regular rule.[1]

This was made the ground of a recent decision under a contract for the excavation of a tunnel, which provided that the compensation should be $1.75 per cubic yard, unless a coal vein running through the tunnel was, in any section of the tunnel, less than four feet wide, in which case the compensation should be $3.50, and which also provided that payments should be made monthly on estimates of the company's engineer, whose decision should be final. It was held that the mistake of the engineer in allowing only $1.75 per cubic yard of excavation in sections where the vein of coal entirely disappeared, was such a violation of the contract as to amount to a fraud, and that consequently his finding and estimate were not conclusive.[2]

436. Decision of Engineer When he Has Made a Mistake of Law.—It is sometimes popularly stated that a mistake as to a question of law will be corrected by the courts. There is a little ground for this assertion. If no reservation is made in the submission of questions to the referee [engineer], the parties are presumed to agree that everything as to law and fact necessary for the decision is included in the reference. Under a general submission the referees have rightfully the power to decide questions of law and those of fact, and they are not bound to award on dry principles of law, but they may award according to equity and good conscience.[3]

A general submission constitutes the arbitrator a final judge of questions of law and fact,[4] and his award cannot be set aside for mere errors of judgment as to the law or facts of the case submitted to him.[5]

The settlement of controversies by arbitration is looked upon with great favor by the courts, and ordinarily, if the award be within the power of the arbitrators and unaffected by fraud, mistake, or irregularity, the judge has no power over it, except to make it a rule of the court and enforce it according to the course of the court. "The referees are a law unto themselves, and may decide according to their own notions of justice and without giv-

[1] Louisville E. & St. L. R. Co. *v.* Donnegan (Ind.), 111 Ind. 179.

[2] Norfolk & W. R. Co. *v.* Mills (Va.), 22 S. E. Rep. 556.

[3] Klein *v.* Catara, 2 Gallison C. C. 61 [1814]; Kirk & Randall *v.* The E. & W. India Dock Co., 55 L. T. Rep. (N. S.) 245 [1886]; Morse on Arbitration 296; Hall *v.* Norwalk F. Ins. Co. (Conn.) 17 Atl. Rep. 356.

[4] Morse on Arbitration 296; *contra* Jennings *v.* Gray, 29 Iowa 537.

[5] Masury *v.* Whiton, 111 N. Y. 679 [1888]; Hall *v.* Norwalk F. I. Co. (Conn.), 17 Atl. Rep. 356; Kirk & Randall *v.* E. & W. India Dock Co., 55 L. T. Rep. (N. S.) 245 [1886]; Sweet *v.* Morrison, 116 N. Y. 19 [1889]; Porter *v.* Buckfield R. R., 32 Me. 559; Perkins *v.* Giles, 50 N. Y. 228; *and see* 15 Ill. 72, 412, 461; *semble* Byron *v.* Low, 109 N. Y. 291; Phelan *v.* Mayor, 119 N. Y. 86; D. & H. Canal Co. *v.* Penna. Coal Co., 50 N. Y. 266; Stewart *v.* Grier (Del.) 7 Houst. 378.

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ing any reasons therefor." "Even where they decide erroneously, the error will not vitiate the award unless it appears that they intended to decide according to law" and failed in the attempt.[1]

Arbitrators, referees, and engineers are not usually required to find a statement of facts or conclusions of law. Unless their award contains (is based upon) erroneous views of the law as a basis of the award, their decision in the absence of fraud will not be reviewed.[2] The mode or manner of making an estimate or of investigating a case is not a ground for setting it aside unless corruption or partiality is shown.[3]

Certainly no mistakes in matters of fact depending upon the misjudgment of the engineer whether in weighing evidence or the construction of contract or of written admissions are of any avail to avoid his award.[4] Mistakes in drawing incorrect inferences or forming erroneous judgments or conclusions of fact will not vitiate his award.[5]

If, however, a point of law be referred to the court by spreading it on the award, and the referee mistakes the law, the award will be set aside. If he admits the law, but decide contrary thereto upon principles of equity and good conscience, although such intent appear on the face of the award, it is no ground to set it aside.[6]

When the decision of matters by the engineer is not confined to the contract merely, but comprehends all matters in controversy between the parties, thus leaving the existence of the contract, as well as its terms and construction, to be determined, and the award does not undertake to identify the contract or construe its provisions, but simply declares that there is so much due on the contract, a court has no power to modify the award so as to make it conform to the contract, unless it clearly appears from the award that the arbitrators intended to decide according to the legal rights of the parties, and not according to their own ideas.[7] "Unless the certificate itself discloses an intention to decide according to law, such intention can be shown in no other way."[8] To avoid an award on the ground of a mistake of law, the mistake must appear on the face of the award;[9] and even when arbitrators are required to decide according to the strict rules of law, if the error complained of is not plain, or if the point of law is doubtful, their decision will not be interfered with on account of error in law.[10]

[1] Wyatt *v.* Lynchburg & D. R. Co. (N. C.), 14 S. E. Rep. 683 [1892]; *citing*, Lusk *v.* Clayton, 70 N. C. 184; Jones *v.* Frazier, 1 Hawks 379; Hurdle *v.* Stallings, 109 N. C. 6; Leach *v.* Harris, 69 N. C. 532.

[2] Smith *v.* Kron (N. C.), 13 S. E. Rep. 839.

[3] Hartford F. L. Co. *v.* Bonner Mer. Co. 56 Fed. Rep. 878.

[4] Vanderwerker *v.* V. C. Ry. Co., 27 Vt. 130 [1854].

[5] Roloson *v.* Carson, 8 Md. 208 [1855]; McCahan *v.* Reamy, 33 Pa. St. 535 [1859]; *but see* Arnold *v.* Mason, 11 R. I. 238 [1877], where it was held that a material mistake of fact was a good ground for setting aside an award.

[6] Klein *v.* Catara, 2 Gallison C. C. 61 [1814]; *and see* Kirk & Randall *v.* The E. & W. India Dock Co., 12 App. Cas. 738.

[7] Wyatt *v.* Lynchburg, etc., R. Co. (N. C.) 14 S. E. Rep. 683 [1892].

[8] Wyatt *v.* Lynchburg & D. R. Co. (N. C.), 14 S. E. Rep. 683 [1892]; *citing*, Ryan *v.* Blount, 1 Dev. Eq. 382.

[9] Witz *v.* Tregallas (Md.), 33 Atl. Rep. 718.

[10] School Dist. *v.* Sage (Wash.), 43 Pac. Rep. 341.

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Where engineers and architects make a mistake, is in seeking to substantiate their decisions by proofs. This is not vainglory in imitation of chief justices, but comes from the technical training which engineers undergo from their earliest studies. As students at the blackboard, and throughout their apprenticeship, they have had to demonstrate the truths and principles on which they work and by which they have judged, and it is the most natural, and at the same time dangerous, thing to undertake, to uphold their position in the eyes of a prejudiced and perhaps ignorant contractor, or upon legal principles about which they know so little. As has been said in so many times in this work, an engineer should be non-committal; it were well, in many places, to be dumb; usually the least said the better. He should in his estimates justify his every act and conclusion, and fortify his every decision and judgment against every attack, but the place for such records, notes, and comments is, like a physician's or lawyer's, in his diary, note-books, and office, and not spread upon a certificate, estimate, or award, which is for results and conclusions only. If an engineer will have his award enforced, no references to points of law, to circumstances, or to facts should be made, unless the contract requires them. If an engineer gives the legal grounds and current of events by which he has arrived at his decision, and it is apparent that his groundwork was false, then his conclusions must be wrong, even though he has exercised an honest judgment, and his certificate may be impeached.

437. Discovery and Proof of Fraud on Part of Engineer Renders Certificate Unnecessary.—When fraud is discovered and a contractor seeks to recover for what he has done without the certificate of the engineer or a final estimate, two questions arise: First, whether the engineer's fraud renders the estimate legally insufficient and unnecessary? or secondly, whether it is incumbent on the contractor to demand of the company, or use proper exertions to procure, a sufficient final estimate? The importance of having a final estimate by a competent engineer in charge of the execution of the work, and the fact that the contract expressly requires it, renders it improper to deprive the company of the benefit of such an estimate, unless it be very clear that it has been forfeited by the company's own acts or default. By the terms of the contract the final estimate is usually to be made by the engineer having charge of the work. By its terms, then, he is the only one who will answer that description. If to be made by the incumbent of an office it might be different. His final estimate being fraudulent it would be unjust to require the contractor to submit to another, which may be as unreliable as the first one. He is wholly unfit to make another, and it is the fault or misfortune of the company who have selected him to have a fraudulent engineer.[1] When the reference is to arbitrators by name, and their award is set aside for misconduct, it is proper to try the cause in the regular course of the business of the court, unless other arbitrators are agreed upon.[2]

[1] B. & O. R. Co. *v.* Polly Woods Co., 14 Gratt. 448 [1858]; *see also* Price *v.* C., S. F. & C. Ry Co., 38 Fed. Rep. 307 [1889]; Meyers *v.* Pac. Const. Co., 20 Oreg. 603.

[2] Robinson *v.* Shanks (Ind.), 20 N. E. Rep. 713 [1889].

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So it has been held that if the contractor has proved that the final estimate made by the engineer was fraudulent, he might recover without further proof that he was unable to procure such final estimate.[1]* If the engineer has fraudulently underestimated the work, or wrongly classified it in his monthly estimates, it seems the contractor can bring suit without alleging that the questions have been referred to the engineer, no hearing having been expressly provided for.[2]

Fraud terminates the engineer's authority and divests him of his powers as umpire, and opens the doors of the courts for the contractor. It must be apparent to the reader that an overzealous engineer, or one with more zeal than principle, could, by his own imprudence, render the most vital part of the contract null and without effect. Such a consequence might be more detrimental to the interests of his company than what he could ever have filched from the contractor by nefarious practices. The case once in court, it gives the determination of questions of the most technical character, of facts difficult in the extreme, of things concealed and known only to the parties and to the engineer, of mathematical operations requiring peculiar preparations and skill, to a jury indifferently selected, and to judges appointed or elected without any consideration of their fitness to pass judgment upon such questions; a misfortune which almost every clause of the contract seeks to avert, and to prevent which the engineer was employed. Whatever hardships result, the justice of these decisions cannot be questioned. The owner or company having employed and trusted the engineer, it is in as good, if not a better, position to detect and know his disposition and character, and it is a sound principle of agency that if a third person or the principal must suffer from the acts of an agent, it should be the principal who has employed, retained, and trusted the agent.

438. Other Instances in which Engineers' Certificates have been Dispensed With.—Other circumstances have been mentioned in cases as a possible excuse for the nonproduction of the certificate, or the performance of the condition, but the cases are rare in which actual recovery has been allowed without it. It is often asserted that if the performance of the condition precedent has been rendered impossible by time or accident or agencies beyond the control of the contractor, its performance may be excused.

The author is aware that there is a rule to the contrary, that a condition precedent will not be excused for the above reasons, in a court of law, though the performance of the act necessary to recover would be excused if it were regarded as a covenant or a promise instead of a condition precedent;[3] but in practice to-day the sharp distinction between law and equity does not

[1] Byron *v.* Bell (Com. Pl.), 10 N. Y. Supp. 693.

[2] Meyer *v.* Pac. Const. Co., 20 Oreg. 603; *and see* Phillips *v.* Foxall, 41 L. J. Q. B. 293; *and* McMahon *v.* New York, etc., R. Co., 20 N. Y. 463

[3] Langdell's Summary of Contracts, 1075.

* *See* Sections 414, 427–428, *supra*.

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exist, in many states, and courts of law have adopted the principles of courts of equity so far as their procedure will admit, and recovery is frequently allowed in courts of law if the failure of the contractor to perform does not go to the essence of the contract.[1]

It has been held under some circumstances,[2] * where performance is prevented by inevitable accident, as the destruction of the subject-matter of the contract, the performance will be excused.[3] † If the completion of the work is prevented by the engineer, by authority bestowed by the contract,[4] or is prevented by authority of the state[5] or city,[6] or by an act of the law,[7] or by accident, fraud, or some unavoidable cause,[8] or by condition over which the contractor has no control,[9] but which are entirely within the control of the owner,[10] the certificate that the contract has been entirely performed is no longer necessary as a prerequisite to the contractor's recovery.[11]

In rendering the certificate or making the final estimate, the engineer should consider the contract obligations assumed by the parties only, and the objects to be accomplished by it. The interference of a third party should not be considered. It was therefore held that an injunction duly issued by a court in a suit by a third party against the company or city afforded no excuse for the refusal of the certificate; that if the certificate was to be given when the contract was beyond all question completed, its refusal after completion was unreasonable, and that the contractor might recover without it.[12] If the work is to be performed to the satisfaction of an engineer or architect named, or to be paid for only upon the presentation of his certificate, the approval, certificate, or estimate will be excused in case of the engineer's death or prolonged absence.[13] In another case the

[1] This does not seem to be true of express conditions precedent, Langdell's Summary 1077; *and see* Chism *v.* Schipper, 51 N. J. Law 1 [1888]. That a court of equity will give relief by granting an account, M'Intosh *v.* Great Western Ry. Co., 2 De. G. & Sm. 764; Waring *v.* M. S. & L. Ry. Co., 7 Hare 482; Johnson *v.* S. & B. Ry. Co., 3 D. G. M. & G. 914; Munro *v.* W. & B. Ry. Co., 13 Wend. 880; Godefroi & Shortt Ry. Cas. 94; Scott *v.* Raiment, L. R. 7 Eq. 112; Fry's Specific Performance of Contracts, § 827, p. 366.

[2] For which see cases cited, and Langdell's Summary of Contracts, pp. 1074–1089. The size of this book will not permit an exhaustive treatment of the subject of conditions and their performance, which may be found in any of the standard works on contracts.

[3] Lord *v.* Wheeler, 1 Gray, 282 [1854]; Cleary *v.* Sohier, 120 Mass. 210 [1876]; Niblo *v.* Buisse, 3 Abb. App. Dec. 375 [1865]; Rawson *v.* Clark, 70 Ill. 656 [1873]; *but see* Brumby *v.* Smith, 3 Ala. 123 [1841].

[4] Devlin *v.* Second Ave. R. Co., 44 Barb. (N. Y.) 81 [1865].

[5] Jones *v.* Judd, 3 Comstock (N. Y.) 412 [1850].

[6] Theobald *v.* Burleigh (N. H.) 23 Atl. Rep. 367.

[7] Kingsley *v.* Brooklyn, 78 N. Y. 216 [1879].

[8] Mills *v.* Weeks, 21 Ill. 561.

[9] Brown *v.* Overbury, 11 Exch. 715.

[10] N. Y. & N. H. A. Sprinkler Co. *v.* Andrews, 23 N. Y. Supp. 998.

[11] *See* Buckman *v.* Landers (Cal.), 43 Pac. Rep. 1125; Byron *v.* New York, 54 N. Y. Super Ct. 411, *and* Whelan *v.* Boyd, 5 Cent. Rep. 651.

[12] Bowery National B'k *v.* Mayor, 63 N. Y. 336 [1875]; *see also* Union Cem. Ass'n *v.* Buffalo (N. Y. App.), 26 N. E. Rep. 330 [1891].

[13] Schenke *v.* Rowell, 7 Daly 286 [1877]; Quigley *v.* DeHass, 82 Pa. St. 267; Firth *v.* Midland Ry. Co., L. R. 20 Eq. 100.

* *But see* Secs 674 *et seq.*, *infra.*

† *See also* Secs. 669–680, *infra.*

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court declined to reverse a judgment on account of errors, because the architect was dead and the court said it would do no good.[1]

It is submitted that this will hold only in cases where the decision was to be rendered by a particular person. If referred to the engineer of the company for the time being or to the incumbent of an office, death will not excuse the certificate unless the company neglects or refuses to appoint another.[2] If another be appointed by the owner and accepted by the contractor the certificate of the newly-appointed engineer must be obtained as a condition precedent to recovery by the contractor.[3] Probably no formal acceptance in terms by the contractor would be necessary; acceptance would be implied by the court if the work was continued under the engineer's measurements and directions. If another engineer be not selected or agreed upon the contractor may sue upon his contract.[4] If no architect has been appointed the work, of course, cannot have been completed to one's satisfaction, and the appointment of the architect is a condition precedent to the performance of the contractor's covenant to complete the works, notwithstanding that they were to be completed by or upon the day named.[5]

If the work undertaken by the contractor is of such a character that he has been selected on account of his peculiar skill, knowledge, or ability, there are cases in which the death of the *contractor* will excuse the completion of the work, and in some jurisdictions enable his representatives to recover for what he has done.[6]

439. Performance of Condition Precedent Prevented by Failure or Refusal of Engineer to do His Part.—If no estimate has been made by or through the neglect, fault, or unreasonable refusal of the engineer or of the party who employs him, the contractor can probably recover without the engineer's estimate or certificate for the work he has performed,[7] if there

[1] County of F. *v.* Laing, 127 Pa. St. 119 [1889].

[2] Schenke *v.* Rowell, 7 Daly 286 [1877].

[3] Beecher *v.* Shuback (Com. Pl.), 23 N. Y. Supp. 604; Wallis Iron W'ks *v.* Monmouth Pk. Ass'n (N. J.), 26 Atl. Rep. 140.

[4] Pretzfelder *v.* Merchants' Ins Co. (N. C.) 21 S. E. Rep. 302; Griffith *v.* Happersberger, 86 Cal. 605; N. Lebanon R. Co. *v.* McGrann, 33 Pa. St., 530; Ranger *v* Gt. Western R Co., 27 Eng. Law & Eq. 35.

[5] Hunt *v.* Bishop, 8 Exch. 675 [1853].

[6] Wolfe *v.* Hawes 20 N. Y. 197 [1859]; *but see* as to excusing performance of conditions precedent, Langdell's Summary 1075–1079; *and see* Chism *v.* Schipper, 51 N. J. Law 1 [1888].

[7] Schenke *v.* Rowell, 7 Daly 286 [1877]; Heine *v.* Meyer, 61 N. Y. 171 [1874]; Snell *v.* Cottingham, 72 Ill. 161 [1874]; Wood *v.* Chicago, etc., Ry. Co., 39 Fed. Rep. 52; Byron *v.* Mayor, 54 N. Y. Super. Ct. 411 [1887]; Thomas *v.* Fleury, 26 N. Y. 26; Barton *v.* Hermann, 11 Ab. Pr. (N. S.) 382; Flaherty *v.* Miner, 123 N. Y. 382; Williams *v.* Chicago, etc., R. Co., 112 Mo. 463; Van Keuren *v.* Miller, 71 Hun (N. Y.) 68; Marcus Sayre Co. *v.* Benz (N. J. Ch.) 26 Atl. Rep. 911; Ormes *v.* Beadle, 2 Giff. 166 [1866].

So held in a case between materialman and contractor; certificate refused as unnecessary: Murphy *v.* Jones (Sup.), 38 N. Y. Supp. 461.

Can have an action at law. Sharpe *v.* San Paulo Ry. Co., 8 Chanc. App. 607; McMahon *v.* The N. Y. & E. Ry. Co., 20 N Y. 463 [1859]; Herrick *v.* Belknap, 27 Vt. 673 [1854], can recover at law; Merril *v* Ithaca & O. R R. 16 Wend. 586; Nolan *v.* Whitney, 13 Rep'tr 601, *and cases cited*, s. c., 88 N. Y. 648 [1882]; Starkey *v.* De Graff, 22 Minn. 431; Langdell's Summary 1083; Bently *v.* Davidson (Wis.), 43 N.W

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has been a substantial compliance with all the terms of the contract and nothing remains to be done in relation thereto which is practicable and reasonble to complete the job.[1] Even though the building contract provides for payments only on certificates of the architects, it does not prevent recovery by the builder if he has fully performed the contract and the architect refuses his certificate without sufficient cause.[2] If the contractor has returned the final certificate of the architect as not being satisfactory, and the architect afterwards refuses another or to redeliver the same one, the contractor may recover without it.[3]

If the contractor prove that he was ready and willing to perform the condition precedent, but was prevented from doing so by the act of the owner, he will be discharged from further performance and may recover on a *quantum meruit* or in an action on the contract.[4] The contractor may recover a reasonable sum for work and labor done, money expended in the performance of the contract, and materials furnished, and in addition an equivalent sum for the profits which he would have realized from the performance.[5]* The owner cannot insist on a condition precedent when he himself has defeated a strict performance.[6]

A refusal to make the estimate *at once* when the work has been stopped because the appropriations have been exhausted, but which estimate was made within five weeks thereafter, was held not such a refusal as would enable the contractor to avoid the engineer's estimate.[7] It should be made within a reasonable time.[8] A delay of a year on the part of the owner to determine damages due to a failure to perform to the satisfaction of an architect was held fatal to the claim for any damages.[9] If the engineer's

Rep 139 [1889]; *and see* Devlin *v.* N.Y. & E. Ry. Co., 20 N. Y. 463; Beecher *v.* Shuback, 23 N.Y. Supp. 604; Sweeny *v.* U. S., 15 Ct. of Cl. 400; Rude *v.* Mitchel (Mo.), 11 S. W. Rep. 225 (1889); Jenks *v.* Robertson, 12 Alb. L. J. 57; Smith *v.* Smith, 45 Vt. 433; *and* Weeks *v.* O'Brien, 141 N. Y. 199; *and see also* Neenan *v.* Donoghue, 50 Mo. 493, where only *one* member of a committee of *three* examined the work and accepted it. The contractor was permitted to recover.

[1] Craig *v.* Geddis (Wash.), 30 Pac. Rep. 396; *accord,* Bently *v* Davidson (Wis.), 43 N. W. Rep. 139 [1889]; Smith *v.* Brady, 17 N. Y.176; Thomas *v.* Fleury, 26 N.Y. 26; Wyckoff *v.* Meyers, 44 N. Y. 145; Nolan *v.* Whitney, 88 N. Y. 648; U. S. *v.* Robeson, 9 Pet. 328; Smith *v.* Wright, 4 Hun 652; Whiteman *v.* Mayor, 21 Hun 121.

[2] Van Keuren *v.* Miller (Sup.), 24 N Y. Supp. 580; Bd. of Ed *v.* First Nat. B'k (Sup), 24 N. Y. Supp. 392; Marcus Sayre Co *v.* Benz (N J. Ch.), 26 Atl. Rep 911.

[3] Arnold *v.* Bourinque, 144 Ill. 132, *reversing* 44 Ill. App. 199.

[4] 3 Amer. & Eng. Ency. Law 922; *cases cited,* Planche *v.* Colburn, 8 Bing 14; Goodman *v.* Pocock, L R. 15 Q. B 576; Cort *v.* Ambergate R. Co., L. R. 17 Q. B. 127; Hall *v.* Rupley, 10 Pa. St. 231; Moulton *v.* Trask, 9 Metc. (Mass.), 577; Whelen *v.* Boyd, 114 Pa. St. 228; Hoagland *v.* Moore, 2 Blackf (Ind.) 167; Woolner *v.* Hill, 93 N. Y. 576; United States *v.* Behan, 110 U. S. 339; Bannister *v.* Read, 1 Gilman (Ill.) 92; Selby *v.* Hutchinson, 4 Gilman (Ill.) 319; Webster *v.* Enfield, 5 Gilman (Ill.) 298; Derby *v.* Johnson, 21 Vt 17; Clark *v.* Marsiglia, 1 Denio (N. Y.) 317.

[5] Kendall Bank Note Co. *v.* Comm'rs of Sinking Fund, 79 Va. 563; Cent. Lunatic Asylum *v.* Flanagan, 80 Va. 116.

[6] Butler *v.* Tucker, 24 Wend. 449; Doll *v.* Noble (N. Y.), 22 N. E. Rep. 406 (1889); *see* McKone *v.* Williams, 37 Ill. App. 591.

[7] Dhrew *v.* City of Altoona, 121 Pa. 401 [1888]; s. c., 15 Atl. Rep 636.

[8] Soderberg *v.* Crockett, 17 Nev. 410.

[9] Baumister *v.* Patty's Exec'rs, 35 Wis.

* *See* Secs. 440 and 690–696, *infra.*

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certificate be filed before the commencement of an action (three months after work was completed) the contractor cannot allege the absence of such certificate or proceed as if there were none, even though there has been unreasonable delay in filing it.[1]

If the contractor demand an estimate of work done and receives an unqualified refusal, or is indefinitely put off or it is not done with reasonable dispatch, the contractor is entitled to bring suit and to prove the value of his work by other means.[2] The contractor may have the work estimated by other engineers, whose evidence of the quantities is admissible.[3] If the engineer be designated as the officer of a certain bureau, and he refuses to act, it cannot be shown by the owner that the work done does not conform with the rules and regulations of such bureau.[4] When the architect declared that he refused the certificate on the ground that the contract had not been complied with, and it was proved that he had admitted that the contract was substantially performed, but that he neglected to give the certificate because "the owner had told him not to give it, and that he could not do because the owner was a friend of his, and that to give it would break friendship with him," it was held that the certificate was unreasonably and in bad faith refused, and that the contractor might recover the balance of the contract price, less an allowance for damages on account of omissions and deviations.[5] Another case held it was a question for the jury to determine whether the certificate was unreasonably withheld.[6]

The contractor must have asked for a certificate, or have offered to refer disputes to the engineer's determination.[7] Some cases hold that the contractor must make a demand for the certificate, and it has been held that an inquiry as "whether the returns are in"—*i. e.*, whether the estimates and measurements of the division engineer have been returned to the chief engineer so that he can make his final estimate—is not a demand of the chief engineer for a certificate of work done.[8] *

217 [1874]; *four months*, Preston *v.* Syracuse (Sup.), 36 N. Y. Supp 716.

[1] O'Brien *v.* City of New York (N. Y. App.), 35 N. E. Rep. 324, 139 N. Y 543.

[2] Dhrew *v.* Altoona City, 121 Pa. St. 419; McMahon *v.* N. Y. & E R. Co., 20 N. Y. 463; Herrick *v.* Belknap, 27 Vt. 673; Downey *v.* O'Donnell, 92 Ill. 559; Grant *v.* Savannah, etc., R. Co., 51 Ga. 348; Atlanta, etc., R. Co. *v.* Maughan, 49 Ga. 266; Milnor *v.* Georgia R. Co., 4 Ga. 385; Lewis *v.* Hoar, 15 Am. Law Review 239 [1881]; Trustees of I. & M. Canal *v.* Lynch, 10 Ill. 521; *see* Thomas *v.* Fleury, 26 N. Y. 26 [1862]; N. Y. N. H. A. Sprinkler Co. *v.* Andrews, 23 N. Y. Supp. 998; McFadden *v* O'Donnell, 13 Cal. 160 [1861]; A. J. Anderson Elec. Co. *v.* Cleburne Co. (Tex.), 27 S. W. Rep. 504 [1894]; Bucher *v.* Schuback (Com. Pl.) 23 N. Y. Supp 604; Wilson *v.* York & Md. R. Co., 9 Peters 237; Williams *v.* Chicago, etc., R. Co., 112 Mo. 463; Guidet *v.* Mayor, 36 N. Y. Super. Ct. 557 [1873]; *and see* 21 Amer. & Eng. Ency. Law 79; *see also* United States *v.* Robeson, 9 Pet. 319–327; Devlin *v.* 2d Ave. R. R., 44 Barb. 81; Jenks *v.* Robertson, 12 Alb. L J. 57; Smith *v.* Smith, 45 Vt. 433.

[3] Crawford *v.* Wolf, 29 Iowa 567 [1870]; McFadden *v.* O'Donnell, *supra*.

[4] A. J. A. Electric Co. *v.* Cleburne, etc., Co. (Tex.), 27 S. W. Rep. 504.

[5] Anderson *v.* Meislahn, 12 Daly 150 [1883].

[6] Gibbons *v.* Russell, 13 N. Y. Supp. 879.

[7] Hartupee *v.* Pittsburg, 97 Pa. St. 107 [1881].

[8] Byron *v.* Low (N. Y.), 16 N. E. Rep. 45 [1888]; *and see* Wilson *v.* York & Md.

* *See* Sec. 417, *supra*.

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The fact that the contractor does not know the address of the engineer and could not obtain it from the company, who failed to assist him in getting an estimate from the engineer, will excuse the demand and production of it in the absence of proof that the engineer disapproved the work done.[1] The duty to submit questions to the engineer or architect is mutual, and neither party can take advantage of its own neglect to do so.[2]

440. Inspection and Estimate Rendered Impossible by Act of Owner or Company.*—If the certificate is withheld *not* because the work has not been well and properly completed according to the contract, but by order or request of the owner of the building or of the company, the builder may recover without the certificate.[3]

When the contract contained a provision that the certificate of performance shall be given "agreeable to the drawings and specifications made by architects and signed by the parties thereto, and the drawings and specifications have been returned to the architect," and no drawings and specifications were ever prepared, the failure to procure the architect's certificate was held no bar to recovery and its production unnecessary.[4] A failure on the part of the company to perform their part of the contract has been held to be sufficient cause for the contractor to rescind the contract and to sue for labor and materials furnished, in which case the part requiring an acceptance by the architect would not be in force, and the company could not claim the benefit of it. If this were not the law the company could prevent the contractor from completing the job, and thus prevent him from doing that which was necessary to be done before he could procure the acceptance or a certificate of the architect.[5]

If the owner refuses to allow the contractor to proceed with and complete the work, the provision "that all disputes as to the construction of the work shall be settled by the architect, and all disputes as to the value of extra work, and omitted work, shall be settled by arbitration," ceases to be operative, and the contractor may bring an action for the value of the work he has done and materials he has furnished, without the architect's certificate.[6] †

R. Co., 9 Peters 327; Williams *v.* Chicago, etc. R. Co. (Mo.), 20 S. W. Rep. 631.

[1] Union Stove Works *v.* Arnoux, 26 N. Y. Supp. 83.

[2] County of Fayette *v.* Laing, 127 Pa. St. 119 [1889]; McFadden *v.* O'Donnell, 18 Cal. 160 [1861]; Downey *v.* O'Donnell, 92 Ill 559.

[3] Whelen *v.* Boyd, 114 Pa. St. 228 [1886]; Crawford *v.* Wolf, C. & A 29 Iowa 567; Kingsley *v.* Brooklyn, 78 N. Y. 216 [1879]; 3 Amer. & Eng. Ency. Law 922, *and cases cited;* Guidet *v.* Mayor, 36 N. Y. Sup. Ct. 557 [1873]; Mills *v.* Paul (Tex.), 30 S. W. Rep. 558; St. Louis & P. R. Co. *v.* Kerr (Ill.), 38 N. E. Rep. 638; Martin *v.* Leggett, 4 E. D. Smith (N. Y.) 255; Anderson *v.* Meisahn, 12 Daly 150 [1883]; United States *v.* Robeson, 9 Pet. 319; Brunsden *v.* Beresford 1 C. & E. 125; M'Intosh *v.* Great Western Ry., 2 Hall & T. 250, *in a court of equity.*

[4] Phœnix Iron Co. *v.* The Richmond, 6 Mackey's R. 180 [1887].

[5] Bennett *v.* Glatfeldt, 120 Ill. 175; *see* Linch *v.* Paris Lumb. Co., 80 Tex. 23; *and* Gillen *v.* Hubbard 2 Hill. (N. Y.) 303.

[6] Velsor *v.* Eaton, 14 N. Y. Supp. 467 [1891]; Kingsley *v.* Brooklyn, 78 N. Y. 216 [1879]; Markey *v.* City of M. (Wis.), 45 N. W. Rep 28 [1890].

* *See* Secs. 323–326, *supra*, and 439–40 and 689, *infra.*

† *See* Secs. 323–326, *supra*, and 670 and 689, *infra.*

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If the company has rendered the inspection, and therefore the estimate and certificate, impossible by its own act, by concealing, undoing or destroying the work that has been done, it has been held that the contractor might recover without the certificate.[1] When the performance of the work has been arrested by the acts or omissions of the company, the contractor may have his election either to treat the contract as rescinded and recover for what the work is reasonably worth, or to so much as he is justly entitled, or he may sue upon the agreement to recover for the work completed according to the contract and to recover damages he has sustained by reason of the refusal to permit the contractor to perform the contract; which include his loss of profits.[2] * When the performance has been prevented by circumstances not under the control of either party, then neither party is in default and no profits can be recovered.[3] † The contractor's recovery will be for work actually performed according to the rate established by the contract, for if the contractor assumes the risks, he should be entitled to the advantages resulting from them; and the fact that he has done the easier part of the work first, is no reason why they should not recover *per* the contract rate, for they could not have recovered more than the contract price if the more expensive parts of the work had been undertaken and performed first.

The English courts have entertained suits for damages by the contractor against the architect and owner, either jointly or severally, when through fraud or collusion they have withheld or refused a certificate.[4] The fraud or collusion must be alleged,[5] for he cannot be subject to an action for errors of judgment and skill, nor for refusing to reconsider such alleged mistakes, his duties involving discretion and judgment.[6] The owner it seems is not liable for the acts of his architect or engineer in withholding the certificate.[7]

441. Some Courts allow Contractor to Recover on a Substantial Performance of his Contract.—The approval of the architect may be presumed from the presence of the architect at the time the work was done and his failure to make any objections.[8] If the architect, acting in good faith, fails and refuses to approve the work in any form, the general rule is, without doubt, that the contractor cannot recover. If the owner approves the work, such approval by the architect is dispensed with; and when a contractor has fairly endeavored to perform his contract and has, in fact, substantially per-

[1] Doyne *v.* Ebbsen, 72 Wis. 234 [1888].

[2] Jones *v.* Judd, 4 Comstock (N. Y.) 412 [1850]; Boyd *v.* Meighan, 48 N. J. Law 404 [1886]; Hall *v.* Bennett, 48 N. Y. Super. Ct. 302; Langdell's Summary of Contracts 1077.

[3] Jones *v.* Judd, *supra*. This decision was not without dissention and was rendered on a vote of four to three, those voting in the negative maintaining that damages should have been included. The work was excavation and embankment of earthworks.

[4] Batterbury *v.* Vyse, 2 H. & C. 42; Ludbrook *v.* Barrett, 36 L. T. (N. S.) 616.

[5] Stevenson *v.* Watson, 4 C. P. D. 148.

[6] Stevenson *v.* Watson, *supra*.

[7] Clarke *v.* Watson, 18 C. B. (N. S.) 278.

[8] Wright *v.* Meyer (Tex.). 25 S. W. Rep. 1122; Coon *v.* Citizens' W. Co., 152 Pa. St. 644.

* *See* Secs. 690–696, *infra*.

† *See* Secs. 669–680, *infra*.

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formed it, many courts will permit him to recover if they can find any plausible ground or pretext to support such a decision.[1] *

442. Instances in Which Contractor has Been Allowed to Recover, Without Complete Performance, and Without Securing Engineer's Certificate.—Some courts[2] seem to have been more lenient with contractors and more ready to permit a recovery without a strict performance of the contract or of its conditions than other courts of certain states or of England or of Canada. In New York this is due to several causes, and among others it may be attributed to the code practice in vogue, which gives jurisdiction of equity courts, and to the fact that the courts have been divided on this question. In the United States, usually a substantial performance of a contract in good faith will entitle the contractor to recover for his work notwithstanding slight or trivial defects and omissions in its performance, for which allowance may be made from the contract price. A refusal by the engineer to give his certificate because of small and unimportant defects and omissions has been held unreasonable, and to dispense with the necessity of it, even though the contractor had intentionally furnished slightly defective, work, in the performance of his contract.[3] † Where an owner with his architect has accompanied the contractor on a tour of inspection through the building and they have pointed out what is necessary to complete the entire job, which finishing touches have been made and done, and the architect afterwards called the attention of the contractor to a few little odd jobs and repairs to the amount of $30, which he insisted should be done before he would grant his certificate, refusing the certificate until they were done, thereby keeping some $2,700 from the contractor; the court regarded these little items of work "as items hatched up as deficiencies by the owner and his architect" to avoid paying the contractor, and sufficient evidence of unreasonableness and bad faith to dispense with the condition precedent.[4] This New York case must be taken as probably very near the line, and the least evidence of fraud and bad faith that would suffice. It must be presumed that the court was pretty well satisfied of the owner's and architect's intentions, and that the contractor had been the victim of their collusion, but the bare fact of their insisting on these odd jobs and repairs being done would hardly justify such a conclusion. It is true that the architect might have given his certificate for the bulk of the money due and have deducted

[1] Kane *v.* Ohio Stone Co., 39 Ohio St. 1 [1883].

[2] Nolan *v.* Whitney, 88 N. Y. 648 [1882]; *citing numerous cases;* Keener's Quasi-Contract Cases, pp. 118–139.

[3] Demarest *v.* Haide, 52 N. Y Super Ct. 398 [1885]; *accord,* Bradley *v.* Brennick, N. Y. C. P., Dec. 1878; Heckman *v.* Pinkney, 81 N. Y. 211.

[4] Thomas *v.* Fleury, 26 N. Y. 26; *accord,* Bradner *v.* Roffsel (N. J.), 29 Atl. Rep. 317 [1894]; *but see* Hanley *v.* Walker (Mich.), 45 N. W. Rep. 57 [1890], which held that though the architect had been through the building and pointed out defects to be remedied which the contractor had done, and did not excuse him from furnishing the architect's certificate which had been made a condition precedent to his recovery.

* *See* Secs. 700–702, *infra.*

† *See* Secs. 698–702, *infra.*

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sufficient to complete the job, but if it was bad faith or frivolous on the part of the architect to retain so large a sum of money for so trifling a matter, it was equally unreasonable for the contractor to refuse to perform the few odd jobs. The question whether defects were so trivial and insignificant as to justify the finding that the work was substantially performed has been held a question of fact.[1]

The question of what is a substantial performance has been held a mixed conclusion of fact and law. Whether a defect or omission constituted a breach of the contract it seems is not a question for the jury, but a question of law for the court,[2] and the question whether the conclusions of law was supported by the findings of fact will be sufficient to sustain exceptions.[3]

If the architect certified to the completion of the contract when it was not finished, the question would arise if it would be binding and conclusive on the owner. It has been held that it was; that a certificate for works which lacked some $45 of being completed was not sufficient to impeach the certificate for fraud or to justify the owner in refusing to pay for at least the work actually done.[4] There are cases to the contrary which hold that the completion of the work should be insisted upon, and that it is no excuse that a portion of it might be executed and the whole completed at the cost of a few dollars.[5] *

These cases cannot be said to decide that the holding of a contractor to the strict and ultimate completion of his contract is an evidence of bad faith, but the decisions are valuable in that they contain lessons for architects and engineers—lessons that they all have to learn sooner or later. They show the necessity of being noncommittal, and of keeping their views to themselves until they have carefully looked over the works, the contracts, the specifications, and have carefully considered them all, in connection with one another, and to refrain from expressing themselves as to what will constitute a satisfactory completion of a structure until they are well satisfied that everything is done that the contract requires. As stated before, an engineer should see much and say little.

In Massachusetts it has been held that if there has been an honest intention to go by the contract, and a substantial execution of it, but some comparatively slight deviations as to some particulars provided for, the party may recover on a *quantum meruit* even when there is a special contract, and so much should be deducted from the contract price as the works are worth less, on account of the departures and omissions.[6] Another case holds that if the

[1] Johnson *v.* De Peyster, 50 N. Y. 666 [1872].
[2] Glaucius *v.* Black, 67 N. Y. 563
[3] Ketchum *v.* Herrington (Sup.), 18 N. Y. Supp. 429 [1892].
[4] Lincoln *v.* Schwartz, 70 Ill. 134; *see also* Kelley *v.* Syracuse, 31 N. Y. Supp. 283, *and* Wildey *v.* School Dist., 25 Mich. 419.
[5] Finnegan & Co. *v.* L. Engle, 8 Fla. 413 [1859].
[6] Hayward *v.* Leonard, 7 Pick. 181 [1828].

* *See* Secs. 370, 382–390, *supra.*

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contractor has left the work without fraud or wilful default, believing it to be completed as required by the contract, he is entitled to recover the price agreed upon, less the amount paid to finish it to the acceptance of the engineer.[1] He may recover the amount due subject to deduction for damages for imperfections and deficiencies in the work.[2] The New Hampshire courts would be apt to allow a recovery on the same ground.[3]

The law of contracts in general is much more strict, and requires a complete performance of conditions precedent, as the English law requires.[4] *

443. Instances Showing when the Engineer's Determinations have been Upheld.—The giving of a final certificate when works lacked some $45 of completion has been held not to be sufficient to impeach the engineer's certificate for fraud and to justify the company in refusing to pay at least for the work actually done,[5] and when a distance was to be ascertained and fixed by an engineer, by which the contractor was to be paid, was declared to be considerably less than by the usual route or by the air line, it was held not to be a mistake so gross as to imply bad faith or a failure to exercise an honest judgment.[6]

An award which is not the result of the judgment of the engineer, but is based on an agreement between one party and the engineer even though authorized by the other party, is not binding if the consent of one party was obtained by fraudulent means;[7] and an agreement on the part of the architect with his employer that cost of the works shall not exceed a certain sum, which was concealed from the builder, has been held so far a fraud as to excuse him from obtaining the architect's certificate, and to entitle him to recover without it.[8] Under an allegation of fraud it was held that evidence of the use of inferior and rotten flooring in a building should have been admitted as tending to show bad faith on the part of the architect in accepting such materials.[9]

In England the engineer's decision has been held to prevail notwithstanding there was a clause in the contract that "the inspection at the shops is not in any way to commit the company to the approval and acceptance of materials which, when delivered, shall not be strictly in accordance with the drawings and specifications," and another clause that "it is expressly understood that the engineer's approval is not in any way to relieve the contractors

[1] Walker *v.* Orange (Mass.), 16 Gray 193 [1860]; *see also* Davis *v.* Badders (Ala.), 10 So. Rep. 422.

[2] Danville Bridge Co. *v* Pomeroy, 15 Pa. St. 151 [1850]; *accord.* Kane *v.* Ohio Stone Co., 39 Ohio St. 1 [1883].

[3] Britton *v.* Turner, 6 N. H. 681; Smith *v.* B. C. & M. Ry. Co., 36 N. H 459.

[4] Keener's Cases on Quasi-Contracts; Langdell's Summary 1074 to 1089; *but see*, Lewis *v.* Hoar, 15 Amer. Law Rvw. 239 [1881].

[5] Lincoln *v.* Schwartz 70 Ill. 134; *but see* Kelley *v.* Syracuse, 31 N. Y. Supp. 283.

[6] Kiehlberg *v.* United States, 97 U. S. 398 [1878].

[7] Stockton Works *v.* Glen Falls Ins. Co. (Cal.), 33 Pac. Rep. 633, 637, 638.

[8] Kemp *v.* Rose, 1 Giff. 258; Kimberly *v.* Dick 13 Eq. 1; *and see* Pawley *v.* Turnbull, 3 Giff. 70.

[9] Tetz *v.* Butterfield, 54 Wis. 242 [1882].

* *See especially* Secs. 697-704, *infra.*

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from the conditions and stipulations in the specifications." It was held that the contract, as a whole, showed that the parties intended the final expression of the engineer's satisfaction with the entire contract to be conclusive. The court said: "It would be most extraordinary if this clause was binding on the company if they had disputed the quality of the iron and not binding if they did not."[1]

[1] Dunaberg & W. Ry. Co. v. Hopkins Co. (Eng.), 36 L. T. Rep. 733 [1877].

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CHAPTER XV.

CERTIFICATE AND ESTIMATE OF ENGINEER OR ARCHITECT CONCLUSIVE ON BOTH PARTIES TO THE CONTRACT.

444. Provision that Engineer's Determinations shall be Equally Binding and Conclusive upon Both Parties to the Contract.

> "It is hereby further agreed that the said directions, decisions, admeasurements, valuations, certificates, orders, and awards of the said engineer, which may be made from time to time, shall be final and conclusive upon the company or owner and the contractor[s] and upon his [their] respective legal representatives."

445. Engineer's Certificate and Decision are Conclusive on the Owner as well as the Contractor.—An agreement to arbitrate is not binding on either party unless both are bound,[1] for by the laws of arbitration an award is not binding upon one party unless the other is likewise bound. The groundwork of the law governing the submission of questions and disputes to engineers and architects is that of arbitration. While it is frequently held that the submission is not strictly a submission to arbitration, and the determination is not an award so as to be made a rule of the court under the codes and special laws of many states, yet it has, as has been shown in previous chapters, all the essentials of a common-law submission to arbitration. The engineer has been called a *quasi*-arbiter, an umpire, and a referee, from the earliest to the present period, and the cases have been supported upon the principles of arbitration and governed by its laws and rules. It is an almost universal law, therefore, that when a contract provides that the engineer shall pass upon the work and certify to payments to be made, or that the work and materials must be to his satisfaction before any payment therefor shall become due, his decisions are binding and conclusive upon the contractor, owner,[2] sureties,[3] subcontractors,[4] and all parties to the contract.[5]

[1] Nullelly *v.* Southern Iron Co. (Tenn.), 29 S. W. Rep. 361.

[2] McAuley *v.* Carter, 22 Ill. Rep. 53 [1859].

[3] Finney *v.* Condan, 86 Ill. 78 [1877].

[4] Grannis, etc., Co. *v.* Devees, 25 N. Y. Supp. 375; Park Fire Clay Co. *v.* Ott (Pa.), 30 Atl Rep. 1040; Ross *v.* McArthur 85 Iowa 203; Brown *v.* Decker, 142 Pa. St. 140 [1891]; O'Reilly *v.* Kerns, 52 Pa. St. 214; Guilbault *v.* McGreevy, 18 Can. Sup. Ct. 609; Clark *v.* Diffenderfer, 31 Mo. App. 232; *and see* Woodruff *v.* Hough (Ct.), 91 U. S. 596 [1875]; Lathrop *v.* Ellsworth, 15 N. Y. Supp. 873 [1891]; Cummings *v.* Bradford (Ky.), 22 S. W. Rep. 548 [1893]; Smith *v.* Molleson, 74 Hun (N. Y.) 606; St. Louis, etc., Ry. Co. *v* Kerr, 48 Ill. App. 496; Ricker *v.* Collins, 81 Tex. 662, and St. Joseph I. Co. *v.* Halverson, 48 Mo. App. 383, which held engineer's estimate conclusive upon creditors of subcontractor.

[5] Sanders *v.* Hutchinson, 26 Ill. App.

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The conclusiveness and binding effect of this clause upon the party is usually upheld whenever the engineer's or architect's determination is made a condition precedent to payment, even if it is not expressly stipulated that his decision shall be final and without appeal.[1]

When it is expressly provided that the engineer's decision shall be final and conclusive, or without appeal, it is so held[2] in the absence of proof of fraud, gross mistake, or unfair dealings on the part of the engineer. His acceptance of the work, or his refusal to accept, is equally as binding and conclusive upon both the owner and contractor.[3]

When the certificate has been granted by the engineer, the fact that it was afterwards rescinded by the city, board, or company, will not prevent the contractor from recovering, for the condition required has been performed, and it is beyond the power of either party to undo it.[4] A court of equity will compel the issuance of the bonds, the payment of money collected, and the collection of the rest by assessment by mandamus, even though the work does not in all respects comply with the contract and specifications, there being no allegation of fraudulent practice in procuring and giving of the certificate.[5] The engineer's decision is conclusive, and the duties of the comptroller are purely ministerial, and he must approve and issue a warrant to pay contractor on engineer's certificate.[6] A writ of mandamus will be issued to compel the comptroller to sign the warrants, or specifically state his reasons for refusing to do so. An answer by the comptroller that "it does not appear that the contract was made in accordance with the act governing such con-

638; Flynn *v.* Des Moines, etc., R. Co., 63 Iowa 492; O'Dea *v.* City of Winona, 41 Minn. 424; Price *v.* Chicago, etc., R. Co., 38 Fed. Rep. 304; People *v.* City of Syracuse, 20 N. Y. Supp. 236; Phila., etc., R. Co. *v.* Seber Howard, 13 How. Rep. 307; Alton, etc., R. Co. *v.* No thcott, 15 Ill. 49; Vulcanite Pav. Co *v.* Phila. Traction Co. (Pa.), 8 Atl. Rep. 777; Starr *v.* G. C. Min. Co., 6 Montana 485; Brady *v.* Mayor of N. Y., 30 N. E. 757 [1892]; *accord*, Coon *v.* Allen (Mass.), 30 N. E. Rep 83 [1892]; Laidlaw *v.* Hastings Pier Co., 36 Law Times Rep. 736; Thompson *v.* Lord Bateman, 36 Law Times Rep. 736; McCoy *v.* Long, 13 Ill. 147.

[1] Wyckoff *v.* Meyers, 44 N. Y. 143 [1870]; People *v.* Syracuse, 20 N. Y. Supp. 236; s. c. (N. Y. App.) 38 N. E. Rep. 1006; O'Dea *v.* Winona (Minn.) *supra*, Park Fire Clay Co. *v.* Ott (Pa.), 30 Atl. Rep. 1040; Wilcox *v.* Stephanson (Fla.), 11 So. Rep. 659; Tetz *v.* Butterfield, 54 Wis. 242 [1882]; Sheffield, etc., Co *v* Gordon, 14 Sup. Ct. Rep. 343; Kennedy *v.* Poor (Pa), 25 Atl. Rep. 119; Hot Springs R. Co. *v.* Maher, 48 Ark. 522.

[2] Price *v.* Chicago, etc., R. Co., 38 Fed. Rep. 304 [1889]; Gay *v.* Haskins, 30 N. Y. Supp. 191; Bournique *v.* Arnold, 33 Ill. App. 303 [1889]; Reilly *v.* City of Albany (N. Y.), 39 Alb. L. J. 174 [1889]; Trustees of I. & M. Canal *v.* Lynch, 10 Ill. 521; *and see* Snell *v.* Brown, 71 Ill. 134; Finney *v.* Condon, 86 Ill. 78; Lull *v.* Korf, 84 Ill. 225; Downey *v.* O'Donnell, 86 Ill. 78; Mercer *v.* Harris, 4 Neb. 82; Howard *v.* Alleghany Val. R. Co., 69 Pa. St. 489 [1871]; O'Reilly *v.* Kerns, 2 P. F. Smith 214; Beswick *v.* Platt (Pa.) 21 Atl. Rep. 306 [1891]; Phila., etc., R. Co. *v.* Seber Howard, 13 How. Rep 307; Sinclair *v.* Tallmadge, 35 Barb. 602; Boettler *v.* Tendick (Tex.), 11 S. W. Rep 497 [1889]; Reynolds *v.* Caldwell, 1 P. F. Smith 298; Snaith *v.* Smith, 25 N. Y. Supp. 513; s. c., 27 N. Y. Supp. 379; Thompson *v.* Lord Bateman, 36 Law Times Rep 736.

[3] Reilly *v.* City of Albany, 112 N. Y. 30 [1889], *and cases cited supra.*

[4] Reilly *v.* City of Albany, 112 N. Y. 30 [1889]; Bournique *v.* Arnold, *supra.*

[5] People *v.* Syracuse, 20 N. Y. Supp. 236; s. c., 38 N. E. Rep. 1006.

[6] *In re* Freel, 148 N. Y. 165; [1896]; *semble*. People *v.* Fitch, 147 N. Y. 355; *accord*, Commonwealth *v.* Clarkson, 3 Pa St. 281 [1846]; *but see* Beeckman *v.* Landers (Cal.), 43 Pac. Rep. 1125.

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tracts, that the articles were unsuitable and unserviceable, and that the contractor was allowing large commissions to the agent who secured the contract, was held not a ground of objection founded on matters within the comptroller's discretion, and not a defense to the writ.[1]

Neither the contractor nor the owner can question or dispute the engineer's decision, except for fraud, or something that implies or creates a presumption of fraud, and the jury[2] should be well satisfied of the fraud to disregard the engineer's estimate, or his refusal to grant a certificate.

446. Owner Cannot Avoid Engineer's Certificate by Pleading Work was Insufficiently Done.—Whether the work must be completed according to the contract and specifications, or whether the engineer's decision and acceptance will prevail, is not settled. It should be decided by settling the question, "What was the intention of the parties?" If that can be gathered from the contract, it should hold.[3] Sometimes a clause is inserted providing for such a contingency.

When the contract provided that the materials used should be strictly in accordance with the plans and specifications, and it authorized the city to appoint such a person to inspect [and accept] the materials as might be deemed proper, it was held that a difference of opinion between the contractor and inspector as to whether or not the materials conformed to the plans and specifications was an incident contemplated by the terms of the contract, and that the rejection of materials in good faith by the inspector gave no ground for damages to the contractor, even if the rejected materials did conform to the specifications.[4]

If a structure is to be built according to the plans and specifications and to the satisfaction of the engineer, it may be doubted if his acceptance will hold unless it has been done according to the contract.[5]* The provision for acceptance, or to engineer's satisfaction, has been held an additional safeguard,[6] but when full powers to determine quantity, quality, value, and other like questions as to workmanship and completion of a structure are given to an engineer, and his decision is made final and conclusive upon the parties, or it is made a condition precedent to liability to pay therefor on the part of the owner, it is generally held that the parties cannot go behind his decision without impeaching his estimates and decisions for fraud, collu-

[1] Commonwealth *v.* Philadelphia (Pa. Sup.), 35 Atl. Rep. 195; Commonwealth *v.* Clarkson, 3 Pa. St. 281 [1846]; *and see* Board of Pub. Liby. *v.* Arnold, 60 Ill. App. 328, and People *v.* Palmer (Sup.), 42 N. Y. Supp. 282

[2] Tetz *v.* Butterfield, 54 Wis. 242 [1882]; Sharpe *v.* San Paulo Ry. Co., 8 Ch. App. 606; Taylor *v.* Renn, 79 Ill. 181; Scott *v.* Corporation of Liverpool, 3 D. & J 334; Price *v.* Chicago S. F. & C. Ry. Co. 38 Fed. Rep. 304 [1889].

[3] Dunaberg & W. Rv. Co. *v.* Hopkins & Co., 36 Law Times 733.

[4] Montgomery *v.* City of New York, 29 N. Y. Supp. 687; s. c. 45 N. E. Rep. 550; Pennell *v.* Mayor, 14 N. Y. Supp. 376, was distinguished.

[5] *See* Kennedy *v.* Poor (Pa.), 25 Atl. Rep. 119; s. c. 151 Pa. St. 472.

[6] Glaucus *v.* Black, 67 N. Y. 563 [1873]; Board *v.* First Nat'l Bank, 24 N. Y. Supp. 392.

* *See* Secs. 370, 381–388 *supra.*

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sion, or such conduct as implies fraud or bad faith on the engineer's part.[1] When work has been accepted by the engineer and he has issued his certificate of completion to the contractor, it is no defense to an action for the contract price that "in certain particulars the work does not conform to the plans and specifications or contract,"[2] or "that the engineer's estimate was largely in excess of the actual quantities and the contractor greatly overpaid,"[3] or "that the required work to be paid for had never been done,"[4] or "that there were omissions,"[5] or "that the work was defective or that the structure fell."[6] An agreement to complete work to the satisfaction of a commissioner of public works, and according to certain plans and specifications, does not require a literal compliance with the specifications and plans.[7] There should be no fraudulent concealment of defects, or misrepresentations.[8]

When the engineer has passed judgment, rendered his estimate, and a settlement has been made by the tribunal and according to the manner prescribed by the parties, courts will not open up the whole question if they can justify their course in not so doing.[9] If an engineer has been present upon the works, watched their progress, inspected and estimated it from time to time, and has given his final certificate of completion, with the amount due the contractor, there can be no going behind it. The engineer, under such circumstances, has been held the agent of the owner, and his knowledge held to be the owner's knowledge, and if there were no false or fraudulent representations the owner and contractor were alike bound.[9]

When the work has been completed and accepted the contractor cannot be held for breakages, repairs, or injuries resulting from defective work or materials.[10] If poor work results from the engineer's negligence or ignorance, it has been held to be contributory negligence of the owner, and he cannot recover from the contractor.[11] If, however, the *final* estimate has not been

[1] People *v.* Syracuse, 20 N. Y. Supp. 236; s. c. (N. Y. App.) 38 N. E. Rep. 1006, 144 N. Y. 63, *and see cases cited supra*, Secs. 422-428.

[2] People *v.* Syracuse (N. Y.), 20 N. Y. Supp. 236; s. c. *on appeal*, 38 N. E. Rep. 1006; Snaith *v.* Smith, 27 N. Y. Supp. 379; Vulcanite Pav. Co. *v.* Phila. Traction Co., 115 Pa. St. 280 [1887]; s. c. 8 Atl. Rep 777. Evidence to that effect will not be received, Reilly *v.* City of Albany, 112 N. Y. 30 [1889]; Brady *v.* Mayor of N. Y., 30 N. E. Rep. 757 [1892]; Phila., etc., R. Co. *v.* Seber Howard, 13 How. Rep. 307; Board, etc., *v.* Newlin (Ind.), 31 N. E. Rep. 465; Harvey *v.* Lawrence (Eng.), 15 L. T. Rep. 571 [1867]; Omaha *v.* Hammond, 94 U. S. 98 [1877]; s. c., 5 Cent. Law Jour. 168.

[3] Price *v.* Chicago, etc., R. Co., 38 Fed. Rep. 304; Lathrop *v.* Ellsworth, 15 N. Y. Supp. 873 [1891].

[4] Laidlaw *v.* Hastings Pier Co., 36 Law Times Rep. 736.

[5] English *v.* School Dist. (Pa.), 30 Atl. Rep. 506

[6] People *v.* Syracuse, 20 N. Y. Supp. 236, Beswick *v.* Platt (Pa.), *supra*; Brown *v.* Decker, 142 Pa. St. 640 [1891]; Board of Commrs. *v.* O'Connor (Ind.), 35 N. E. Rep. 1006.

[7] Brady *v.* Mayor of N. Y., 30 N. E. Rep. 757 [1892]; *affirming* 9 N. Y. Supp. 893

[8] Boettler *v.* Tendrick (Tex.), 11 S. W. Rep 497 [1889]; Ayr Road Trustees *v.* Adams, 11 Scotch Session Cases 326 [1883].

[9] Ayr Road Trustees *v.* Adams, 11 Scotch Session Cases 326 [1883].

[10] Potomac Steamboat Co. *v.* Harlan & Hollingsworth Co., 66 Md. 42 [1886]; Adams *v.* Hill, 16 Me. 215 [1839].

[11] Potomac Steamboat Co. *v.* Harlan & Hollingsworth Co., 65 Md. 42 [1886].

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made and given to the contractor, the contractor may be held to the terms of his contract by the engineer, and the fact that he has received progress certificates that work was satisfactory and has been paid according to them does not constitute a waiver of defects in the work, which were not apparent upon mere inspection.[1] *

447. Provision that Estimate and Decision of Engineer shall be Final and Conclusive upon Contractor.

Clause: "To prevent all disputes and litigation, it is further agreed by and between the parties to this contract, that the chief or acting chief engineer shall in all cases determine the amount or the quantity of the several kinds of work which are to be paid for under this contract, and he shall determine all questions in relation to said work and the construction thereof, and he shall in all cases decide every question which may arise relative to the fulfillment of this contract on the part of the said contractor, and his estimate and decision shall be final and conclusive upon said contractor; and in case any question shall arise between the parties hereto touching this contract, such estimate and decision shall be a condition precedent to the right of the party of the second part to receive any money under this agreement."[2]

448. Provision that Certificates Inconsistent with Terms of Contract may be Rejected.

Clause: "And provided further that nothing herein contained shall be construed to affect the right hereby reserved of the said commissioner to reject the whole or any portion of the aforesaid work should the said certificates or any of them be found or known to be inconsistent with the terms of this agreement or otherwise improperly given."[2]

449. Provision that Certificate shall not Preclude City or Board from Showing True and Correct Amount and Character of Work.

Clause: "And it is hereby expressly agreed and understood by and between the parties hereto that the said parties of the first part, their successors and assigns, shall not, nor shall any department or officer of the city of New York, be precluded or estopped by any return or certificate made or given by any engineer, inspector, or other officer, agent, or appointee of said Department of Public Works or of said parties of the first part, under or in pursuance of anything in this agreement contained, from at any time showing the true and correct amounts and character of the work which shall have been done and the materials which shall have been furnished by the said party of the second part or any other person or persons under this agreement, nor from at any time withholding payment of the several sums herein specified until the said party of the second part, when thereunto required on behalf of the said city, shall make and furnish sufficient and independent proof of the quantity and quality of the work and materials done and furnished under this agreement."[2]

450. Meaning of Clauses Reviewed.—Taken separately or together these

[1] Hartupee *v.* Pittsburg, 97 Pa. St. 107 [1881].

[2] Stipulations used by Department of Public Works, New York City.

* *See* Secs. 463–469, *infra.*

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are interesting stipulations, that have been adopted by aqueduct commissioners, dock and public works departments of New York City, who are believed to be the authors of them. It should be observed that it is first provided that the engineer's estimate and decision on every question shall be final and conclusive on the *contractor* and a condition precedent to *his* right to receive any moneys under the agreement. The engineer's decision is not made final and conclusive on the board or city, but by a later clause the right is expressly reserved to reject the whole or any part of the work if the engineer's certificate be found inconsistent with the contract or otherwise improperly given. By another provision neither the city nor any officer thereof is to be precluded from showing the true and correct amounts and character of the work and materials furnished by the contractor, nor from withholding payments therefor until the contractor shall furnish independent proof of the quantity and quality of work and materials furnished.

451. Work Instead of Certificate is Rejected when Engineer has Gone Wrong.—Secondly, it is expressed in terms, what is often held by the courts, viz., that the engineer, architect, or arbitrator must render a decision which is consistent with the terms of the contract of submission ; but the stipulation goes further, and imposes a penalty upon the contractor by rejecting his work, if the certificates be found inconsistent with contract or are improperly given. For the wrongful act of the engineer the contract imposes a penalty upon the contractor, which is manifestly unjust unless he has influenced the engineer's acts. The contractor has no control over the engineer, who is the employee of the city, company, or owner, yet the rejection of his work may depend upon the engineer's acts or misdeeds, without regard to who instigated them.

452. Stipulation Holds Contractor to Terms which City Expressly Repudiates.—Thirdly, the contract reserves to the board, city, or owner the right to show the true and correct amounts and character of work and materials, which right it expressly denies to the contractor. It establishes a tribunal for the contractor which it expressly repudiates for the city. By its terms the contractor agrees to abide the decision of a man in whom the board or city confessedly have not the confidence which they require the contractor to repose in him, although it employs him, holds him its agent, and retains him in its control.

453. Contractor to Prove His Claims if City be Dissatisfied with Engineer's Estimates.—The right which the city retains to dispute the quantities, etc., is expressly denied to the contractor. Nor is this all; the contract requires further that if the engineer neglects, fails, or refuses to perform his duties, or performs them in a fraudulent and dishonest manner, that then the contractor's payments for work done and materials supplied may be withheld until he shall have furnished independent proofs of the quantity and quality of the work and materials he has supplied. He first forfeits his right to show what he is justly entitled to, if it be to the city or board's

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advantage, and then he is required to furnish independent proofs of the same, if the estimates are unfavorable or unsatisfactory to the city or board.[1]

By such an agreement the elements of an arbitration are wholly destroyed, and the foundation upon which the cases, which uphold the decision of engineers and architects as quasi-arbitrators, stand is undermined. It leaves nothing but the contract obligation to bind the contractor, and it is at least doubtful if his agreement to abide by the decision of the engineer would be binding and conclusive. In view of the adverse and hostile criticisms of our courts of the clauses cited and discussed in Chapter XII, one can imagine with what disfavor these extraordinary and burdensome stipulations may be received.

454. Elements of an Arbitration are Wanting when but One Party is Bound by Award.—By these stipulations the draftsman has sought to give greater protection to the board or city without any evident regard to the burdens, hardships, and injustice imposed upon the contractor. The contractor is required to submit every question and dispute to a *quasi*-arbitrator, by whose award he alone is bound. The essential element of a submission to arbitration, and by which its legality is affected, is wanting. How can one party of an arbitration be bound and the other party be free to accept or repudiate the award? When the mutual obligation of both parties to abide by the decision of the engineer is destroyed, the groundwork upon which nearly all the cases decided, have been sustained, is destroyed. It ceases to be a tribunal, and the whole discussion of Chapter XII and Chapter XIII (Secs. 335-417) is opened and reviewed.

Whether or not the clauses will be sustained, and the contractor alone be bound by the engineer's decision, will depend upon whether the courts regard the engineer as a *quasi*-arbitrator, as he is looked upon in the great majority of cases, or whether he is regarded as the agent or impersonation of the city, company, or owner.[2]

455. Agreement Savors Strongly of Injustice and Oppression. Obligation is Not Mutual.—The obvious intent is to make the engineer's estimates and decisions conclusive upon the contractor, and to leave the city (or, better say, its officers) free to accept or repudiate the engineer's estimates and determinations as it (they) will, to question the accuracy of his estimates and the justice of his decisions and to appeal them to our courts for trial, which trial is denied to the contractor. The contractor is required to submit unqualifiedly to the determinations of the of the city's paid servant and agent, which the city itself and its officers refuse to trust. Such a con-

[1] The author has used he words "unfavorable and unsatisfactory" here, and believes that he is justified in so doing, for nearly all the trouble arising in such cases comes from disagreements as to the meaning and intent of the contract, which often is ambiguous; and it is only when the decision of the engineer is against the interest of the city or at variance with the board's understanding and wishes, that such determinations are repudiated.

[2] *See* Ranger *v.* Gt. Western R Co., 5 H. of L. Cas. 72; Williams *v.* Chicago, etc., R Co., 112 Mo. 463

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tract contains all the objectionable elements by reason of which courts have refused to enforce such stipulations. The contract is to the satisfaction of one of the parties to the contract, or of an agent whom the city retains the right to control and direct, to employ and to discharge. He may be the agent, mouthpiece, and tool of the city or its officers, elected or appointed, and his determination is to all intents and purposes that of the city itself. The contract obligations, therefore, are not mutual.

456. Some Reasons why Stipulation should not be Favored, or Upheld Even.—In view of what has preceded, it will be difficult to see how the stipulations can be sustained except upon the theory of a condition precedent. If adopted in certain states and if decisions already rendered were followed, they would certainly be fruitful of trouble and litigation, which would be expensive to both parties, and in which the contractor would probably have the best of the fight. Clauses so manifestly unjust, burdensome, and arbitrary, imposed by men acting for and in behalf of a justice-loving, fair-minded public, should not be upheld wherever and whenever the test is made one of jurisprudence, equity, or precedence.

The power to impose such restrictions and conditions in a contract for public work, required to be advertised and let to the lowest bidder, assumed by public officers without authority, is directly in contravention to the spirit and letter of the laws, charters, and constitutions of our public institutions, requiring open and honest competition before contracts for public work shall be awarded.

Conditions and stipulations so onerous and unfair, and so needless and useless, so tyrannical and arbitrary, might well be regarded as an additional burden imposed upon the people or property, paying for the improvement, without authority or reason.* By adopting them the officers of the city have assumed to increase the burdens, and therefore the taxes of the city, without authority, precedent, and almost without following. Burdens, contingencies, and possibilities are put upon the contractor, or bidder, which no reasonably careful and honest man would undertake, except at a price far above the actual value of the work. The reservation of such privileges is a warning from men in power to any bidder that is not in favor, to not undertake the work without providing himself with the sinews of war, which must be at the expense of the work and therefore of the city.

457. Stipulations are Not in Favor Elsewhere. When Adopted, they have been Modified.—That such stipulations are not in good favor is evident from the fact that many cities of New England which have adopted the clauses of the New York contract have omitted or modified these clauses so as to make the engineer's estimate binding upon both parties, excepting a brief statement as follows, viz.: "Provided, that nothing herein contained shall be construed to affect the right hereby reserved of the said Commissioner of

* *See* Sec. 334, *supra*.

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Public Works to reject the whole or any portion of the aforesaid work, should the said engineer's certificate be found or known to be inconsistent with the terms of this agreement, or otherwise improperly given."* Whatever right the commissioner would have to reject and not pay for work would depend upon the rights reserved in other parts of the contract, but the right to repudiate unauthorized acts of the engineer the law reserves, and any acts or errors on his part which would imply bad faith or fraud entitle the owner or commissioner to the protection of the courts in any case, and under any stipulation. The clause as recited above would give no unusual privileges, and the question whether the certificate was or was not consistent with the terms of the contract, or had been improperly given, would become a question for the courts, and depend upon whether it was according to the contract and was free from fraud, collusion, or such gross mistakes as would necessarily imply bad faith.[1]

Whether work could be rejected which itself conformed to the contract and specification merely because the certificate was inconsistent may well be doubted.

458. The Clauses have Found Little Favor in the Government Departments, in other Cities or with Other Corporations.—The clauses have been in use for some years by the aqueduct commissioners, public works and dock departments of the City of New York, and were adopted wholesale by the village of Newton, Mass., in 1890, in the contract for its water works. They have not found sufficient favor to be adopted in other cities in New York State, in the United States, in Canada, or in Great Britain. The cities of Boston, Providence, Chicago, Cincinnati, Indianapolis, Kansas City, St. Louis, St. Paul; Toronto, Canada; Liverpool, London, and Manchester, England; the commercial, manufacturing, and railroad companies of the country; the Supervising Architect of the United States and the U. S. Army Engineers, the World's Columbian Exposition; the public works departments of Canada, England, or India, have not seen fit to adopt them. In fact, if these clauses as used by the various departments of the City of New York have inherent superiority or special strength, it must be in consequence of some conditions or circumstances peculiar to the city herself, or that is peculiar to the administration of the courts [laws] of the state. The various departments of other corporations, cities, states and governments have not discovered the necessity nor propriety of adopting them, notwithstanding thousands of printed copies have been distributed throughout the countries.

The contract form adopted by the departments of engineering and public works for work on the New York State canals provides that state engineer and surveyor and division engineer shall finally and conclusively

[1] *Semble*, O'Brien *v.* Mayor, 15 N. Y. Supp. 525, 139 N. Y. 543, *cases cited*.

* Providence; Massachusetts Metropolitan Sewerage Commission; Boston Water Works; St. Louis.

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decide questions of quantity, prices, etc., subject however to the revision of the canal board, *as provided by law.* The right to revise or review the estimates of the engineer is sometimes reserved, more frequently of late than formerly, where the engineer is a public official, perhaps elected or appointed, and therefore susceptible to political influence. The right to revise has been reserved to a railroad president.[1]

459. Modified Forms of the New York Clauses are in Use.—The 1891 contract for branch sewers of the City of Philadelphia (but not for main sewer), requires "the work to be done to the satisfaction of the director [engineer], and that all materials and work shall be subject to the inspection and approval of the director" [engineer], which would probably be interpreted to his *reasonable satisfaction and approval.* The contract also contains the following clause:

> "It is further expressly understood and agreed by and between the parties hereto, and is hereby made part of this agreement, that nothing contained in this contract or in the specifications hereto attached shall be taken or construed to preclude the said party of the first part from contesting the estimates or certificates of any officer of the City of Philadelphia, or the claim of the said part... of the second part under this contract, or under such estimate or certificate, but the said party of the first part shall be at full liberty to take every legal defense to the character, quality, and quantity of the said work and materials, and to the time and manner in which the same shall be furnished and done, notwithstanding the certificates or approval of any officer of said city,"

which is equitable and proper, since there is nothing in the contract which attempts to take away the same right and privileges from the contractor.

460. Cases Decided where New York Stipulations were Used.—So far as the author has been able to learn there is no case which has fairly and squarely decided that a contract stipulation which makes the engineer's estimate and decision final and conclusive upon the contractor alone, should be upheld. The case of O'Brien *v.* New York[2] is sometimes cited as authority for such a statement, but it falls far short of it. In this case the question of the finality and conclusiveness of the engineer's decision upon the city was not determined nor questioned.

The claim of the contractors was for extra work in express contradiction to the terms of the contract, and the subjects herein discussed were not the questions which determined the decision. The case decided (1) that an engineer is confined to the express terms of his contract; (2) that the withholding of the engineer's certificate is immaterial when the contractor has received all that is due him; (3) that progress certificates do not affect the final certificate when final certificate is to be conclusive;[3] (4) that no

[1] Gonder *v.* Berlin Branch R. Co., 33 Atl. Rep. 61, 171 Pa. St. 492 [1895].

[2] O'Brien *v.* Mayor, etc., of New York, 15 N. Y. Supp. 520 [1891]; s. c., 65 Hun 112 [1892]; on appeal, 35 N. E. Rep. 323 [1893]; s. c., 139 N. Y. 543 [1893]; 142 N. Y. [1894].

[3] *See also* Gonder *v.* Berlin Br. R. Co., 171 Pa. St. 492 [1895].

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recovery can be had for extra work unless ordered as required by the contract; (5) that the contractor should refuse to do work ordered which is not included in contract; (6) that the city is not liable to contractors for mistakes of engineer in giving erroneous lines and levels, even though he be an agent, servant, or officer of city; (7) that the circumstances existing at time of and which led to the passage of a statute may be considered in giving it a construction, and in construing the provisions of a contract made under it.[1]

461. Right to Revise Estimates or to Require Work to be Done According to Contract, Though Certified by Engineer.—When the contract not only omits to make the engineer's certificate binding on the city, but elsewhere provides that neither the commissioners nor any department officers of the city shall be precluded by any return or certificate of the engineer from showing the true amount of work done, it is safe to say that the city would not be held bound by engineer's estimate if they could show that the engineer's returns were wrong.[2] If the city or its officers should fail to exercise their power of revision or to show the true and correct quantities, and the certificate was held conclusive on the contractor, it should likewise be held conclusive on the city or owner.[3]

In Nebraska it has been held that "when payments are to be made on the certificate of the architect that the work has been done in strict accordance with the drawings and specifications, and that he considers the payments justly due," and it is further provided "that said certificate, however, shall in no way lessen the total and final responsibility of the contractor, neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill or not according to the drawings and specifications either in execution or materials," was an agreement that the certificate of the architect should not be conclusive, and that the owner was not estopped by payments on such certificates from claiming damages because poor materials and defective work were furnished.[4]

462. Practical Working Effect of the Contract Stipulation.—The practical effect of these stipulations where they have been used does not seem to have been all that was anticipated. Certainly New York City has furnished her full share of scamping scandals in the past twenty years, and the litigation has been almost unparalleled. The hardships to which her contractors may

[1] O'Brien *v.* Mayor of New York, 139 N. Y. 543; *many cases cited.*

[2] O'Brien *v.* New York, 139 N. Y. 543 [1893]. Another feature of O'Brien *v.* Mayor of New York is that they sued the city of New York when the contract was made under a special power conferred by the legislature, and the aqueduct commissioners and engineers who had ordered the extra work were held not the agents of the city.

[3] *Semble*, Gonder *v.* Berlin Branch R. Co., 171 Pa. St. 492 [1895]. This case decides nothing as to whether decision of engineer would be conclusive or not conclusive, but it seems to have been a foregone conclusion with the court that it was final and conclusive, and that the president could review and revise the engineer's estimates, as provided by the contract. *See also* Consaul *v.* Sheldon, 35 Neb. 247 [1892].

[4] Consaul *v.* Sheldon, 35 Neb. 247 [1893].

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have been subject, under the contract terms employed, were enough to drive a contractor to dishonest practices, litigation, and desperation.

463. Provision that Inspection and Approval shall not Relieve Contractor from his Liability to Furnish Proper Work and Materials.

Clause: "It is further agreed that the inspection or approval of the engineer, or his agents, or assistants, of all or any of the work during its construction, shall not relieve the said contractor from the full responsibility of doing the work required by the conditions of this agreement." *

464. Provision that Progress Certificates shall not Relieve Contractor from Liability for Poor or Defective Work and Materials.

Clause: "And it is hereby further expressly provided that the granting of any progress (or final) certificate, or the payment of moneys thereunder, shall in no way lessen the liability of the contractor to replace bad or defective work, though the same may not have been detected at the time such certificate was given or acted upon."

465. Provision that Progress Certificates are Made Subject to Revision and Correction in Final Certificate which May be Made without Notice to Parties.

Clause: "It is further expressly understood and agreed by and between the parties hereto that the action of the engineer or surveyor by which the said parties [contractor] are [is] to be bound and concluded according to the terms of this contract, shall be that evidenced by his final certificate; all prior certificates upon which partial payments may be made being merely estimates, and subject to the correction of such final certificate, which final certificate may be made without notice to the contractor thereof, or of the measurements upon which the same is based." †

466. Provision that Contractor shall be Responsible for Protection and Preservation of Permanent and Temporary Works and Materials, and the Engineer's Inspection, Approval, or Certificate, shall not Relieve Contractor from Doing his Work Properly and Completely.

Clause: "From the commencement of the works to the completion and acceptance of the same the care of the whole of the permanent works, and of the whole of any temporary works until their removal, shall remain with the contractors, and they shall in every respect be held responsible for all accidents from whatever cause arising, and chargeable for anything that may be stolen, removed, or destroyed, to whomsoever belonging, and they shall also replace and make good all loss, injury, damage to, and all defects in the said works, or premises, or to the adjoining or other buildings, premises, and property, from bad or insufficient materials, bad workmanship, or any other cause whatsoever, and whether such damage or defects were occasioned by the negligence of the contractors, or their agents, or servants, or not, or may be or might have been discovered during the

* *See* Secs. 331, *supra*, and 482, *infra*. † *See* Sec. 482, *infra*.

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progress of the works or in consequence thereof, or may be or might have been prevented, or shall appear or be known after the completion thereof, or whether payment may wholly or partially have been made, or the works approved as supposed to have been properly done; and no certificate or approval of any works by the engineer or any other officer of the city shall affect or prejudice the right of the city against the contractors, or be considered or held as at all conclusive as to the sufficiency of any works or materials." *

467. Contractor's Liability for Defective Work and Materials which Have Been Inspected, Approved, and Certified.—These clauses are inserted in construction contracts to settle between parties the question as to the liability of the contractor when work has been undertaken, completed, and accepted under the direction, supervision, and final approval of an engineer, architect, or inspector of the owner, city, or government, then can the contractor be called to account for poor materials, defective work, or for injuries resulting from the same?

In an English case where a railroad company had entered into a contract for the manufacture and delivery of rails, the inspection, testing, and approval of the work was stipulated for by the engineer, and it was also expressly provided that such approval should not in any way relieve the contractor from the condition and stipulations contained in the specifications as to the materials, work, and tests. Power was given to the engineer to reject any rails or fish-plates he disapproved on any ground whatever, and his decision on any points of doubt or dispute were made final and binding on the parties. It was further provided that the inspection of the engineer should not in any way commit the company to the approval and acceptance of rails which were not in strict accordance with the specifications and plans. The rails were found defective after they had been delivered, paid for, and half of them laid, and it was held that the company could not recover from the contractor, but that the acceptance of the engineer was conclusive.[1]

If inspectors are clothed with the authority usually bestowed upon engineers in construction contracts, and the work or structure has been accepted and the contract fully executed, and there has been no fraud practiced by the contractor, it seems pretty well settled that the owner or company can have no recovery against the contractor for defective work or materials.[2]

If under a contract to make the excavations for a building under the

[1] The D. & W. Co. *v.* Hopkins, 36 L. T. Rep. 733 [1877].

[2] Price *v.* Chicago R. Co., 38 Fed. Rep. 304, *grading;* Vulcanite Co. *v.* Traction Co., 8 Atl. Rep. 777, *paving;* Omaha *v.* Hammond, 94 Fed. Rep. 98 [1877]; Coon *v.* Citizens' W. Co. (Pa.), 25 Atl. Rep. 505, *water works;* Adams *v.* Hill, 16 Me. 215 [1839]; Board *v* Newlin, 81 N. E. Rep. 465, *grading;* People *v.* Syracuse, 20 N. Y. Supp 236, *a sewer;* Trustees *v.* Adams, 11 Scotch Sessions Cases 326, *a structure; con ra,* Dhrew *v.* Altoona, 121 Pa. St. 414.

* Care should be taken not to create a tenancy. *See* Sec. 767, *infra.*

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instructions of an architect the work is done as required by the architect and to his approval, whether in conformity to the drawings made or not, it is performed.[1] *

Therefore in a case where the contract stipulated that the machinery of a steamboat should be of the best material throughout and the workmanship first class, and the steamboat company was to furnish a suitable and competent person to superintend the construction, with the right to reject anything not equal to the requirements of the contract, and inspect the work, and every facility was afforded him to inspect the work and materials at all times: After the boat was completed, delivered and accepted, the straps of the starboard walking beam gave way and caused serious injury, and it was held that the damage was due to the negligence on the part of the steamboat company's agents, and there could be no recovery.[2] Another case in point[3] held that when a company has furnished plans and specifications to the contractor, and has accepted the work after seeing it in progress and completed, it could not recover from the contractor the money paid him because the work proves defective and injury results. This contract was for the construction of a wharf which afterward gave way. When a contract to build a bridge required the county commissioners, if they had a superintendent, and would exercise their privilege of inspection, to be present as materials were furnished or labor expended, and pass upon them, it was held that, where the superintendent was present, watching the progress of the work, and it was done pursuant to his directions, and in substantial compliance with the plans, the commissioners waived their right to pass on the workmanship and materials, and their right to condemn either, unless there was collusion between the contractor and the superintendent.[4]

It has been held that the *final* certificate may be withheld upon the discovery of defective works subsequent to payments on progress certificates.[5] When work has been rejected as deficient, the architect, it seems, cannot arrange that the work shall be accepted and the deficiency made good to the company.[6] †

468. Materials and Work Inspected and Approved by Inspectors.—When the decision of architect or inspector is not made binding on the parties, it has been held that his acceptance of inferior materials will not bind the owner nor relieve the contractor from performing his agreement in strict conformance with the contract.[7] If work has not been accepted the

[1] Smith *v.* Farmers' Trust Co. (Iowa), 66 N. W. Rep. 84.

[2] Potomac Steamboat Co. *v.* Harlan & Hollingsworth Co., 66 Md. 42 [1886].

[3] Beswick *v.* Platt, (Pa.) 21 Atl. Rep. 306 [1891].

[4] Board of Com'rs *v.* O'Conner (Ind.), 35 N. E. Rep. 1006; Wright *v.* Meyer (Tex.), 25 S. W. Rep. 1122; *but see* Richardson *v.* Mahon, L. R. 4 Ir. C. P. 486; Coon *v.* Citizens' Water Co., 152 Pa. St 644.

[5] Cooper *v.* Uttoxeter Bur. Bd., 11 L. T. N. S. 565.

[6] Barcus *v.* Hannibal, etc., Pk. Rd. Co., 26 Mo. 102

[7] Glaucus *v.* Black, 50 N. Y. 145 [1872]

* *See* Secs. 381–390 and 446, *supra.*

† *See* Secs. 370, 381–390, *supra.*

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payment of progress certificates will not constitute a waiver of defects in quality which were not apparent from inspection.[1]* If the contractor be subject to the directions of the engineer in charge as to the quality of materials furnished and the manner of doing the work, he is not responsible for defects of the work as a whole if he has complied with the engineer's directions.[2]† Third parties, as property owners, are not bound by the inspection and acceptance of work by inspectors and engineers in whose judgments they have acquiesced when the defects are not such as are revealed by actual tests only.[3]

The courts of Nebraska have held that under a clause frequently employed in construction contracts, which provides that "the engineer's certificate shall in no way lessen the contractor's final and total liability or exempt him from liability to replace work afterwards discovered to have been ill done," the owner might recover damages for the use of poor materials and defective workmanship,[4] notwithstanding he had made payments on the engineer's (progress ?) certificate. ‡

469. Defects Concealed by Fraud or Connivance.—Whether the fraudulent acts of a contractor in concealing defects would permit a recovery after acceptance may well be doubted. There are numerous cases that employ language that *intimates* that a recovery can be had.[5] Some frequent expressions with courts are as follows: "That the settlement having been made without any false or fraudulent representations of the contractor,"[6] "in the absence of fraud or gross mistake,"[7] or "the contractor having acted in good faith,"[8] then the city or owner cannot recover back money paid for work that has been inspected and accepted by engineers. The cases are extremely rare where an actual recovery by the owner has been had in the courts on account of fraud on the part of the contractor, though there are many cases with *dicta* that recovery *cannot* be had if there is no fraud or deceit.

Poor materials and work are often, if not usually, the result of the arbitrary and willful intention of contractors to save themselves expense, and should not be a matter of much difficulty to prove. §

[1] Hartupee *v.* Pittsburgh, 97 Pa. St. 107; Van Buskirk *v.* Murden, 22 Ill. 446; Estep *v.* Fenton, 66 Ill. 467; Trustees *v.* Bradfield, 30 Geo. 1; Korf *v.* Lull, 70 Ill. 420 [1873]; O'Brien *v.* Mayor, 139 N. Y. 543 [1893]; Gonder *v.* Berlin Br. R., 171 Pa. St. 492 [1895]; *and see* Barton *v.* Herman, 11 Abb. Pr. 379; Morgan *v.* Birnie, 9 Bing. 672; Westwood *v.* Sec'y of State, 11 W. R. 261; *and see* Venzie *v.* Bangor, 51 Me. 509; *and* Iarge *v.* Bossieux, 15 Gratt. 83.

[2] *In re* Freel (Sup.), 38 N. Y. Supp. 143; *but see* Wis. Red Brick Co. *v.* Hood (Minn.), 69 N. W. Rep. 1091; *and see* Charlestown Ice Co. *v.* Joyce (C. C. A.), 63 Fed. Rep. 916.

[3] City of Nashville *v.* Sutherland (Tenn.), 29 S. W. Rep. 228.

[4] Consaul *v.* Sheldon, 52 N. W. Rep. 1104; Trustees *v.* Bradfield, 30 Geo. 1.

[5] Boettler *v.* Tendrick, 11 S. W. Rep. 497.

[6] Ayr. Road Trustees *v.* Adams, 11 Scotch Sessions Cases 326.

[7] Brady *v.* New York, 30 N. E. Rep. 757.

[8] O'Dea *v.* Winona 41 (Minn.) 424 [1889].

* *See* Sec. 701, *infra*. † *See* Secs. 256, 388, *supra*, and 701, *infra*. ‡ *See* Sec. 417, *supra*. § *See* Secs. 120 and 121, for effect of concealment or fraud on the statute of limitations.

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In an action to recover damages for the breach of a contract to build the foundation of a house it appeared that two stone piers were so defectively built that it was necessary to rebuild them, and that the walls were otherwise faulty. Plaintiff had paid the contract price before discovering the defects, which were not apparent. It was held that a contention that, having negligently paid the money without examination, plaintiff cannot recover it, is untenable, since the doctrine applies only to defects which are apparent.[1] The failure of the owner's architect and superintendent to object to work done under the contract does not show acquiescence in such work as in the use of laths wider than those specified in the contract, in the placing of them too near together, and the failure to press the morter so as to form a proper key.[2]

[1] Barker *v.* Nichols (Colo. App.), 31 Pac. Rep. 1024; *see also* Carter *v.* James, 13 M. & W. 713; Howlett *v.* Tarte, 10 C. B. (N. S.) 826.

[2] Monahan *v.* Fitzgerald (Ill. Sup.), 45 N. E. Rep. 1013; *and see* Mollen *v.* Ford, 28 Fed. Rep. 689.

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CHAPTER XVI.

ENGINEER'S OR ARCHITECT'S CERTIFICATE.

ITS FORM, SUBSTANCE, AND REQUIREMENTS. CORRECTION OF ERRORS IN CERTIFICATE OR ESTIMATE. CERTIFICATE AND ESTIMATE MADE WITHOUT NOTICE TO PARTIES.

470. Provision that Right to Recover and Liability to Pay for Work shall be Conditioned upon Procuring the Engineer's Certificate.

Clause: "It is hereby further expressly agreed and understood by and between the parties to this agreement that no payments shall be due to or demanded by the contractor, nor shall the owner, company, or city be in any way liable to pay or be in any way indebted to the contractor for any sum or sums of money for work done or materials furnished under this contract, or on account of, or in connection with, this contract, or growing out of the construction or completion of the works undertaken, whether by reason of alterations, deviations, additions, omissions, or otherwise, except, unless, and until the engineer shall have measured and estimated the same and shall have certified in writing and under oath that the same is due under the contract, and that the work and materials are to his satisfaction and acceptance and according to the plans and specifiations forming a part thereof."

471. Provision that an Itemized Account and a Personal Inspection shall be Made. Certificate to be Subscribed and Sworn To.

Clause: "Provided always that the contractor shall obtain from the said engineer or architect an itemized account, and estimate of the work done and materials furnished, and a certificate, subscribed and sworn to, that he has made a personal inspection of the works, and that he considers the amount rendered correct and the amount certified is properly due under the terms of the contract, plans, and specifications, which certificate shall be a condition precedent to any liability on the part of the owner, company, or city to pay."

472. Provision Making Engineer's Certificate a Condition Precedent to the Owner's Promise to Pay.

Clause: "And the said party of the first part does hereby, for himself and his heirs, executors, and administrators, covenant, promise, and agree to and with the said party of the second part, his heirs, etc., that he shall and will, in consideration of the covenants and agreements herein described being strictly performed and kept by the said party of the second part as specified, will and truly pay, or cause to be paid, unto the said party of the second part, his heirs, etc., the sum of.....dollars in lawful money of the United States of America,

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in the following manner.....; provided that in each of the said cases a written certificate signed, dated, and sworn to before an authorized magistrate, shall be obtained from the said engineer or architect, or other engineer or architect for the time being employed by the said party of the first part, that the said contract work has been performed in strict accordance with this agreement, and has been so far completed as to entitle and justify the payment of the sum named in each case."

473. The Engineer's Certificate: Its Form and what It should Contain.— When the engineer's certificate is a condition precedent to payment to the contractor, a question that frequently arises is, "What is a good and sufficient certificate?" The answer is usually to be found in the contract. If the parties have failed to prescribe any particular form or to require the engineer to certify to certain facts, then almost anything that the engineer may render as his certificate will answer the purpose. It has been held that it need not be in writing, but is sufficient if verbally declared that the work has been completed to his satisfaction,[1] and the fact that the submission is in writing does not require the award to be so,[2] nor is parol evidence admissible to show that it was the intention of the parties to have a written approval.[3]

The certificate need not state the amount due if it certifies to the final completion of the work,[4] or that the amount is due.[5] It is not necessary that the estimate and decision be made under oath,[6] nor that it be signed, though it be made in writing,[7] nor that it be delivered or transmitted by the engineer or arbitrators who made it.[8] It must be the certificate of the engineer, and if subscribed must be signed by himself and not by his assistant.[9] The certificate need not state that the work has been according to the plans and specifications unless the parties have stipulated for such a formality in the contract.[10] *

In the absence of a provision in a contract, the date to be inserted in the certificate was held to be within the discretion of the engineer. That where there was delay in beginning the work, the engineer might properly refuse to date his certificate back to the date of the contract.[11]

[1] Roberts *v.* Watkins, 32 L. J. (N. S.) C. P. 291 [1863]; s. c., 14 C. B. (N. S.) 592; Oates *v.* Bromil, 1 Salk 75; Russell on Arbitration (2d ed.) 1242; Gubbins *v.* Lautenschlager (C. C.), 74 Fed. Rep. 160; Kirk *v.* Bromley Union, 2 Phill. 640.

[2] Godel *v.* Raymond, 27 Vt. 241 [1855].

[3] Union Stove Works *v.* Arnoux, 28 N. Y. Supp. 23; *and* Lloyd's Law of Building (2d ed.) § 21.

[4] Pashby *v.* Mayor of B., 18 C. B. 2.

[5] Wyckoff *v.* Meyers, 44 N. Y. 143 [1870]; *but see* Flannery *v.* Sahagian (N. Y. App.), 31 N. E. Rep. 319, *contra*, for an award, *and see in point* Mayor *v.* Butler, 1 Barbour 325 [1847]; *and* Witz *v.* Tregallas (Md.), 33 Atl. Rep. 718.

[6] Monongahela Nav. Co. *v.* Fenlon, 4 W. & S. 212. *See also* Payne *v.* Crawford (Ala.), 10 So. Rep. 911, *accord.*

[7] Malone *v.* P. & R. Co., 157 Pa. St. 430.

[8] McMillan *v.* Allen (Ga.), 25 S. E. Rep. 505; *but see* Anderson *v.* Miller (Ala.), 19 So. Rep. 302, where submission stipulated a personal delivery.

[9] McIntyre *v.* Tucker, 25 N. Y. Supp. 95.

[10] Downey *v.* O'Donnell, 92 Ill. 559 [1879].

[11] State *v.* Frazier (Ind.), 14 N. E. Rep. 561 [1888].

* *See* Sec. 503, *infra.*

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Any certificate or estimate that is made by the engineer and which is accepted and treated by the parties as sufficient will justify payments by the company and will hold against the surety of the contractor.[1] A promise to pay for work on the approval of an engineer has been held to require no certificate at all, in view of the fact that the engineer had visited the works every day, and that the owner did not deny that the engineer approved the work as done.[2]

To constitute a certificate given by the superintendent of work a final one, it is not essential that it be therein declared to be such. If apparently in balance or satisfaction of all claims, it is sufficient.[3] On the other hand, the *last* monthly estimate is not the final estimate, so as to give the contractor the right to recover percentages retained and payable only after final estimate, if the last monthly estimate was not final in form but similar to prior monthly estimates.[4] In such a case the company may show that a final estimate has been made by the engineer, fixing the quantity, character, and value of work done, and the amount due therefor.[5] It seems that the engineer determines which is his final estimate, and not the company nor the contractor.[6]

474. Certificate must be Made and Executed in Strict Conformity with the Requirements of Contract.—A written certificate which recites that "there is now due to" the contractor "the final payment on his contract," naming the amount, has been held a compliance with a provision that the architect shall certify in writing that all work has been to his satisfaction.[7] A certificate reciting that a certain number of miles of track have been laid, that trains have been run over the same, and that it is in condition suitable for traffic, is not sufficient to entitle the contractor to recover payments due only when each mile of track was fully completed, and "on the certificate of the chief engineer that a certain number of miles named are completed ready for the rolling stock."[8] Under a submission to arbitration, an award for a certain sum less an allowance for hauling 620 staves, without naming the amount to be deducted, is void for uncertainty.[9]

Certificates by engineers have been held sufficient when they have certified to the satisfactory completion of a job except certain minor details to be finished or repaired. A letter to the owner stating that a structure was completed except some planking which could not be done until low water,

[1] Finney *v.* Condon, 86 Ill. 78 [1877].
[2] Union Stove Works *v.* Arnoux, 28 N. Y. Supp. 23.
[3] Rousseau *v.* Poitras, 62 Ill. App. 103.
[4] Gonder *v.* Berlin Br. R Co., 171 Pa St. 492; B harrell *v.* Quimby (Mass.), 39 N. E. Rep. 407; Gay *v* Haskins, 31 N. Y. Supp. 1022; *but see* Weeks *v.* Little, 47 N. Y. Super. Ct. 1.
[5] Gonder *v.* Berlin Br. R. Co., 171 Pa. St. 492 [1895].
[6] Gonder *v.* Berlin Br. R. Co., *supra.*
[7] Snaith *v.* Smith, 27 N. Y Supp. 379; Baumister *v.* Patty, 35 Wis. 215; Wyckoff *v.* Meyers, 44 N. Y. 143; Mercer *v.* Harris, 4 Neb. 77; Bloodgood *v.* Ingolsby, 1 Hilt. (N. Y.) 388; *and see* Stewart *v.* Ketelbs, 36 N. Y. 392; *and* Barney *v* Giles, 120 Ill. 154.
[8] Perkins *v.* Locke (Tex.), 29 S. W. Rep. 1048.
[9] Parker *v.* Eggleston, 5 Blatchf. (Ind.) 128; *see also* Zerger *v.* Sailer, 6 Binn. (Pa.) 24; Ingraham *v.* Whitmore, 75 Ill. 24.

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that he was willing to accept the structure as it stood, advising the owner to retain a certain amount to insure its completion, has been held a sufficient certificate to entitle the contractor to recover the price less an amount sufficient to complete the planking.

Payments made repeatedly upon certificates of a peculiar form without objection may effect a waiver of the provision of the contract requiring a different form, especially when the objection is first made at the trial.[2] *

475. Certificate must Be Certain as to Amount, and it should Be Complete. —An award or a certificate must be certain as to the amount to be paid. It need not state the precise amount in figures, but it is sufficient if it describes the means by which the amount can be ascertained, as by measurement, e.g., a survey,[3] or an arithmetical calculation.[4]

A certificate that the contractors "are entitled to payment, being the last payment on contract price for your residence," with a remark that said payment "is the same as written in article of agreement less credits and credit for defective plastering," was held sufficient to entitle the contractors to sue for said payment, in the light of a finding by the jury that the contractors were not liable for the defects in the plastering.[5] Such certificates subject to credits or claims of either party are sufficient, it seems, to satisfy the condition precedent and to admit the contractors to the courts to determine and enforce their rights. A certificate by the architect that the subcontractor is entitled to a settlement, but without prejudice to any claim the builder may have for time lost or work done in carrying out the terms of the contract, is sufficient to meet the builder's refusal to make final payment of the sum due on the ground that subcontractor had failed to procure the architect's certificate as to the proper performance of his work.[6]

An architect may perhaps be justified in making such a certificate between a subcontractor and a builder, neither of whom are bound to pay him for his time and trouble to adjust their differences, but such a certificate between the owner and the contractor in which questions and differences are left open and undecided, would be a breach of professional practice for which an owner might properly give his architect a well-merited rebuke. It is essential to the validity of an award by arbitrators that it should make a final disposition of the matters embraced in the submission, so that they may not become the subject of future litigation,[7] and the same

[1] Washington Bridge Co. *v.* Land, etc., Co. (Wash.), 40 Pac. Rep. 982; Mills *v.* Weeks, 21 Ill. 568.

[2] Bloodgood *v.* Ingolsby, *supra;* Berton *v.* Hermann, 11 Abb. Pr. N. S. (N. Y.), 382; Goldsmith *v.* Hand, 26 Ohio St. 107.

[3] Galloway *v.* Webb, Hard. (Ky.) 318.

[4] 1 Amer. & Eng. Ency. Law 700.

[5] Robinson *v.* Baird (Pa.), 30 Atl. Rep. 1010.

[6] Grannis, etc., Co. *v.* Deeves, 25 N. Y. Supp. 375, 72 Hun (N. Y.) 171.

[7] Ingraham *v.* Whitmore, 75 Ill. 24 [1874], 1 Amer. & Eng. Ency. Law 678, note 1.

* *See* Sec. 478, *infra*.

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should hold of the determinations and decisions of engineers and architects.[1]

The result of making incomplete certificates is illustrated in a case where an architect instead of deciding the question, who was at fault in omitting the resin which was required by the contract to be put under the floors, merely credited the owner "by amount retained until resin filling is properly put under floors, or until ascertained by whose fault the resin was omitted." The court held that the owner was not entitled to credit for the amount unless he proved it was by the builder's fault that it was left out, and that that was a question for the jury.[2]

476. Parties Should Agree as to Form and Matter of Certificate.—If an owner or a company wishes a written certificate, signed and sealed, or the contractor desires the engineer's estimate and decision to be made under oath, they must incorporate their intentions in their contract.[3] They will not be implied, nor supplied by usage or custom. A full statement of account and estimate by the engineer must be stipulated for by the terms of the agreement or it cannot be required, or made an excuse for nonpayment of contract price. When certain forms are to be followed or certain facts are required by the agreement to be certified the estimate, decision, or certificate must be strictly in accordance with the provisions agreed to by the parties.[4] Therefore a condition that work shall be paid for "on receipt of the engineer's certificate that the work was fully and completely finished according to the specifications," is not fulfilled by a certificate stating "that the buildings were finished in such a manner that he would accept them if he were the owner and that he was satisfied as to the work and materials."[5] A promise to pay "on the presentation of a certificate certifying that the work has been well and truly performed and accepted by him, and that all damages and allowances which should be paid or made by the contractor have been deducted," is not a promise to pay upon the presentation of a certificate that the contractor "is entitled to a payment by the terms of the contract," but neglects to certify that the work has been well and truly performed and that damages and allowances have been deducted.[6]

477. Instances in which Certificate has been Held Insufficient.—A mere order by the architect requesting the owner to pay the contractor a certain sum "to apply on an account," is not a sufficient certificate under a clause to pay and be bound by a certificate signed by architect "to the effect that the work is done in strict accordance with the drawings and specifications and that he considers the payment properly due."[7] The checking by the architect of an account of the builder's charges rendered, and the forwarding

[1] *But see* Mills *v.* Weeks, 21 Ill. 561.
[2] Huckestein *v.* Kelly & Jones Co. (Pa.), 25 Atl. Rep. 747.
[3] Pashby *v.* Birmingham, 18 C. B. 2.
[4] *See* Anderson *v.* Miller (Ala.), 19 So. Rep. 302.
[5] Smith *v.* Briggs, 3 Denio 73 [1846].
[6] Barney *v.* Giles (Ill.), 11 N. E. Rep. 206, 120 Ill. 154 [1887].
[7] Michaelis *v.* Wolf (Ill.), 26 N. E. Rep 384 [1891]; Row *v.* Boteler, 40 Mo. App. 218.

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it to the owner as the builder's account, has been held not a certificate by the architect that the work has been done to his satisfaction, nor to amount to a performance of the condition precedent.[1]

When the contract required the contractor to present to the treasurer a certificate from the engineer, "stating that he had examined, measured, and computed the work, that it had been done to his satisfaction, and was completed, or that payment was due, etc.," it was held that the required certificate must be in writing, and that it must state that the work had been done to the satisfaction of the engineer, and that he had examined, measured, and computed the same, and that payment was due. Therefore a certificate stating the nature or character of the work and giving the amount, underneath which was written "Allowed one-third of the above $521.66," "certified for the sum of $521.66," signed by the engineer, and certified on the back of account "I hereby certify that the written account is for [describing work], that I have examined the same, and that Messrs. ..... [contractors] are entitled to receive the same," and signed by the engineer, was held insufficient to satisfy the terms of the contract.[2]

Words written in the margin of an award or certificate by the engineer in a distinct sentence will become a part of the award and receive the same construction as if inserted in the body of it.[3] It is therefore submitted that the above certificate was not held insufficient because part of it was written on the back, but because of the omission of necessary data.

A less stringent construction was given to a Wisconsin case, where a contract to make payments only on the production of a certificate setting forth the amount of stone furnished and its value, and that the same was to the architect's satisfaction, was in effect satisfied by a certificate of the amount and value of stone work furnished, stating the value at the contract prices, but not stating in terms that the same was to his satisfaction. It was regarded as amounting in effect to a certificate that the work was to his satisfaction.[4]

478. Certificate must Meet Requirements of Contract.*—If the contract stipulated for a written certificate, the condition must be satisfied by producing a written certificate, nor will the mere want of writing give ground for relief in equity according to the English cases.[5] A formal approval and acceptance will not suffice when a written certificate is required.[6]

A certificate to be signed by two officers of a city is fatally defective if

[1] Morgan *v.* Birnie, 9 Bingham 672 [1833].

[2] Ardagh *v.* Toronto, 12 Ontario Repts. 236 [1886], *citing numerous cases.*

[3] Platt *v.* Smith (N. Y.), 14 Johns. R. 368 [1917].

[4] Bannister *v.* Patty's Exrs., 35 Wis. 216 [1874]; *accord*, Union Stove Works *v.* Arnoux, 98 N. Y. Supp. 23; *accord*, Snaith *v.* Smith, 27 N. Y. Supp. 379.

[5] Leake's Digest of the Law of Contracts, p. 640, *and English cases cited.*

[6] Schenk *v.* Rowell, 3 Abb. N. Cas. 42; Hanley *v.* Walker, 79 Mich. 605; Lamprel *v.* Billericay Union, L. R. 3 Exch 283; Russell *v.* Sa Da Bandeira, 13 C. B. N. S. 149; Goodyear *v.* Weymouth, 1 H. & R. 67; *and see* Roy *v.* Boteler, 40 Mo. App. 224.

* *See* Sec. 474, *supra.*

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signed by one only, and will not entitle the contractor to recover under it.[1] Likewise when an award of three arbitrators is required, an award by two and a statement by the third that "it was all right" is not sufficient.[2] If, however, the submission provide that the decision of the majority shall be the unanimous decision of the arbitrators, it will hold if signed by two of three arbitrators.[3]

The measurements and computations recorded in the engineer's books will not satisfy a provision requiring the work to be measured by certain engineers, and their estimate or certificate to be rendered to the sub-contractor by the contractor, which estimate is to be final and conclusive between them. Such books may be admitted in evidence of the amount of work done, but they are not conclusive estimates of the work done or the compensation to be received.[4]

Under a provision to pay for mason work "when all the works are completely finished and certified by the architect to that effect," a certificate that the contractors "have completed the mason work to your building" was held sufficient.[5]

479. Certificate Good in Part and in Part Bad.—An award may be good in part and in part bad. In such a case it is void for so much only as is bad. By analogy the same principle is applied to the decisions and estimates of an engineer.[6] The fact that some of the orders of an award, to be performed by the same party, are bad is no reason for holding the party discharged as to those which were properly awarded.[7] If the void part can be readily separated from the valid without doing injustice, the good will be upheld and the bad rejected; but, if a separation cannot be made readily and without doing injustice, the whole will be declared void.[8]

The fact that an engineer has exceeded his contract powers with regard to one or more items is no ground for excluding the whole estimate or certificate. That part only should be disregarded as to which the engineer has exceeded his powers.[9] If however the award goes beyond the issues limited by the submission and is therefore in excess of the powers conferred on the arbitrator [engineer], and the matter in excess cannot be separated from the residue, then the award will be invalid as a whole.[10]

[1] Adams *v.* The Mayor, 4 Duer (N. Y.) 295 [1855].

[2] Weaver *v.* Powell (Pa.), 23 Atl. Rep. 2070 [1892], *cases cited.*

[3] Witz *v.* Tregallas (Md.), 33 Atl. Rep. 718.

[4] Schwerin *v.* De Graff, 21 Minn. 354 [1875].

[5] Stewart *v.* Ketaltas, 9 Bosw. (N. Y.), 261 [1862].

[6] South's Adm'r *v.* South, 70 Pa. St. 195; Drew *v.* Altoona, 121 Pa. St. 401-421.

[7] Bouck *v.* Bouck (Minn.), 59 N. W. Rep. 547.

[8] Leslie *v.* Leslie (N. J. Ch.), 24 Atl. Rep. 319; Lincoln *v* Schwartz, 70 Ill. 134; Jackson *v.* Ambler, 14 Johns R. 96 [1817]; *many cases cited in* 1 Am. & Eng. Ency. Law 710-11.

[9] Sanders *v.* Hutchinson, 26 Ill. App. 633; *accord* Mills *v.* Weeks, 21 Ill. 596; Drhew *v.* City of Altoona, 121 Pa. St. 411, 15 Atl. Rep. 636 [1888]; *see also* South's Adm'r *v.* South, 70 Pa. St. 196.

[10] Glade *v.* Schmidt, 20 Bradwell, 157 [1885]; s. c., 27 Ill. App. 114; Shrump *v.* Parfitt, 84 Hun (N. Y.) 341; Leslie *v.* Leslie, 52 N. J. Eq. 332.

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A supplemental or subsequent award that is bad for not being within the terms of the submission does not impair the first award made according to the terms of the contract;[1] but in accepting an award, a party cannot take the benefits of a part of the award and complain of the illegality of another part; he must accept the award in its entirety.[2]

480. Certificate should be Final and Complete when Rendered.—The award may be valid as to the matters submitted and void as to matters decided, but not embraced in the reference.[3] If the award be not final, or is not complete as to all matters submitted, it is void altogether, and not admissible even as an account stated.[4] If the award refers to certain note or account books, from which the amount of the award is to be determined, and such notes or accounts are so incomplete that the amount cannot be computed without other evidence, then the award is void for uncertainty.[5]

If certain matters within the submission are not passed upon by the arbitrator, as when it remains for him to approve a lease of liens, it is not a final award. Yet though the award be not valid, if the contract still remains in force, the contractor's remedy is open to him whenever a valid award is made. It has been argued that a failure on the part of the engineer or architect to consider all matters submitted to him was to that extent a fraud upon the party against whom the discrimination was made.[6]

481. Certificate as Evidence in Court.—When the acceptance and certificate of the engineer are made a condition precedent to payment for work, they are of course admissible to prove completion and acceptance of work.[7] The certificate is admissible in a suit to recover for work done, when the contract provides that the work shall be done subject to the inspection, approval, or rejection of said engineer.[8] But a copy of the final estimate, though in the handwriting of the engineer who made the original, cannot be received from a subcontractor as evidence, there being no proof that the principal contractor had ever received the original final estimate which he was notified to produce.[9]

The unsworn statement of an engineer that a paper certified by him is a true copy of a measurement of work done, made by his predecessor in office, is not legal evidence.[10] Even though the contract make the architect's certificate conclusive on the parties, yet in the absence of such certificate, his testimony is not conclusive, but will stand upon the same terms as other

[1] Eddy's Exec'r *v* Northrup (Ky.), 23 S. W. Rep. 353; Edmund on *v.* Wilson (Ala.), 19 So. Rep. 367.

[2] Thornton *v.* McCormack (Iowa), 39 N. W. Rep. 502 [1888].

[3] Bogan *v.* Daughdrill, 51 Ala. 312

[4] Hamilton *v.* Hart, 125 Pa. St. 142 [1889]; 107 Pa. St. 419. *distinguished.*

[5] Mather *v.* Day (Mich.), 64 N. W. Rep. 198.

[6] Mercer *v.* Harris, 4 Neb. 77; School Dist. *v.* Randall, 5 Neb. 408; *see* Mills *v.* Weeks, 21 Ill. 561.

[7] Hamilton Co. *v.* Newlin, 132 Ind. 27; *and see* Mills *v.* Weeks, 21 Ill. 561.

[8] W. Chicago Park Comm'rs. *v.* Barber, 62 Ill. App. 108; Gillies *v.* Manhattan B. Imp. Co. (N. Y. App.), 42 N. E. Rep. 196; Stewart *v.* Carbray, 59 Ill. App. 397.

[9] Reilly *v.* Lee, 16 N. Y. Supp. 313 [1891]; *and see* Swank *v.* Barnum (Minn.), 65 N. W. Rep. 722.

[10] Langford *v.* Sanger, 35 Mo. 133 [1864].

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witnesses of equal knowledge and opportunity.[1] Certificates of an engineer as to the amount of work done by a plaintiff under a contract, though a condition precedent to the right to payment under its terms, are not admissible in evidence, unless the fact that they were furnished is pleaded.[2] Sworn copies of estimates from the office of the resident engineer are competent evidence in an action by a subcontractor against a contractor, for the purpose of ascertaining the value of work done.[3]

Two interesting cases in evidence are reported, one where a contractor had been prevented by the company from completing his contract, and he sued for profits he would have realized if he had been permitted to complete it. The court held that written estimates of the amount and cost of work made by engineers after the letting of the contract could not be placed before the jury to disprove the amount of profits claimed by contractor.[4] In another case where a contract provided that the engineer or architect should decide any dispute arising as to the meaning of drawings and specifications, it was held that that fact did not render the engineer's admissions of defects admissible as evidence, if such admissions were made in the absence of the contractor, in a suit for a balance due on the contract by the contractor.[5]

482. Can Engineer's Certificate be Revised or Corrected after it is Once Rendered.—The estimate made and the certificate rendered, or a classification made, or a dispute decided in a certain way, the question is sometimes raised whether the engineer can subsequently change or revise it. The question arises frequently in regard to monthly estimates or progress certificates, when the contract does not expressly provide that such preliminary estimates are approximate only and are therefore provisional, and that only the final estimate and certificate shall be binding and conclusive on the parties.*

If this last condition be not expressed, it has been held in some cases that monthly estimates will be held conclusive, even though made by an assistant; at any rate when subcontractors have been paid according to such estimates.[6] It has been held that if no provision or stipulation is inserted in the contract to the effect that the monthly estimates are only approximate and are subject to revision and readjustment at the final estimate, then the monthly estimates duly certified by the engineer and according to which the principal contractor has paid his subcontractors, are final and conclusive, and are not subject to remeasurement and reclassification to correct alleged mistakes and discrepancies. "The mere incompetency or mere

[1] Fitzgerald *v.* Beers, 81 Mo. App. 356; Boteler *v.* Roy, 40 Mo. App. 234.

[2] Boden *v.* Maher (Wis.), 69 N. W. Rep. 980.

[3] Lyon *et al.* *v.* McCadden, 15 Ohio 551 [1846].

[4] Tenn. & C R. R. Co. *v.* Danforth, 13 So. Rep. 51.

[5] Garnsey *v.* Rhodes (N. Y. App.), 34 N. E. Rep. 199.

[6] Price *v.* Chicago, etc., R. Co., 38 Fed. Rep. 304 [1889]; as to classification, Ricker *v.* Collins (Tex.), 17 S. W. Rep. 378 [1891]; Barker *v.* Belknap & V. C. R. Co., 27 Vt. 700; Gulf, etc., R. Co. *v.* Ricker (Tex.), 17 S. W. Rep. 382 [1891].

* *See* Secs. 413, 463, and 465, *supra*.

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negligence of the division or chief engineer does not meet the requirements of the case, unless their mistakes were so gross as to imply bad faith;"[1] but the authorities are quite as strong and numerous that progress certificates are merely provisional and subject to adjustment in the final certificate.[2] It seems, however, that a promise by an engineer to classify in a certain way at some future day does not amount to a classification. When he makes the final estimate and classification he may exercise his discretion.[3]*

A Massachusetts case is authority for the statement that "the engineer may revise and correct the statements within a reasonable time, if he can do so without prejudice to the rights of either party."[4] In this case the engineer had made an estimate of earthwork filling where there was a general subsidence, from the measurements of his assistant engineer, and he revised it afterwards, when he made a personal inspection.[5]

483. Rules as to Correction of Awards by Arbitrators.—There are instances where the affidavit of an arbitrator has been admitted to show some simple error in fact, like a miscalculation; such as a mistake in computation.[6] The opinion has been expressed that an engineer would be entitled to correct a clerical error apparent on the face of the award,[7] and an arbitrator has been allowed to insert the word "dollars" in a statement of amount due.[8] These cases would not be good law if they were simple cases of arbitration. A mere clerical error in an award cannot be corrected by the arbitrator himself,[9] unless the correction be one that does not affect the merits of the award, as a mere clerical error of omission,[10] and a decision or award which is expressly made subject to alterations upon the suggestion of errors by the parties is not a valid award.[11] It has been held that an award may provide for the correction of a mistake in the calculation of the interest.[12]

484. When Award has been Made, Arbitrator's Powers are at an End.—A mistaken calculation of figures in making an award cannot be corrected. The arbitrator's authority, when once completely exercised pursuant to the

[1] Chicago, etc., R. Co. *v.* Price, 138 U. S. 185 [1891].

[2] O'Brien *v.* New York (App.), 35 N. E. Rep 328, 139 N. Y. 548, 142 N. Y. 671; *and* McNamara *v.* Harrison (Ia.), 46 N. W. Rep. 976 [1890]; *and* Cooper *v.* Uttoxeter Bur. Bd., 11 L. T. N. S. 565; *contra*, Tharsis Sulphur Co. *v* M'Elroy, L. R. 3 App. Cas. 1040; *and* Hartupee *v.* Pittsburgh, 97 Pa. St. 107; Crumlish *v.* Wilmington, etc., R. Co., 5 Del. Ch. 270 [1879].

[3] Dorwin *v.* Westbrook, 24 N. Y. Supp. 955.

[4] Palmer *v.* Clark, 106 Mass. 373 [1871].

[5] *Semble*, Reynolds *v.* Caldwell, 51 Pa. St. 298.

[6] Hazeltine *v.* Smith, 3 Vt. 535; *and see* Clement *v.* Foster, 69 Me. 318.

[7] Robinson & Rea Mfg. Co. *v.* Mellon, 139 Pa. St. 257 [1891].

[8] Smith *v.* Potter, 27 Vt. 304 [1855]; Platt *v.* Smith, 14 Johns. 368 [1817]; Godwell *v.* Raymond, 27 Vt. 341 [1855].

[9] Mordue *v.* Palmer, L. R. 6 Ch. 22.

[10] Godell *v.* Raymond, 27 Vt. 241; McKinstry *v.* Solomons, 2 Johns. (N. Y.) 57; s. c., 13 Johns. 27.

[11] McCrary *v.* Harrison, 36 Ala. 577; Hooker *v.* Williamson, 60 Tex. 524.

[12] McKinstry *v.* Solomon, 2 Johns. (N. Y.) 57; *but see* Gardner *v.* Masters, 3 Jones Eq. (N. Car.) 462.

* *See* Sec. 390, *supra*.

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terms of the reference, is at an end and the award cannot be reviewed again.[1] Having once made an award the arbitrator is *functus officio*, and he cannot afterwards make a second award, though the first one was defective,[2] unless he has expressly reserved the power to correct errors which may be found in it,[3] which might be an imprudent thing to do.* The award is complete on delivery, and not before, and the fact that it was signed and ready to deliver, but not delivered, does not prevent its being recalled or revoked.[4] "When an arbitrator has made and published his award or report as a completed instrument his power is wholly at an end. He has exhausted his authority. He can do nothing more in reference to the arbitration or the subject-matter. He cannot reopen the case, nor make a new or supplemental award or report, nor alter or amend the award or report already made, nor file additional, explanatory, alterative, or amendatory documents. What he has done must stand or fall without further aid or assistance from him. He can neither support it or impeach it."[5] "After the award has been executed and published to the parties, the arbitrators have no more to do with it; they cannot destroy its validity as a public instrument by wrongfully withholding it from the possession of the parties."[6]

485. Engineer's Certificate Analagous to an Award of an Arbitrator.—When a final estimate has been made by an engineer, and a certificate thereof rendered to the contractor, it is extremely doubtful if it may be reviewed, revised, and corrected.[7] It has been held that there can be but one final estimate, and that the engineer cannot revise it, nor make a new one after he has submitted it as final.[8] If the engineer's certificate be regarded as an award and the engineer has delivered it to the parties, he cannot recall it.[9] Some doubt has been expressed as to the necessity of having an award signed and delivered to prevent the parties from revoking the submission to arbitration, and the subsequent filing of the award.[10] If the engineer could recall his certificate, when would the award be final and litigation be at an end? If an award might be opened after a short time has elapsed, why not after a longer period? The law is well settled that an arbitrator (and the same should be held of an engineer with full powers of an arbitrator) cannot review his decisions or revise his estimates if it in any way involves a reconsideration of the merits of the ques-

[1] Morse on Arbitration 229; Woodbury *v.* Worthy, 3 Me. 85 [1824].
[2] Flannery *v.* Sahagian (App.) 31 N. E. Rep. 319; 1 Amer. & Eng. Ency Law 689.
[3] Edmundson *v.* Wilson (Ala.), 19 So. Rep. 367.
[4] Shulte *v* Kennesy, 40 In. 352 [1875]; Byars *v.* Thompson, 12 Leigh (Va.) 550; Butler *v.* Greene (Neb.) 68 N. W. Rep. 496.
[5] Morse on Arbitration 226.
[6] Morse on Arbitration 228.
[7] Loeffler *v.* Froelich, 35 Hun 368.
[8] Gonder *v.* Berlin Br. R Co., 171 Pa. St. 498; Weeks *v.* Little, 47 N. Y. Super. Ct. 1; *and see* Mercer *v.* Harris, 4 Neb. 82; Pashby *v.* Mayor, 18 C. B. 2; Jones *v.* Jones, 17 L. J. Q. B. 170.
[9] Robinson Rae Mfg. Co. *v.* Mellon (Pa.), 21 Atl. Rep. 91 [1890]; Woodbury *v.* Worthy, 3 Me. 85 [1824].
[10] McKenna *v.* Lyle (Pa.), 26 Atl. Rep 777.

* *See* Secs. 475, 480, 483, *supra.*

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tion or an exercise of his judgment.[1] He cannot reopen the case and go into a general rehearing to make a new estimate and certificate.[2]

486. An Engineer or Arbitrator can Do One of Three Things When He has Made a Mistake.—If the arbitrator [engineer] wishes to revise or correct a manifest error in his certificate, it may be done in one of three ways: first, he may apply to a court of equity to have the correction made.[3] The court may recommit the award to have the mistake rectified.[4] The court itself cannot change an award not even to correct an obvious miscalculation; it must either confirm, reject, or recommit the award, and it is within the court's discretion whether it will reject the award or recommit it to the arbitrator.[5] The court may recommit an award to correct an acknowledged error or informality, on the ground of newly-discovered evidence but not upon the ground of a change of opinion of the arbitrators, and when recommitted the full power of the arbitrators revives as to the whole cause, their powers are restricted only by the submission;[6] secondly, the engineer or arbitrator may advise the party of his error or they may both agree to abandon the award made and resubmit the questions to the decision of the engineer;[7] thirdly, if either party refuse to recommit the subject to the engineer, the other party may bring suit in a court of equity to have the error corrected, by recommitting it to the engineer.

487. A Court of Equity will Refer Back or Correct a Palpable Mistake.—A court of equity will correct a palpable mistake or miscalculation of figures made by arbitrators.[8] A court of law may refuse to correct a mistake even of a mathematical calculation as a mistake in subtraction,[9] but such a mistake is no ground to set aside an award.[9] The error in general must appear on the face of the certificate or in some paper, letter, or drawing delivered with it.[10]

If the error be one of simple arithmetic, to determine the correct amount presents no question for a jury, the court may either perform the labor of ascertaining the result, or it may entrust it to any competent individual. In legal presumption the court knows the result.[11] The mistake should be

[1] Robinson Rea Mfg. Co. *v.* Mellon, 139 Pa. St. 257 [1891]; Smith *v.* Potter, 27 Vt. Rep. 304 [1855].

[2] Robinson Rea Mfg. Co. *v.* Mellon, *supra*.

[3] Mordue *v.* Palmer, L. R. 6 Ch. 22.

[4] Kleine *v.* Catara, 2 Gallison C. C. 16 [1814]; *see also* Greenough *v.* Rofe, 4 N. H. 357 [1828]; Roosevelt *v.* Thurman, 1 Johns. Ch. 220 [1814]; *and see* Eisenmeyer *v.* Sauter, 77 Ill. 515 [1875]; State *v.* Rulon (N. J.), 14 Atl. Rep. 881 [1888], to explain "to the heirs;" *and* Herrick *v.* Belknap, 27 Vt. 673.

[5] 1 Amer. & Eng. Ency. Law 711.

[6] Eastman *v.* Armstrong, 26 Ill. 216; *and see* Burnside *v.* Potts, 23 Ill. 415 [1860].

[7] Lewis *v.* Chicago, etc., R. Co., 49 Fed. Rep. 708; Essenmeyer *v.* Sauter, 77 Ill. 515 [1875]; *and see* Mansfield, etc., R. Co. *v.* Veeder, 17 Ohio 385.

[8] Newland *v.* Douglass, 2 Johns. (N. Y.), 62 [1806]; Howell *v.* Howell, 26 Ill. 460.

[9] Kleine *v.* Catara, 2 Gallison C. C. 61 [1814]. The suit should not be brought against the arbitrator, but against the other party to the submission, 3 Atkyns 644 [1748].

[10] Sweet *v.* Morrison, 116 N. Y. 19 [1889]; *citing* Fudickar *v.* Ins. Co., 62 N. Y. 392; Coal Co. *v.* Salt Co., 58 N. Y. 667; Woods *v.* Monell, 1 Johns. Ch. 502; Todd *v.* Barlow, 2 Johns. Ch. 551; Lewis *v.* Chicago, etc., Ry. Co., 49 Fed. Rep. 708.

[11] People *v.* Board, 125 Ill. 9 [1888].

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so palpable as to afford sufficient cause for a court of equity to reform it.[1]

488. If Certificate or Award be Regular and Engineer or Arbitrator has Not been Misled, it will Hold.—If the award is not ambiguous and is within the scope of the submission, and there is no fault on the part of the arbitrators, and they were not deluded, deceived, or misled, and have decided as they intended, and as the evidence warranted, the award cannot be attacked on the grounds of an error in computing the amount found due.[2] It cannot be impeached for mistake arising from error in judgment of the referee or in drawing conclusions from evidence and observation.[3] If the engineer has given different estimates to the owner and contractor, it has been held proper to submit both of them to the jury to determine which is the correct one.[4]

489. Special Statutes Conferring Power to Correct Errors in Awards.—Some states have passed special statutes conferring power on a court to correct an award which is imperfect or when there are obvious miscalculations,[5] they embody the same principles of the law as has been set forth in the cases cited. The mistakes and miscalculations must be apparent on the face of the award, or in some paper delivered with it, and be so plain that they are obvious to the referee the moment they are pointed out.[6] The award may be referred back to the arbitrator, but not for a review of the case on its merits, or to reconsider the evidence or any other matter on which he has already decided. The court cannot make a new and different award based upon a different view of the law or of the facts of the case; it has the same power as it has over a verdict to sustain it, or set it aside as a whole.[7]

490. Some Cases where Engineer has Recalled and Corrected his Certificate.—In this matter regarding the powers and duties of an engineer, the case of O'Brien *v.* New York, under the stipulation making the engineer's decision conclusive on the contractor, but not upon the city, furnishes an unusual result. In this case the engineer delivered his certificate to the aqueduct commissioners, which to all intents and purposes was a publication of it, and then recalled it and revised it, making the allowance to the contractor much less than in the prior certificate. It was held proper, as the earlier estimate included work which was not properly comprised in the contract. The progress certificates were held not conclusive, but capable of being corrected in the final estimate.[8]

[1] Robinson Ren Mfg. Co. *v.* Melton, 139 Pa. St. 257 [1891].
[2] Hathaway *v.* Hagan (Vt.), 8 Atl. Rep. 678 [1887].
[3] Palmer *v.* Clark, 106 Mass. 373.
[4] Keystone Brewing Co. *v.* Walker (Pa.), 11 Atl. Rep. 650 [1888].
[5] Rev. Stat. Ind. 1881, § 846, Act of Penna. Legislature, June 16, 1836 P. L. 717.
[6] School Dist. *v.* Sage (Wash.), 43 Pac Rep. 341.
[7] Ginn *v.* Bowers, 126 Pa. St. 552 [1889]; Deford *v.* Deford (Ind.), 19 N. E. Rep. 530 [1889].
[8] O'Brien *v.* New York (N. Y. App.), 35 N. E. Rep. 323, 142 N. Y. 671.

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Another peculiar case was decided not long ago in Illinois, in which the contractor was to be paid "upon the presentation of the architect's certificate," which was to be final. The contractor received the certificate, and, being disappointed in the balance due according to the architect's estimate, he deliberately surrendered it and returned it to the architect, who afterwards refused to give him another. The supreme court held the contractor could recover without the certificate,[1] but the court of appeals held that the contractor's act in deliberately returning the certificate was a taking of the burden upon himself of proving his right to recover without the certificate, and that he had willfully and deliberately disqualified himself from compliance with his contract,[2] and he could not therefore recover. This decision was reversed in 1892, when the court held that when the certificate was once made and signed and rendered by the architects, that the rights of the parties were then determined and fixed, and that the fact that the builder handed the certificate back to the architect did not change their rights or affect the validity of the certificate. The certificate was compared to a promissory note payable on demand.[3]

Without doubt usually progress or monthly certificates may be corrected, so as to equalize the whole at the end or correct errors.[4] *

491. Testimony of Arbitrator in Regard to his Award or Certificate.—An arbitrator is not a competent witness to prove his own misconduct[5] or to show a mistake in his award.[6] He cannot contradict an award which he has signed,[7] nor explain uncertainties in the award.[8] To this rule there is an exception in cases of fraud, and an exception has been allowed in a case of mistake.[9] An arbitrator may be called as a witness to testify the time when and the circumstances in which he made his award,[10] and also concerning what matters were submitted to them.[11] One who refused to join in the award may testify to acts of partiality and misconduct on part of the other arbitrators.[12] Parol evidence is not admissible to show that an award upon which judgment has been rendered was founded upon matters not pleaded; nor can the "understanding" of the arbitrators be shown.[13]

The testimony of an arbitrator (architect) is competent to show that no

[1] Arnold *v.* Bournique (Ill.), 33 N. E. Rep. 530.

[2] Bournique *v.* Arnold, 33 Ill App. 303 [1889].

[3] Arnold *v.* Bournique, Ill. Sup. Ct., Jan., 1892.

[4] Faunce *v.* Burke & Gonder, 16 Pa. 469; Monongahela Nav. Co. *v.* Fenlon, 4 W. & S. 205; Yutzy *v.* Buffalo Valley R. R., 1 Walker 463; Memphis, etc., R. R. *v.* Wilcox, 48 Pa. St. 161; *semble*, Drlew *v.* Altoona, 121 Pa. St. 401; Gonder *v.* R. R. Co., 171 Pa. St. 497 [1895].

[5] Claycomb *v* Butler, 36 Ill. 100 [1864]; Schmidt *v.* Glade, 126 Ill. 485 [1888].

[6] Newland *v.* Doug'ass, 2 Johns. (N Y.) 62 [1806]; *but see* Eisenmeyer *v.* Sauter, 77 Ill. 515 [1875], *and* Klein *v.* Catara, 2 Gallison C. C. 61 [1814].

[7] Campbell *v.* Western, 3 Paige 124 [1832].

[8] 1 Amer. & Eng. Ency. Law 992.

[9] Pulliam *v.* Pensoneau, 33 Ill. 375 [1864].

[10] Woodbury *v.* Northy, 3 Me. 85 [1824].

[11] 1 Amer. & Eng. Ency. Law 691.

[12] Levine *v.* Lancashire Ins. Co. (Minn.), 68 N. W. Rep. 855.

[13] *Cases in* 17 Amer. & Eng. Ency. Law 422.

* *See* Secs. 467–469, *supra.*

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final award was made, and that although he had signed it, having subsequently discovered a mistake therein, he never delivered it.[1] If the affidavits of the arbitrators are in support of their award, the court may in its discretion permit the person impeaching the award to examine them.[2]

Conversations and admissions between the owner and his engineer as to defects in the work made in the absence of the contractor are not admissible in an action by the contractor for a balance due if the architect in no way represents the contractor. The fact that the contract provides that the engineer shall decide any disputes as to the meaning of the drawings and specifications does not render it admissible.[3] The engineer is the agent for many purposes of the owner, and his conversations and admissions to the contractor are generally admissible in such an action.[4] * A letter from the engineer to the contractor in regard to proper mode of performing work, written and received after completion of work, cannot be received to change the construction of the contract.[5]

492. Provision that Engineer's Certificate, Estimate, and Decision may be Made Without Notice to the Contractor.

Clause: " * * * every such doubt, dispute, and difference shall from time to time be referred to and be determined, settled, and decided by the engineer or architect, who shall be competent to enter upon and investigate the subject-matter of such doubt, dispute, and difference, either with or without reference or notice to the parties to this agreement, or to either of them, or after such investigations or inquiries as he may think fit to make or instigate, and who shall judge, decide, order, and determine thereon, etc."

Clause: "And as soon thereafter as the engineer may think convenient the engineer shall estimate, fix, and determine, either *ex parte* or by and after reference to the parties, or either of them, or after such investigations or inquiries as he may think proper to make or instigate, and he shall certify, * * * etc."

Clause: "All progress or prior certificates upon which.....per cent. payments shall have been made are to be regarded as mere estimates, and subject to correction in the final certificate, which may be made without notice to the contractor, and without explanation of the measurements and data upon which it is made or based."

493. Under a Submission to Arbitration Parties Are Entitled to a Hearing.—Without these stipulations the question whether or not the parties are entitled to notice and to be given an audience before or at the time the

[1] Shulte *v.* Hennesy, 40 Iowa 352 [1875].
[2] Robinson *v.* Shanks (Ind.), 20 N. E. Rep. 713 [1889].
[3] Evans *v.* Montgomery (Mich.), 55 N. W. Rep. 362; Garnsey *v.* Rhodes (Sup.), 18 N. Y Supp. 484, (N. Y. App.), 34 N. E. Rep. 199.
[4] Wright *v.* Reusens (N. Y. App.). 31 N. E. Rep. 215; Mobile & B. Ry. Co. *v.* Worthington (Ala.), 10 So. Rep. 839; *but see* Huntsville, etc., Ry. Co. *v.* Corpening (Ala.), 12 So Rep. 295; Burgess *v.* Wareham, 7 Gray (Mass.) 345; *numerous cases cited by counsel in* Woodruff *v.* R. & P. R. Co., 108 N. Y. 39 [1888].
[5] Braney *v.* Town of Millbury (Mass.), 44 N. E. Rep. 1060.

* *See* Sec 849*a*, *infra*.

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engineer or architect makes his final estimate, is one that has been raised frequently. To evade the question it is customary to insert a clause by which either one or both of the parties waives their [his] rights to a hearing before the engineer, architect, or referee.

Without the protection of a police or military force, the impropriety of having an open trial of the vexing questions that arise in engineering and architecture, can be imagined. Free fights and riots would be, too often, the end of such hearings with the intrepid, coercive class of men which make up the rank and file of our contractors and builders. It may be wondered that they are not even more roughshod when the oppression which they undergo and the risks they assume are considered.

Under a submission to arbitration, it is well settled that either party is entitled to a hearing by all the arbitrators, and that an award made without due and proper notice to the parties of the proceedings under a submission is void, and has no binding effect.[1] A refusal to hear evidence pertinent and material to the controversy will vitiate an award by arbitrators in a court of equity,[2] and it has been held that if either party suppress or conceal material facts, and it be shown that such facts would have produced a different result, it will be sufficient cause for setting aside an award.[3] So when arbitrators were determining disputed boundaries, a refusal to receive and consider certain deeds and maps offered to show the lines was held sufficient reason for setting aside an award.[4] An agreement by the terms of which the arbitrators were "to survey the ground, take levels, and determine" has been held not to amount to a waiver of the right to introduce evidence.[5] However, it has been held that an *engineer* may refuse to hear testimony of witnesses to contradict the estimates furnished by his subordinates who made the measurements, there being no proof of fraud, corruption, bad faith,[6] or misconduct on his part, or palpable mistake appearing on the face of the estimate.[7] To avoid an award when the *arbitrators* have refused to grant a hearing, or to receive material evidence, it is not necessary to show partiality, bad faith, or corruption of the arbitrator.[8]

A provision in a construction contract that any dispute as to the value of extra work, or work omitted, shall be settled by arbitration, does not bind the contractor or builder to a settlement without a hearing and witnesses. If the owner refused to admit a clause allowing witnesses, and the contractor insisted upon it, then both parties will be taken to have abandoned the provision, and the question will be a proper one for the courts.[9]

494. Right to a Hearing may be Waived by the Parties.—The right

[1] Ingraham *v.* Whitmore, 75 Ill. 24 [1874]; Shively *v.* Knoblock (Ind.), 35 N. E. Rep. 1028; *cases collected*, 1 Amer. & Eng. Ency. Law 685

[2] Van Courtlandt *v.* Underhill, 17 Johns. Rep. 405 [1819]

[3] Hurdle *v* Stallings (N. C.), 13 S. E. Rep. 720 [1891]; *accord*, Hart *v.* Kennedy (N. J.), 20 Atl. Rep. 29 [1890].

[4] Hart *v.* Kennedy (N. J.), 20 Atl. Rep. 29 [1890].

[5] Sweet *v.* Norrison (N. Y.), 22 N. E. Rep. 276, 116 N. Y. 19 [1889].

[6] *Citing* Perkins *v.* Giles 50 N. Y. 228.

[7] Ingraham *v.* Whitmore, 75 Ill. 24 [1874].

[8] Anderson *v.* Meislahn, 12 Daly 150

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to be present at a hearing may be waived by an express agreement, or by consent of the parties, or by failure to appear or be excused for absence, when the party has had notice of a hearing.[1] * When the submission is silent as to notice of a hearing, notice must be given.[2] Whether or not the contractor had notice, or waived the notice of a hearing, is a question for the trial court.[3] It seems that if the contractor accept or perform in part the award of arbitrators made at a meeting of which contractor had no notice, that he will be held thereby.[4]

An umpire who has been chosen to decide in case of disagreement of the arbitrators, may make an award without either of the arbitrators joining with him; yet it is his duty to hear the whole case, and to make a distinct award thereon as the result of his judgment. If he decides the case without a hearing, simply on the statements of the arbitrators, his award will be void.[5]

495. Earlier Cases Treated Engineer as an Arbitrator, and Required a Hearing —The same rule was generally applied to an engineer in the capacity of a *quasi*-arbitrator in the early cases, in which cases the engineer was treated as an arbitrator. These cases held that the builder and contractor are entitled to a hearing, and that both parties should be notified and given an opportunity to be present when the estimate or certificate was made, and that determinations made *ex parte* were not final and conclusive.[6] Whether there was testimony to be given or not, it was held that notice should have been given, so that the contractor could have been present, and look out for his interests, and guard against mistakes; that if an arbitrator who is presumed to be totally indifferent be required to give notice of a hearing, that there was even greater reason that the selected and paid servant of one of the parties, acting in the capacity of an umpire, should give the same notice; that as the contractor's interests were entirely dependent upon the skill and integrity of the company's engineer, he should at least have the benefit of a hearing and notice of the time and place when the engineer will investigate the matter, with a view to rendering his decision;[7] that the conclusiveness of a decision of a third person with respect to the rights of the parties required this unless there was something in the terms of the agreement declaring or clearly importing that such notice had been waived, or was not expected or intended.[8] Another case [1839] held that

[1883]; Altman *v.* Altman, 5 Daly 486, *distinguished.*

[1] Box. *v.* Costello, 27 N. Y. Supp. 293; *semble*, Ingraham *v.* Whitmore, 75 Ill. 24 [1874].

[2] Shively *v.* Knoblock, *infra.*

[3] Shively *v.* Knoblock (Ind.), 35 N. E. Rep. 1028.

[4] Ferrier *v.* Knox Co. (Tex.) 33 S. W. Rep. 896.

[5] Ingraham *v.* Whitmore, 75 Ill. 24 [1874].

[6] Collins *v.* Vanderbilt, 8 Bosw. (N. Y.) 313 [1861]; Wilson *v.* York & M. L. Line R. Co., 11 Gill & J. 58 [1839]; McMahon *v.* N. Y. & Erie R. Co, 20 N. Y. 463 [1859]; *and see* Gay *v.* Lathrop, 6 N. Y. St. Rep. 603, 2 Wood on Railroads 999; Packard *v.* Van Schaick, 58 Ill. 79.

[7] McMahon *v.* The N. Y. & Erie R. Co, 20 N. Y. 465; Collins *v.* Vanderbilt, 8 Bosw. (N. Y.) 313 [1861].

[8] Collins *v.* Vanderbilt, *supra.*

* *See* Secs. 414 and 417, *supra.*

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the plainest dictates of natural justice required that no man should be condemned unheard; that the right to notice was implied in the agreement to submit.[1]

The former case was one where the arbiter had accompanied his employer, the owner, over the works at the latter's request, and the owner had said if it was all right he would pay; but they found by inspection that all was not done, and the architect stated to the contractor what he must do to complete the works. The arbiter subsequently visited the works alone, and being satisfied all was done he gave his certificate to that effect. The court held that it was not sufficient, as the subsequent inspection was without notice to the owner or employer.[2]

Another and earlier case had held that no notice was necessary when measurements were to be made, but that when the engineer was to make an estimate of certain expenses incurred by the contractor in performing extra work, he was entitled to a hearing and an opportunity to make his representations and suggestions, and of submitting such accounts, bills, and reports as he might have, accompanied with any remarks and observations that seemed pertinent, which, though not binding upon the engineer in making his estimates, should have at least some weight in guiding his judgment to a fair, just, and accurate result. If such an opportunity were not given to the contractor then the engineer's estimate was not binding nor conclusive.[3]

Under a provision that all disputes arising respecting the true construction or meaning of the drawings should be decided by the engineer, whose decision should be final and conclusive, it was held that when one party applied to the engineer for a construction of the specifications, no dispute having arisen, there was no need of giving a notice to the other party.[4]

496. In Many Cases an Engineer and Arbitrator are Distinguished.— There are many cases that distinguish a reference of questions of price, quantity, or quality of materials to the judgment of an engineer in a construction contract from a submission to arbitration. They compare such a reference to an agreement that some third party shall make an appraisement of property,[5] and hold that such estimates and decisions may be made without granting a hearing to the parties or giving any notice thereof unless such hearing and notice be required by the express provision of the contract or by reasonable implication; and that the engineer may make his decision upon such principles as he sees fit honestly to adopt or upon such evidence as he may choose to admit.[6] In the absence of any agreement for notice such cases hold that the parties will be deemed to have waived it.[7] Though the

[1] Wilson *v.* York & Md. Line R. Co., *supra*.

[2] Collins *v.* Vanderbilt, 8 Bosw. (N. Y.), 313 [1861].

[3] Wilson *v.* The York & Mo. R. Co., 11 Gill. & J. 58 [1839].

[4] Gustavesou *v.* McGay, 12 Daly 423 [1884].

[5] Cases collected, 1 Amer. & Eng. Ency. Law 659.

[6] Palmer *v.* Clark, 106 Mass. 378.

[7] Korf *v.* Lull, 70 Ill. 420 [1873]; *and see* Taylor *v.* Renn, 79 Ill. 181.

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architect be sole judge, yet he may not be regarded so strictly an arbitrator as to require that the parties be given notice of the time and place he will render his decision.[1] *

497. Intention of Parties in Regard to a Hearing should be Expressed.—In view of the different opinions entertained as shown by the cases cited, the advisability of a stipulation showing the intention of the parties with regard to a hearing is apparent. If there is no intention to give the contractor an opportunity to present his case, then the contractor should embody a waiver of any rights he may have to a hearing or to a notice thereof; and if on the contrary the parties are mutually agreed that a hearing will be more equitable and proper it should be provided for in the contract. The more general practice is to leave it to the judgment of the engineer, whether he will grant a hearing to either party, as expressed in the clause given in section 492.

No doubt when questions and disputes are to be determined and settled by three arbitrators, or by two arbitrators with a final appeal to an umpire selected by them, there must be a hearing and a notice thereof,† especially where the arbitrators have to be informed of the facts of the case by affidavits, records of measurement, testimony, etc., it could not be otherwise; but when the engineer has all the facts in his possession and the uncertainty or questions in dispute can be determined by measurement, calculation, or investigation, the necessity for a hearing is less apparent. Such references have frequently been distinguished from submissions to arbitration, although the decisions rendered under them have been given the finality and conclusiveness of an award.[2]

498. Hearing may be said to have Been Continuous During Construction of Work.—In cases of construction work the hearing may be said to have continued from the time the contract was signed until the final certificate has been rendered. The contractor as well as the owner are in almost daily intercourse with the engineer, and bring claims and complaints to his attention as they come up in the work. In fact, the law seems to require that they should do so.‡ If a hearing is to be granted, at what stage of the work shall it be given? Shall it be when the measurements are made, when the quantities are estimated and the classifications made, or the quality of work and materials determined, or when the engineer draws up and signs his final certificate? These are questions which the courts do not always consider, but they should have some weight in deciding such questions. The courts have frequently held that the parties need not be notified to be present when arbitrators meet to draw up and sign their award; that arbitrators, like jurors, have the privilege of consultation together in private for the purpose of making their award.[3] Certainly for the purpose of

[1] Korf *v* Lull, 70 Ill. 420 [1873].
[2] 1 Am. & Eng. Ency. Law 659.
[3] Roloson *v.* Carson, 8 Md. 208 [1855]; *cases* 1 Amer. & Eng. Ency. Law 686.

* *See* Secs. 526–528, *infra.* † *See* Secs. 526–528, *infra.* ‡ *See* Secs. 578–581, *infra.*

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checking and comparing reports, estimates, and computations of his assistants, an engineer in charge of extensive works has even greater need of the privacy of his office, undisturbed by the arguments and quarrels of the parties.

If arbitrators are selected with special reference to their special knowledge of, or skill in, the matter in controversy, and it is apparent that the parties intended to rely on their personal knowledge or skill, as is the case with an architect or engineer, the arbitrators may be justified in refusing to hear evidence.[1] A submission to perform an award is not, in general, conditional upon receiving notice of the award, because both parties may equally take notice of it. If, however, it be provided that the award should be notified to the parties, it is no award until notice be given, and personal notice is necessary in order to proceed by attachment for contempt in not performing the award.[2]

[1] Hall *v.* Norwalk F. Ins. Co. (Ct.), 17 Atl. Rep. 356; *accord*, Sweet *v.* Morrison, 116 N. Y. 19; *cases collected* 1 Amer. & Eng. Ency. Law 681.

[2] Leake's Dig. of Contracts 647.

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CHAPTER XVII.

DELEGATION OF ENGINEER'S OR ARCHITECT'S DUTIES TO ASSISTANTS.

MINISTERIAL AND JUDICIAL DUTIES DISTINGUISHED.

499. Provision for Delegation of Engineer's Duties to his Assistants.

Clause : "And it is further agreed by the parties to this agreement, that whenever the engineer aforesaid shall be unable to act, in consequence of absence or other cause, then such assistant as said engineer, or the owner, or commissioner, shall designate, shall perform all the duties and be vested, with full power (subject to the instructions and revisions of the chief engineer) to decide as to the manner of conducting, executing, and estimating the said works in every particular, and that the contractor shall follow the instructions or orders of the officers or persons so appointed."

500. Certain Duties cannot be Delegated.—When the control, direction, and supervision of large works is left to the engineer of the company, and it is further provided that he shall classify, accept, or reject materials, determine quantities, decide upon the character and completion of work, and judge of numerous questions incident to the undertaking, an engineer finds himself so overwhelmed with work that he must delegate a large proportion of the duties and tasks assigned to him by the contract to assistants. This delegation is frequently made a point of attack by disappointed contractors, and sometimes successfully, when the above clause is not inserted in the contract.

It is a general rule of law that delegated powers cannot be delegated, and that an agent cannot employ a sub-agent to do his principal's business. This rule is particularly applicable to those cases where the performance of the agency requires the exercise of special skill, judgment, or discretion. When an engineer has been selected with special reference to his skill, honesty, and integrity, and the special confidence that the parties place in him, there is abundant reason why the trust should not be transferred to another, whose fitness and capacity is not known to the parties.[1]

The appointment of an engineer or attorney creates a personal trust, and the performance of his duties cannot be entrusted to another engineer or attorney, without the express consent of the employer.[2]

[1] Mechem on Agency, Sec. 186, *and cases cited.*

[2] King *v.* Hawkins (Ariz.), 16 Pac. Rep. 434 [1888]; Eggleston *v.* Boardman, 37 Mich. 14; Monahan *v.* Fitzgerald (Ill. Sup.), 45 N. E. Rep. 1013; Bocock *v.* Pavey, 8 Ohio St. 270.

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501. Certain Acts may be Delegated.—This rule, however, does not require that the engineer shall perform in person all of the purely mechanical and ministerial work required, such as copying, drafting, measuring, figuring, and driving stakes. The performance of such duties through the agency of others falls under a well-recognized exception to the general rule. The rule against delegation applies with special force to arbitrators and to *quasi*-arbitrators in whose personal judgment, ability, and discretion the parties to the submission have place their confidence, but the exception seems equally necessary in the case of an engineer or architect. There may be, and usually are, many mechanical and ministerial acts which it is expected will be assigned to others, and which may be delegated with perfect propriety. The act must not require any exercise of discretion or judgment, nor should any act be delegated which requires the exercise of any function upon which the parties have relied upon as being perculiarly within the province of the arbitrator, as those involving the personal skill, honesty, and integrity of the arbitrator.[1] An arbitrator cannot delegate any matter requiring his opinion or judgment, not even to a fellow-arbitrator. The parties must have the benefit of the joint judgment of all the arbitrators acting together.[2]

Arbitrators may consult disinterested persons of acknowledged skill, and obtain such information and advice in reference to technical questions submitted to them as may seem necessary to come to correct conclusions, and they may adopt such opinions as their own, provided that the award is the result of their own judgment.[1]

502. Exception to the Rule that an Agent cannot Delegate His Duties.—There are, according to Mr. Evans in his excellent work on "Principal and Agent," four exceptions to the general rule that the agent cannot delegate his duties to another. They are: 1. When there is a lawful custom or usage to authorize it; 2. When the act is purely ministerial; 3. Where the object of the agency cannot be attained otherwise; 4. Where the principal is aware that his agent will appoint a deputy.

The delegation of duties by engineers and architects to their assistants, has been permitted and placed under each and all of these exceptions, and well it may. It is well known that practically the engineer never does and never can make the estimates, or even verify those made by others on large works, that it is altogether impracticable, and there is a universal custom and usage to employ assistants to do the routine work of inspection, measurements, giving lines and grades, etc. There can be but one conclusion in respect to such a reference to the determination of an engineer, which is that the parties in making their submission had reference to something that was usual, or at least possible.[3]

[1] Mechem on Agency, Sec. 188; Evans on Principal and Agent, 52.

[2] Evans on Principal and Agent [Blackstone ed.] 51; *and see* Benson *v.* Miller (Minn.), 57 N. W. Rep. 948.

[3] Herrick *v.* Belknap, 27 Vt. 681; Palmer *v.* Clark, 106 Mass. 373; Seymour *v.* Long Dock Co., 20 N. J. Eq. 396 [1869]; Sweet *v.* Morrison, 116 N. Y. 19; Wilberly *v.* Matthews, 91 N. Y. 648; Billing's

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The fact that the basis of the engineer's certificate is the measurements made by his assistants, not in his presence, affords no ground of avoiding it, if the duty and the known and usual mode of executing such duties officially require the employment of assistants.[1] It is too narrow an interpretation to insist that the measurements shall be made by the engineer or in his presence. If estimates are made in the usual manner by assistants according to his directions and instructions, and are thereafter revised and verified by him, so far as the nature of the work admits, they may be made the basis of an estimate and certificate of the engineer.[2] *

503. Certain Duties cannot be Delegated except by Express Agreement.—As before intimated, there are duties and powers conferred upon the engineer which he should not and cannot delegate to subordinates. The question is how far must the work be under his direct personal supervision. It would hardly be expected that the engineer should hold both ends of a tape, stand at both ends of a transit, or sight through a level and hold the rod, and if he can employ an assistant to do one of these acts, why not both of them? Why cannot an assistant perform the mathematical operations as well as to look up the logarithms? and in short, why cannot the bulk of the field and office operations be performed by assistants, as they invariably are, on large work? So long as the engineer maintains a careful and constant supervision over the acts and operations of his assistants, knows what they are doing and how they are doing it, and insists that all doubtful or disputed questions shall be referred to him, and takes pains to inform himself as to all questions out of the usual routine of daily operations, he may be said to do all that was contemplated by the parties in their contract. This argument does not apply to cases where the service requires the exercise of special skill, judgment, or discretion, or where the engineer or agent is selected because the parties repose special confidence in him; there is abundant reason why the trust should not be delegated to another of whose fitness and capacity the parties know not, at least not without their consent.[3]

There is a higher class of duties, properly called judicial acts, which the contract should place upon the engineer, such as the determination of questions of the due and proper performance of the contract, the methods to be employed in determining the quantities, the means of attaining certain results, the classification and sufficiency of work done, and a tribunal for the general appeal of all questions about which the assistant may have doubts or which the contractor may question. These cannot be delegated, but must

Awards, 76, 77; Chicago, etc., R. Co. *v.* Price, 138 U. S. 185 [1891]; *see* Evans' Agency, pp. 52–4.

[1] Palmer *v.* Clark, 106 Mass. 373.

[2] Palmer *v.* Clark, *supra;* Chicago, etc., Ry. Co. *v.* Price, 138 U. S. 185 [1891]; *affirming* Price *v.* Chicago, etc., Ry. Co., 38 Fed. Rep. 307 [1889]. It seems that an engineer as an arbitrator may consult other engineers and adopt their opinions. Evans' Agency 52.

[3] Mecham on Agency, §186, *and cases cited;* Evans' Agency, p. 47; *American cases cited in* Blackstone edition; Com. Bank *v.* Norton, 1 Hill 505; *accord* Combes.

* *See* Sec. 529. *infra.*

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be performed by the engineer, to whom such questions are referred by the contract.[1] The engineer or architect should approve and sign the certificate, and not his assistant.[2]

504. The Engineer must Do Whatever the Contract Expressly Requires of Him.—If the contract requires that the work shall be *measured* by the engineer it seems that the measurement of a subordinate will not answer; it was so held in 1839. The court seems to have ignored the necessities of the case and hold strictly to the letter of the law, that an agent has no power to employ a sub-agent without the knowledge and consent of the principal.[3] This was held notwithstanding the fact that the work was to be measured by the engineer of the company, without naming a particular person. The court said: "In his skill and integrity, or the person who might succeed him in the responsible position which he occupied, full and implicit confidence might have been reposed, which the contractor at least might not for valid reasons be unwilling to repose in a subordinate officer, and the execution of the trust by a different person was an assumption of power not warranted by the express terms of the contract.[4]

Some of the cases distinguish between a provision that the engineer should *measure* and that he should *estimate*.[5] It would seem therefore that, in drafting a contract, the word "*measure*" had better be omitted. Unless this case be supported on the strict terminology of the words used—*i. e.*, *measured*—it must be considered as overruled by the more recent decisions cited.

Under a stipulation that the work should be done under the direction and supervision of the chief engineer and his assistants, by whose measurements and calculations the quantities and amounts shall be determined and whose decision shall be conclusive, it was held that a measurement by the assistant engineer was not conclusive, nor his decision that the work was done according to the contract, nor that the contractor was entitled to pay therefor.[6] An estimate by a subordinate engineer will not answer the requirement that the certificate shall be made by the chief engineer, even though the subordinate engineer has done all the surveying, measuring, and inspection, and estimates.[7]

When a contract stipulated that certain work should be paid for as

Case, 9 Co. R. 75; Lynn *v.* Burgoyne, 13 B. Mon. 400; Tibbetts *v.* Walker, 4 Mass. 597; Emerson *v.* Providence Hat Co., 12 Mass. 241; Powell *v* Tuttle, 3 Comst. 396; Bocock *v.* Pavey, 8 Ohio St. 270; Stubbs *v.* Holywell R Co., L. R. 2 Exch. 311, 19 Amer. & Eng. Ency. Law 461 *et seq.*

[1] Seymour *v.* Long Dock Co., 20 N. J. Eq. 396 [1869].

[2] McNamara *v.* Harrison, 81 Iowa 486; Snell *v.* Brown, 71 Ill. 133; McIntyre *v.* Tucker (Com. Pl.), 25 N. Y. Supp. 95; Monahan *v.* Fitzgerald (Ill. Sup.), 45 N E. Rep. 1013; Wilson *v.* York, etc., R. Co., 11 Gill & J. (Md.) 38–58.

[3] 2 Kent's Commentaries, and the maxim, "*Deligatus non potest delegare.*"

[4] The court does not seem to have considered the effect of usage, and the fact that the company could have promoted the subordinate to the position of chief engineer. Wilson *v.* York & Md. Line R. Co. (Md.), 11 Gill & J. 58 [1839].

[5] Sweet *v.* Morrison, 116 N Y. 19.

[6] Snell *v.* Brown, 71 Ill. 133 [1873].

[7] McNamara *v.* Harrison (Iowa), 46 N. W. Rep. 976.

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certified to by the engineer in charge, an estimate of the amount of work done and the value thereof made by a division engineer and O. K.'d by the engineer in charge, was held admissible with the testimony of such engineers.[1] In these cases it was the evident intention of the parties to have the benefit of the chief engineer's approval and adoption of the results obtained by his assistants, and nothing else would suffice.

505. Contract Clause Permitting Delegation of Engineer's Duties Omitted.—Without a clause similar to that recommended, an agreement to abide by the decision of the chief engineer is binding, though he has not himself measured the work,[2] and even though the engineer refuse to hear testimony tending to contradict the estimates of his assistants.[3] Whether his estimates were correct or not, the parties had conclusively submitted their rights to him, and they must abide the result. The engineer's information of the work was furnished by his assistants, and the court held that as personal supervision was not stipulated for in the contract it was not required.[4]

It is a curious state of affairs that an engineer can determine and decide a controversy between two parties in a case in which he would not be accepted in courts as a witness. It seems from the last case that an engineer who has no personal knowledge of work except what he has derived from reports made to him by his subordinates can act as judge of the parties' rights in regard to the work, but it has been held he cannot testify in court regarding the same work.[5]

A recent case has decided that when a contract makes the decision of the chief engineer conclusive, a finding by him on a disputed point is not conclusive if it appear that he paid no personal attention to the matter but acted solely on the statements of subordinates.[6] If the engineer be designated as a public officer the contractor is entitled to the judgment of the officer designated.[7]

If the contract require the certificate to be signed by two or more, the signature of one alone will not be sufficient.[8]* One of the partners of a firm of architects may sign the firm's name to a certificate required to be made by the two architects;[9] but an architect cannot delegate to his partner a power to determine as an arbitrator all matters concerning the materials and character of the work,[10] nor can one partner alone make affidavit to an

[1] Miller *v.* Sullivan (Tex. Civ. App.), 33 S. W. Rep. 695; *and see* Vermont St. Ch. *v.* Brose, 104 Ill. 207; *see* Sweet *v.* Morrison, 116 N. Y. 19 [1889].

[2] Chicago, etc., R. Co *v.* Price, 138 U. S. 185 [1891]; Palmer *v.* Clark, 106 Mass. 373; Herrick *v.* Be knap, 27 Vt. 681; *see also* McNamara *v.* Harrison (Ia.), 46 N. W. Rep. 976 [1890].

[3] Sweet *v.* Morrison, 116 N. Y. 19 [1889].

[4] Holmes *v.* Oil Co., 138 Pa. St. 546 [1891].

[5] Van Hook *v.* Burns (Wash.), 38 Pac. Rep. 763.

[6] United States *v.* N. American Com. Co. (C. C.), 74 Fed Rep. 145.

[7] Adams *v.* New York, 4 Duer (N. Y.) 295

[8] Lull *v.* Korf, 84 Ill. 225.

[9] Wright *v.* Meyer (Tex.), 25 S. W. Rep. 1122 [1894].

* *See* Sec. 530, *infra.*

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estimate presented by a firm of engineers,[1] but the certificate of the surviving member of a firm of architects, if allowed to continue to act as superintendent and architect, will be binding.[2]

506. Engineer Not Properly Designated.—Frequently the designation of the engineer is ambiguous as to whether reference of certain questions are made to the chief engineer or to some one of the subordinate engineers of the staff. It has been held that work to be done to the satisfaction of the engineer of the company had reference to the chief engineer,[3] that estimates of the "engineers in charge" of the road meant the engineers in charge of the entire road and not the one in charge of the masonry in question, and whose decision was subject to the approval of the engineer in chief.[4] When there were three engineers, any one of whom would answer the description of the contract, it was held a question for the jury to determine whether the parties had, the chief engineer, his principal assistant, or sub-assistant engineer, in mind at the time of contracting.[5] A reference to the chief engineer of a company is to the person who fills the office of and is acting chief engineer when the adjudication is called for—he is the proper person.[6] By the Scotch law the engineer must be designated by name, if he be made the arbiter of questions and disputes arising from construction work, which prevents this question from arising.[7] A reference to an engineer, "so long as he should continue to be the company's principal engineer," has been held to continue to the same person, notwithstanding the fact that the company became merged in and amalgamated with another company, the engineer continuing to be the engineer of the same division of the amalgamated roads, though he was not its principal engineer.[8]

If the certificate of the engineer be made a condition precedent, and he die before his certificate is made, the owner may select another, and if the contractor does not object at the time it seems he cannot object after he has rendered his certificate.[9]

When the reference is made to the engineer of the company, or to the owner's architect, the decision and estimate should be made by the one under whom the work was done,[10] or by the one who holds the office when the decision is called for.[11] Under an agreement that work shall be valued

[1] People *v.* Croton Aq. Bd, 26 Barb. (N. Y.) 240.

[2] Davidson *v.* Provost, 35 Ill. App. 126.

[3] Barker *v.* T. & R. R. Co., 27 Vt. 766 [1885].

[4] Reilly *v.* Lee, 61 Hun (N. Y.) 627 [1891].

[5] Leebrick *v.* Lyster, 3 Watts & Serg. 365 [1842].

[6] Connor *v.* Simpson (Pa.), 7 Atl. Rep. 161 [1887]; North Lebanon R. Co. *v.* McGrann, 33 Pa. St. 530; *see also* Wallis Iron Works *v.* Monmouth Park Assn. (N. J.), 26 Atl. Rep. 140; Ranger *v.* Gt. Western Ry. Co., 5 H. of L. Cas. 71 [1854].

[7] Tancred, A & Co. *v.* The Steel Co., 17 Scotch Law Repts. 463 [1890].

[8] *In re* The Wansbeck Ry. Co., L. R. 1 C. P. 269.

[9] Beecher *v.* Shuback, 23 N. Y. Supp. 604.

[10] Wangler *v.* Swift, 90 N. Y. 38.

[11] North Lebanon R. Co. *v.* McGrann, 33 Pa. St. 530; Ranger *v.* Gt. Western R. Co., 27 Eng. Law & Eq. 35; Wallis Iron Wks. *v.* Monmouth Pk. Assn. (N. J.), 26 Atl. Rep 140; *and see* Firth *v.* Midland R Co., L. R. 20 Eq. 100, *where engineer died.*

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by "competent persons," it was held that the owner might name the architect as arbitrator.[1]

507. Delegation of Duties by Engineer as a Public Officer.—When an engineer is a public officer, and certain duties are by law or by the charter, as of a city, required to be performed by him, such as the making of a certificate, he cannot delegate them to his assistant.[2]

The same is true of common councils and boards of public works. Any and all duties requiring the exercise of discretion or judgment must be performed by the person or persons designated by law. A common council cannot delegate to the board of public works, nor to a committee, nor to the city engineer, duties which belong to the council to determine.[3]

While a common council may not delegate its authority to provide or select plans and specifications for a structure, yet it may adopt or ratify the act of another (as an engineer) in procuring such plans and specifications, and may provide for paying the reasonable cost thereof, even if the act of procuring was unauthorized.[4] It may by ordinance delegate to a committee authority to enter into a contract for street improvements, and the contract made pursuant thereto is binding on the city.[5]

Where a city charter provides that the board of public works shall compute the costs of public improvements, and apportion the same, it has no authority to allow the clerk of the engineering department to make such apportionment.[6]

Canal commissioners have been allowed to delegate power to enter upon lands of an individual and take materials for the furtherance of the work,[7] and engineers have been delegated the power to enter upon lands and occupy them for a station for surveying operations.[8]

[1] Stoke *v.* McCullough, 1 Cent. Rep. 55.

[2] Bauer *v.* Lowe (Cal.), 40 Pac. Rep. 337; Warren *v.* Ferguson (Cal.), 41 Pac. Rep. 417; Dowling *v.* Adams (Cal.), 41 Pac. Rep. 413; *and see* McEntire *v.* Tucker (Com. Pl.), 25 N. Y. Supp. 95; McNamara *v.* Harrison, 81 Iowa 486.

[3] To a board of public works. Workmen *et al. v.* Chicago, 61 Ill. 463 [1871]; Floss Union Bldg. Assn. *v.* Chicago, 56 Ill. 354; to a committee to sell property, Beal *v.* Roanoke (Va.), 17 S. E. Rep. 738; to a township to build a bridge, Pleasant View Tp. *v.* Shawgo (Kan.), 39 Pac. Rep. 704; to a mayor to sell bonds, Blair *v.* Waco (Tex.) (C. C. A.), 75 Fed. Rep. 800; nor to grant licenses, Day *v.* Green, 4 Cush. (Mass.) 433; to one not a qualified clerk of the probate judge, the issuing of marriage-licenses, Ashley *v.* State (Ala.), 19 So. Rep. 917; to property-owners the power to permit the location of livery-stables, Chicago *v.* Stratton, 58 Ill. App. 539; to one of its members the location of street-lamps, Gulf, etc., R. Co. *v.* Riordan (Tex.), 22 S. W. Rep. 519; *and see* 19 Amer. & Eng. Ency. Law 461–469.

[4] Koch *v.* Milwaukee (Wis.), 62 N. W. Rep. 918; *see also Re* Em. I. Sav. Bank, 75 N. Y. 388.

[5] Reuting *v.* City of Titusville (Pa. Sup.), 34 Atl. Rep. 916.

[6] McQuiddy *v.* Vineyard, 1 Mo. App. Rep. 264.

[7] Lyon *v.* Jerome 13 Wendell 569 [1836].

[8] *See* Orr *v.* Quimby, 54 N. H. 590 [1874]; *see also* Nevin *v.* Roach (Ky.), 5 S. W. Rep. 546 [1887]; *and* United States *v.* Ormsbee (D. C.), 74 Fed. Rep. 207.

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CHAPTER XVIII.

INTEREST OF ENGINEER OR ARCHITECT IN COMMON WITH THE OWNER OR CONTRACTOR.

HE SHOULD HAVE NO SECRET INTEREST IN THE CONTRACT.

508. Provision that Engineer's Interest in the Works shall not Affect his Decisions.

> Clause: "No objection shall be made to, nor any attempt be made to set aside, any decision, direction, estimate, award, etc., of the engineer or architect, on account of or by reason of any (ordinary) interest, which the said engineer or architect may have or hold in the company in common with others, such as that of a stockholder in an incorporated company, or a property-holder whose estate is subject to a tax or assessment to pay for the contract work, or that of a subscriber to contribute to its cost."

509. What Interest may an Engineer have in the Contract—Should have No Secret Interest in the Works.—By the law of arbitration, an arbitrator can have no interest in the award. If the engineer be strictly an arbitrator or judge, he can have no secret interest in the result of his decisions, nor can he be secretly allied to either party. Since different courts have diverse views as to the real capacity in which an engineer acts, we may expect to find the decisions various as the opinions entertained.

Since the decision in Ranger *v.* The Great Western R. Co.,[1] the principle is pretty well established in the English courts that a general interest in the company, such as any one might ordinarily possess, as the holding of shares of stock in a company, will not disqualify a person from acting in the capacity of an engineer to determine questions, differences, and disputes, or make estimates of work done as between the company and the contractor, even without the foregoing stipulation.

The grounds of this decision were, that the engineer was not an arbitrator, but was a representative of the company; that as its representative servant it was known to both parties that the engineer was interested on the side of the company and that he largely profited by his connection with it; and that the contractor having contracted with this knowledge, and with his eyes open, put himself to a certain degree in the hands of the company, he cannot later object. It was known that the engineer might hold

[1] 5 H. of L. Cas. 71 [1854].

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shares of stock; it was an ordinary circumstance for officers to hold stock of the company which employed them. He might have become possessed of shares any day; and whether he purchased them or inherited them, or they came to him by devise, it cannot be maintained that the whole operations of the company must at once have become convulsed by such an incident as the engineer's becoming a transferee of shares of stock, or that he should be required to resign therefor. This is the substance of the opinions of the judges and lords in deciding this case, in which large sums of money were involved. The engineer was declared to be the servant of the company, and it was shown that the contract did not hold out or pretend to hold out to the contractor that he could look to the engineer in any other character than as the impersonation of the company; that he was a kind of referee to whom certain matters were by the agreement of the parties to be referred, not for his arbitration, but for his report and decision; that to some extent he may be said to act judicially, but he must be considered the officer of the company, and his decision as such accepted.

The engineer in this case was not a particular person, but was designated as the "principal engineer for the time being," and might have been any engineer the company appointed to make the estimates and give the certificates. Furthermore, the engineer's decisions were not made final and conclusive, but provisions were made for an appeal from his decisions to a board of three arbitrators. However, the opinions expressed and the decision of the case have been favorably commented upon, and followed in later cases in both England and America.

In the New York Aqueduct cases,[1] before referred to and dwelt upon, the court seems to have taken the same view of a similar provision, which made the decision of the engineer conclusive upon the contractor, but expressly provided that his certificate should not be conclusive upon the city. It therefore lacked the essential elements of an arbitration.

In a later English case it was said that "the broad principle laid down in Ranger *v.* The Great Western Ry. Co., should not be frittered away by attempting to draw distinctions between the nature and character of the interest which the engineer may have in different cases." It was therefore held that an engineer who was a *lessee* of a railroad, at a rent depending on the amount to which he certified, was not disqualified to make certificates of payments to the contractor.[2] This, it would seem, was a stretching to its elastic limit the rule laid down in the case referred to.[3]

510. The American and English Courts Agree as to Interest an Engineer can have in his Company.—Previous to the decision of Ranger *v.* The Great Western Ry. Co. (1854), it had been held in Pennsylvania that an engineer might be a stockholder in the company which employed him,

[1] O'Brien *v.* New York, 142 N. Y. 671.

[2] Hill *v.* South Staff. Ry. Co., 11 Jurist (N. S.) 192; *and see* Scott *v.* Corp. of Liverpool, 1 De G. & J. 369.

[3] Elliot *v.* S. Devon Ry. Co., 12 Jur. 445.

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and still be legally competent to discharge the ordinary duties confided to him, if the contractor knew at the time he entered into the contract that the engineer was a stockholder.[1] The court made it an exception to the rule when the interest was known to the parties [the contractor]. This exception is not confined to engineering and architectural work, but it is a universal rule of arbitration. The interest must be a secret interest to disqualify the arbitrator from acting judicially. The doctrine of the Pennsylvania case has been followed by a line of cases in the courts of that state.[2] *

The courts maintain that any objections to the fact that the company is enabled to choose its own judge, and one directly interested, to decide or sustain its quarrel are waived by the stipulation which creates the powers; that it is competent for a contractor to agree to the decision of an interested party if he choose so to do, and when with full knowledge he does so, he must abide the result.[3]

These cases have been referred to with approval in the Virginia courts, and the same doctrine upheld. Decisions of engineers have been upheld and made conclusive in the absence of fraud, gross mistake, or a failure to exercise an honest judgment—not strictly upon the rules of arbitration, but distinctly upon the authority of earlier decisions and by analogy to an award by an arbitrator.[4]

If these stipulations be regarded strictly as submissions to arbitration, the decisions of the courts cited cannot be sustained, unless the contractor knew that the engineer was interested, as when he is a stockholder or lessee. It was therefore held under a submission "to some disinterested third party" which consists of two arbitrators, one of whom is a stockholder in one of the parties, that the award was void, unless knowledge of the fact can be proved; and information given to a director of one of the parties a year before was held to be no notice to that party.[5] In this case it was expressly stipulated that the parties should be disinterested; but it is submitted that in any reference to arbitrators it is implied that the judges shall be disinterested.[6]

In the appointment of an engineer there seems to be no such implication, and if parties want a disinterested engineer they should stipulate for it. Yet in some courts, if the engineer's interest exceeds the knowledge of the contractor—*i. e.*, if he be a stockholder in the company—his decisions and estimates may not be obligatory and conclusive between the parties. It was so held in Georgia in 1848.[7] So where an architect with the usual powers

[1] Monongahela Nav. Co. *v.* Fenlon, 4 W. & S. 205.
[2] *See* 4 Harris 469, 5 Casey 82, 4 Casey 224, 306.
[3] The Memphis, etc., R. Co. *v.* Wilcox, 48 Pa. St. 161.
[4] B. & O. R. Co. Polly Woods Co., 14 Gratt. 459 [1858]; *citing* Ranger *v.* Great Western Ry. Co.
[5] B. & O. R. Co. *v.* Cranston Co. (Md.), 17 Atl. Rep. 394.
[6] 1 Amer. & Eng. Ency. Law 672.
[7] Milnor *v.* The Georgia R. & Bkg. Co., 4 Ga. 385 [1848].

* *See* Secs. 363–365, *supra*

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had guaranteed to his employer that the total cost of the structure should not exceed a certain sum, which fact had not been disclosed to the builder at the time the contract was entered into, the court held that the contractor was not bound by the architect's decisions.[1] The agreement, it seems, need not amount to a guarantee on the part of the architect, but a simple assurance that the work shall not cost above a certain amount has been held sufficient to relieve the contractor from the binding effect of the architect's certificate.[2]

511. Moral Obligation of Engineer Forbids any Secret Interest. — Though the binding effect of the decision of engineers has been estabtablished beyond a doubt, when it expressly agreed that it shall be so by and between the parties, yet if the engineer has any secret interest that might prevent him from exercising a free and unbiased disposition and judgment, and to give the contractor his just dues, he should not be allowed to hold the position, nor act as a referee.

One can hardly believe that an engineer who holds a few thousands of dollars' worth of stock in a large corporation would be induced to sacrifice his sense of honor, and perhaps his professional reputation, if detected, by making a low estimate of the contractor's work. To benefit himself a few dollars he must rob the contractor of thousands. An engineer whose avarice was so prominently developed would not content himself with such trifling gains, but would be seeking larger game in darker fields of action, and his true character would not remain long undiscovered. Whatever the law may be, no engineer that has the interests and success of his company truly at heart will maintain relations with it or the contractor which, if discovered, may destroy its contractual relations and subject it to expensive and ruinous litigation. Any efforts on the part of the engineer to confer benefits upon his company to which the contract does not justly and clearly entitle them may result in the company's loss and his own disgrace.

If the engineer desires to manifest his loyalty to his company and prove the value of his services, let him demonstrate it in drafting and letting the contract, in the making of preliminary tests and investigations so as to enable contractors to bid understandingly and closely, and by securing the best location and the most economical design and construction. If sharp practices are to be indulged in let the parties each for themselves carry them out; it is not or should not be the office of an engineer to encourage them nor give his support to them, much more be a party to them. This is, without doubt, the general feeling and sentiment of the engineering profession.[3]

[1] Kimberly *v.* Dick, 41 L. J. Ch. 88.
[2] Kemp *v.* Rose, 1 Giff 258 [1860].
[3] The fact that the engineer has an interest with the company or his employer as a stockholder, Ranger *v.* Gt. W. R. Co., 5 H. L. Cas. 72; Scott *v.* Corpn. of L., 1 De G. & J. 369; Elliot *v.* S. Devon Ry. Co., 2 De G. & S. 17; McIntosh *v.* Midland Cos. Ry. Co., 14 M. & W. 548; Russell's Law of Awards, p. 116; Monon. Nav. Co. *v.* Fenlon, 4 W. & S. 205; B. & O. Ry. Co. *v.* Polly Woods Co., 14 Gratt. 459, *and see* Union R. Co. *v.*

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The fact that the architect was called as a witness in an action between the parties involving the matter in dispute does not disqualify him as a referee.[1] The possible bias of an engineer in favor of the plans and specifications he has drawn or revised is not sufficient to disqualify him from acting as an umpire of questions referred to him in the contract.[2]

512. Provision that Contract may be Rescinded if the Engineer or Any Officer of the City or Company is Interested in the Contract.

Clause: "And the contractor further declares and agrees that no member of the engineering department [corps of engineers] is now, nor shall become, interested in this contract, nor in the works undertaken under it, nor in the supply of work or materials in connection herewith; and it is further agreed on his part that if it shall be known, or discovered, that any such person or persons is [are] interested as aforesaid, the city, company, or owner may rescind, annul, or cancel this contract at any stage of its performance, and the rights, liabilities, and relations of the parties shall be the same as if the contractor had committed a material breach of his contract, the sums denominated liquidated damages shall be forfeited to, and belong to, the said city, company, or owner, as provided in Secs....."

513. Provision that Gifts, Presents, and Bribes shall Be Sufficient Cause for Canceling Contract.

Clause: "And it is further provided and agreed that should the contractor or his agent offer or give any gratuity, presents, or bribes to any officer, agent, or servant of the corporation, such act or acts shall be sufficient cause for the cancellation of this contract and of every agreement and obligation herein contained, and for such act or offer the contractor shall forfeit to the said company or city the full amount of damages assessed and described in this contract, as liquidated damages for the nonperformance of his contract in the manner hereinbefore referred to and explained."

514. The Engineer can have No Interest in the Contractor's Business.— Although an engineer may be an employee of the company or owner of the works, and may have and hold individual interests in the company or employer's business, yet the decisions are unanimous in forbidding any mutual

Dull, 124 U. S. 173 [1888]; (*but see* Smith *v.* B. C. & M. Ry., 36 N. H. 459; Milnor *v.* The Georgia R & Bkg. Co., 4 Ga. 385 [1848]; B. & O. R. Co. v. Canton Co. (Md.), 17 Atl. Rep. 394), or as a lessee of the company, Hill *v.* So. Staffordshire Ry. Co., 11 Jurist N. S. 192, has been held *not* to be sufficient to impute bad faith to him in making his estimates or to disqualify him from acting as referee. Numerous cases express the opinion that the interest should not be secret, nor such as is inconsistent with an impartial and unbiased decision. Elliot *v.* S. Devon Ry. Co., 2 De G. & S. 17; Russell's Law of Awards, p. 116; Smith *v.* B. C. & M. Ry., 36 N. H. 459; Milnor *v.* The Ga. R. & Bkg. Co., 4 Ga. 385 [1848]; B. & O. R. Co. *v.* Canton Co. (Md.), 17 Atl. Rep 394. It must not be such an interest as shall amount to a fraud to conceal from the contractor. Kimberly *v.* Dick, L. R. 13 Eq. 1; Kemp *v.* Rose, 1 Giff. 258; Pawley *v.* Turnbull, 3 Giff. 70.

[1] Barclay *v.* Deckerhoof (Pa. Sup.), 33 Atl. Rep. 71.

[2] Farquhar *v.* Hamilton, 20 Ont. App. 86 [1893]; McNamee *v.* Toronto, 24 Ont. Rep. 313 [1894]; Adams *v.* Railway Co., 16 Scotch Sess. Cas. 843 [1889], *but see* Connell *v.* Canadian Pac. R. W. Co., 16 Ont. Rep. 639; *and see* Jackson *v.* Barry R. Co., 9 Times L. R. 90; *and* Hudson on Building Contracts 290.

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interest or any secret relations between the engineer and contractor. He may not accept gratuities nor profits from the contractor.*

If the engineer were an arbitrator merely, it would be difficult to explain why the company should demand a disinterested judge and the contractor should accept one that was not disinterested. Here, as in so many other particulars, the status of the engineer is modified and distinguished by his peculiar relations to the parties. With regard to the company and the outside world, the engineer is the trusted agent of the company. His relations to the company are defined by the laws and principles of agency, and except so far as his duties as an umpire and *quasi*-arbitrator require him to be unbiased and disinterested, he is the agent of the company, and for many purposes the impersonation of the company itself.[1] The law does not recognize or tolerate conduct on the part of an architect which is hostile to his employer and in the interests of an adverse party with whom he is dealing.[2] †

If an agent who is authorized to enter into a contract on behalf of his employer or principal accepts a secret payment or gratuity from the party with whom he is to negotiate, it will vitiate the contract.[3] The corrupt practice of giving commissions to agents, engineers, and officers who select, adopt, or purchase certain materials of constructions or certain styles of machinery and appliances is a system of doing business that is certain to lead to the most pernicious results. Such contracts are not enforceable by the party offering or giving the gratuity, and the commission or contract to pay a share of the profits is not enforceable.[4] An engineer who accepts such bribes or presents, is constantly under a cloud, and his reputation is in the hands of parties from whose power he should be absolutely free. As to the object of the commissions or gifts there can be but one conclusion: they are given to gain the engineer's favor,—whether at the expense or loss of the company or employer or not, does not matter. A charge made in writing against a supervising architect that he had given work upon a certain building to certain parties who paid him a commission therefor is not actionable as slanderous or libelous.[5] A covenant by the architect with the builder to receive payment from him is sufficient to discharge the owner from his obligation to pay him his salary or commissions.[6] ‡

The engineer is in a position of trust in relation to his employer, having

[1] Ranger *v.* Great Western Ry. Co., 5 H. of L. Cas. 72; Williams *v.* Chicago, etc., Ry. Co., 112 Mo. 463.

[2] Lewis *v.* Slack, 27 Mo. App. 119. He is so far the agent of the company that notice to him of matters pertaining to the work is notice to the company. Danville Bdge. Co. *v.* Pomeroy, 15 Pa. St. 151 [1850]; *see also*, as to engineer's agency, Snaith *v.* Smith, 27 N.Y. Supp. 379; Mulholland *v.* Mayor (N. Y.), 20 N. E. Rep. 856; O'Brien *v.* Mayor of N. Y., 139 N. Y. 543.

[3] Smith *v.* Sorby, L. R. 3 Q. B. D. 552.

[4] Atlee *v.* Fink, 75 Mo. 100; *see* Commonwealth *v.* Phila. (Pa.), 35 Atl. Rep. 195; Mason *v.* Bauman, 62 Ill. 76.

[5] Legg *v.* Dunleavy, 80 Mo. 558.

[6] Tahrland *v.* Rodier, 16 L. C. I. Rep. 473; *and see* Norris *v.* Day, 10 L. J. N. S. 43; Lloyd's Law of Building (2d ed.), § 11; *and see* Gillman *v.* Stevens, 54 How.

* *See* Secs. 84 and 85, *supra*. † *See* Sec. 849A, *infra*. ‡ *See* Sec. 42, *supra*.

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been employed with special reference to his skill, judgment, and integrity. Any acts or circumstances that tend to deprive the employer of the free and unbiased exercise of an honest discretion will destroy the effect of what has been done. It is not necessary that the agent or engineer shall have yielded to the influence of the bribe, or that he shall have been induced to act corruptly; the fact that he might have been biased is sufficient reason for the employer to rescind the contract. Even though it be proved that the company has not actually been injured, and that the bribe has failed to have its intended effect, the principle of the rule is the same, and such contracts cannot be enforced.[1]

Collusion and fraud between contractor and engineer for contractor's benefit and to company's prejudice in making up of estimates will vitiate and avoid the same.[2] Any secret interest of the engineer in the contract unknown to the company or his employer being inconsistent with the fiduciary relations supposed to exist between him and his employer will avoid his estimate, and this is so, even though his decisions and estimates are correct, and notwithstanding the fact that the mind of the engineer has not been biased by the relations he has held to, or by the commissions he has received from, the contractor.[3] *

It therefore follows that an engineer cannot be a subcontractor of works which he must estimate, and in respect to which he is to certify. A contract between the engineer of a telegraph company and the construction company who had contracted to lay the cables of the telegraph company, by which the engineer, who was to certify to the satisfactory and successful completion of the line, was to lay the cable for a sum of money, constituted a fraud, which entitled the telegraph company to have their contract rescinded, and to receive back money which they had paid under the contract. It was held that an agreement with the engineer which had the effect of depriving the company of a disinterested engineer and of the full benefit of their contract was sufficient to relieve the telegraph company from the obligations of their agreement. The fact that there was no concealment, nor any intention to conceal on the part of the contractor, did not change the rule. There must be not only an absence of concealment, but a full and complete disclosure of the relations of the engineer and contractor. Upon every principle of jus-

Pr. (N. Y.) 197, where the architect had accepted advances or loans from the contractor; *and see* Marsh *v.* Masterton, 101 N. Y. 401.

[1] Harrington *v.* Victoria G. Co., L. R. 3 Q. B. D. 549.

[2] Hostetter *v.* Pittsburgh, 107 Pa. St. 419; Hartupee *v.* Pittsburgh, 131 Pa. St. 535; Lucas Coal Co. *v.* Del. & H. C. Co., 148 Pa. St. 227; McCauley *v.* Keller, 130 Pa. St. 53 [1889]; Glessner *v.* Patterson, 164 Pa. St. 224; Gonder *v.* R. R. Co., 171 Pa. St. 497; Kemp *v.* Rose, 1 Giff. 258; Kimberly *v.* Dick, L. R. 13 Eq. 1.

[3] Panama & So. Pac. Tel. Co. *v.* Tel. Works Co., L. R. 10 Ch. App. 515; Harrington *v.* Victoria Dock Co., 39 L. T. Rep. 120 [1878]; Scott *v.* Liverpool, 3 De G. & J. 334; Smith *v.* Sorby, L. R. 3 Q. B. D. 552 [1878]; *see, however*, Cox *v.* McLaughlin, 76 Cal. 60; *and see* Union R. Co. *v.* Dull, 124 U. S. 173 [1888]; Largey *v.* Bartlett (Mont.), 44 Pac. Rep. 962.

* *See also* Sec. 42, *supra*.

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tice and fair dealing it is absolutely necessary that the company be informed.[1] Nor are the consequences relieved from, by the fact that the company would have adopted and acquiesced in the arrangement had they been informed. They should have had the option of deciding whether they would or would not acquiesce in their engineer being placed in an anomalous and dangerous position in which his interests would necessarily conflict with his duty.[2] If the cable, or any part of it, had been laid, the contractor probably could have recovered for what had been done, but not under the contract, nor by the certificate of the engineer.[3]

A seemingly contrary decision has been rendered in California in a case in which the facts are very similar, but the court was divided, and the minority of the justices delivered a strong dissenting opinion. The suit was brought by a *sub*contractor against the principal contractor for the price of work done, so it will be seen at once that neither party to the suit held the relation of employer or principal to the engineer. The work in question was a railroad, which was to be built according to a general line and profile, subject to such variations as the chief engineer of the road might direct. A subcontractor was to receive a fixed price for the work whether the variations ordered by the engineer made the work heavier or lighter. During the progress of the work the subcontractor entered into a secret agreement with the engineer by which he was to receive ten per cent. of the profits of the contract if he would, without impairing the character of the road, or doing anything to the disadvantage of the railroad company, make such variations wherever possible as would make the work less expensive. It was proved that both the principal contractor and the company were willing that the engineer should make the work lighter, without injury to the company's interests. It was proved further that the changes in some instances were made at the request of the company and principal contractor, and that all variations were submitted to and approved by them. It was shown that by extraordinary diligence and application on the part of the engineer that it was possible to so perfect the final location of the road as to suit the convenience and interests of all the parties concerned. The changes were made openly in all respects, and were indorsed by the parties, and the majority of the court, while admitting that the agreement was one not proper to have been entered into, allowed a recovery upon the ground that they could not see how the principal contractor had been injured by the arrangement, and, therefore, why it should prevent the subcontractor from recovering the contract price from him.[4]

If this case had been a suit by the contractors to recover from the com-

[1] Panama & So. Pac. Tel. Co. *v.* India R. G. P. & Tel. Works Co., L. R. 10 Ch. App. 515. The owner cannot complain when he has knowingly employed one of the contractors as a superintendent, Shaw *v.* Andrews, 9 Cal. 73.

[2] Panama, etc., Tel. Co. *v.* India Tel. Works Co., *supra*.

[3] Panama, etc., Tel. Co. *v.* India, etc., Tel. Works Co., L. R. 10 Ch. App. 515.

[4] Cox *v.* McLaughlin, 76 Cal. 60.

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pany there is little doubt but that the facts of the case would have prevented a recovery upon the contract. The fiduciary relations between an agent and his principal forbid any such compact between the agent and other parties interested.

Though the engineer was not the confidential agent of either contractor, he was the umpire between them and between either of them and the company. He was to ascertain the proportion of work performed and to certify to installments due, and was supposed to be a disinterested umpire. When he became a secret partner of one of the contractors employed, he disqualified himself from acting as an umpire and thereby rendered the performance of the contract impossible. The principal contractor was injured by being deprived of an impartial engineer, and by the risk of losing his own contract rights with the company, on the ground that the company would not be bound by alterations assented to under the advice of a corrupted engineer.

There can be no doubt but that the share in the profits of the subcontractor tended to bias the free and honest judgment of the engineer. His profits would be increased as much by changes to the injury of his company as by those which were indifferent or advantageous to the company. The fraud constituted such a breach of the contract as should have prevented a recovery upon it, and although the subcontractor properly may have been allowed to recover to the extent that the principal contractor had been benefited by their work not exceeding the contract price, it should have been distinctly held not a recovery upon his contract.[1]

It is the policy of the law to deal severely with any crooked transactions between an agent and those with whom he negotiates on behalf of his principal, and the same policy is pursued in dealing with arbitrators who have allowed themselves to be placed in compromising positions.

515. Profits Made by an Engineer or Agent in the Conduct of His Employer's Business Belong to the Employer.—It is a well-established principle of law that the profits, directly or indirectly made in the course of, or in connection with, one's employment as a servant or agent, without the sanction of the employer or principal, belong absolutely to the employer or principal. If an engineer be an employee or agent of his employer the same rule of law must hold, and whatever commissions an engineer receives for the selection or adoption of certain materials or appliances or by reason of certain purchases belong to the company, and he may be made to account to his company for the full amount received. An agent can acquire rights in the property of his principal only through a personal contract with him.[2]

An interesting case is one where a ship was consigned to a party to be sold for not less than $90,000. An agent was employed by this party to sell the ship, who having vainly attempted to sell the ship on the terms stipu-

[1] *Dissenting opinion in* Cox *v.* McLaughlin, 76 Cal. 60 [1888]; s. c., 18 Pac. Rep. 100.

[2] Paige *v.* Akins (Cal.), 44 Pac. Rep. 666.

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lated, took it to himself at $90,000, and soon afterwards sold it for $160,000—$75,000 cash and the remainder on credit. The agent neglected to inform the owners that he had taken the ship to his own credit or that he had resold it. He paid the $90,000 to the parties and it was remitted to the owners. In a suit in equity by the owners to compel the agent to account for the profits he had realized by the resale of the ship, the court held that the relation of agent and principal was established between the owners and the broker, and that the latter must account to the former for the profit made in the transaction.[1]

A case more directly in point with the practice that is in vogue in construction of receiving and accepting commissions, is one in which a broker was authorized to purchase a particular ship on the basis of an offer of £9000. The vendor of the ship had authorized his broker to sell the same ship for £8500, with permission to retain to himself all that he received above that amount. The brokers agreed to divide the profits, and the agent of the purchaser received £225 as his part of the profits. In an action at law it was held that the broker was an agent of the purchaser to secure the ship as cheaply as it could be got, and that he must pay over the amount received from the other broker to the purchasers; that there was a legal duty imposed upon the agent to pay the profits that have reached his hand to his employer as belonging to him absolutely, and that where the amount is ascertained a court of law will take the case, there being no necessity for an accounting.[2]

This case is not unlike the ordinary case in construction work where an engineer is directed to recommend an equipment or to purchase the requisite materials, as in the case cited. He is expected to exercise his best judgment and discretion in the selection of the equipment and materials, and it is required of him that he shall purchase them as cheaply as they may be had. If he accepts two, three, or five per cent. of the amount paid for stuff from the seller, he is paying that much more for it than he need pay, and may be compelled to account to his employer for the excess paid.

A surveyor and superintendent of a cemetery association has been held not such a fiduciary as one who could not purchase and speculate in the lots of his employer.[3] A city surveyor has been allowed to recover a reward for discovering, locating, and describing real estate belonging to the city, in absence of proof that it was part of his official duties.[4]

516. Conspiracy or Collusion Between Contractor and Engineer.—Conspiracy and collusion between the contractor and engineer to give false certificates will prevent a recovery in an action by the contractor or his assigns for payments due under the contract. It is a good answer to a sub-

[1] DeBuscshe *v.* Alt., L. R. 8 Ch. D. 286 [1877-8].

[2] Morris *v* Thompson, L R. 9 Q. B. 480 [1874].

[3] Palmer *v.* Cemetery, 122 N. Y. 429 [1890].

[4] Pilie *v* New Orleans, 19 La. Ann. 274 [1867]; *see also* Wills *v.* Abbey, 27 Tex. 202.

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sequent collateral guaranty to pay for the work done, if the fraud be discovered after the promise was made to pay. It seems there is no obligation upon the company to notify the assignees of their discovery of the engineer's fraud, and his conspiracy with the contractor, until steps are taken to enforce the agreement.[1]

An employer or owner has a good cause of action against an architect or engineer who has falsely and negligently, and acting in collusion with the builder, represented to the owner that a certain amount of labor and materials have gone into the house, whereby the owner was induced to pay the builder an amount of money called for by the contract.[2]

517. Engineer should Be a Disinterested Person and the Agent of Neither Party.—Contractors will in many cases fail to appreciate a rule by which an engineer may be interested with the company or owner in the work projected, and under which he can have no interest whatever in the contractor's business. As an umpire or arbitrator alone there is no just reason why he should not be allowed to have the same interest in the one side as in the other side, if the parties are both informed of the interest held, but an engineer has a deeper relation and a further duty to his employer than he owes the other party. That this duty and obligation is inconsistent with the character and duties of a judge cannot be denied, and it is much to be regretted; yet so long as owners and companies having work to be done they will insist upon making the terms of the contracts, and require that such relations shall exist, and so long as contractors are willing to submit their rights to his judgment and forego an appeal from his decision, they will remain in use.

A custom resorted to in some localities of stipulating for a disinterested engineer named, whose fees and salary shall be shared equally by both parties, does away with many of the objections, and secures all the advantages that the parties pretend to provide for in the contract. Engineering under such a system becomes a profession in its strictest sense, and engineers become arbitrators, or umpires, in every sense of the word. That such a practice *should* become general cannot be denied. It would certainly be satisfactory to engineers and to contractors, and it would save a great amount of litigation that is now being carried on. When the construction contract provides that the expenses of the arbitration shall be borne by the contractor and owner equally, it is no defense to an action by the engineer against the party who selected him for the value of his services, nor is it error for the court to exclude the contract, as its admission would not benefit the defendant.[3]

[1] Wakefield & B. D. Bank *v.* Normantown Local Board, 44 L. T. 697; *see* O'Brien *v.* Mayor of N. Y., 139 N. Y. 543, 142 N. Y. 67.

[2] Corey *v.* Eastman (Mass.), 44 N. E. Rep. 217.

[3] Alexander *v.* Collins (Ind. App.), 28 N. E. Rep. 190 [1891].

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518. Company or Owner may Employ an Engineer Known to be Interested in the Contract.—If an owner or company knowingly employ a contractor as a superintendent or engineer, payment upon his certificates cannot be avoided on the ground of inconsistency.[1] In such a case the contract of employment must be clearly proven. The nature of the duties of the two positions being inconsistent, a contract of employment of the contractor as superintendent of his own work cannot be implied.[2]

In England, statutes have been passed making it a penal offense for a public surveyor to be "concerned or interested" in a contract for work which he is to estimate or to which he is to certify. A contract by which the surveyor was to receive a percentage of the amounts he should certify to be due was held to be within the act, and that the surveyor was liable to a penalty in respect to each contract.[3]

518A. Differences Between the Engineer in Charge and His Associate or Superior Officers.—Pertinent to this subject of "interest" of an engineer is a circumstance or position into which any engineer's experience may place him. It is that of dictation or coercion of superior officers, or persuasion of associate officers, who display and even *may have* an unusual interest in the success of the contractor. Such cases come up most frequently in government or city work, where the engineers and officers are appointed under civil-service rules, and where the subordinate officers are required to swear to the accuracy of their measurements, estimates, and inspections. Under civil service, subordinates do not feel that they owe their positions entirely to the good-will and favor of their superiors, and they are less likely to be servile to political machinations. The dictation usually takes the form of suggestions as to quantities or classifications which, if not acted upon, may be given the formality of orders to classify materials in a certain way, or to increase the quantities to suit the fancy or profit of the resident or division or chief engineer. Such instances have occurred in the experience of most engineers, maybe when they were younger in the profession and were perhaps less experienced in the ways of the world, and when they would hardly believe, or scarcely realize, the real motive or inwardness of the suggestions and orders. The author's experience has been no exception, and he can clearly recall orders issued from a carriage driven along the line of works to allow a uniform depth over the whole line for the mucking or grubbing independent, and irrespective of, accurate measurements to the contrary,—to the profit of the contractor.

In such a position the engineer*—*i.e.*, the real engineer in charge—must either swear to what is untrue or he will incur the displeasure of his

[1] Shaw *v.* Andrews, 9 Cal. 73; McCarthy *v.* Loupe 62 Cal. 299.

[2] Friedland *v.* McNeil, 33 Mich. 40 [1875].

[3] Whitely *v.* Barsley, L. R. 21 Q. B. D. 154; *and see* 19 Amer. & Eng. Ency. Law 470, *note.*

* The word engineer is used because in most cases the officer above will be a commissioner or political appointee who has no right to the title.

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superior officers, for by the contract terms frequently, and by the rules of the government department having the work in charge, it will be required that the engineer in charge, and the other officers through whose hands his estimate passes, shall take oath to its accuracy and truthfulness. His refusal may even endanger his position if the supreme officer of the department be also in strong sympathy with the contractor, or has been trained in those methods of engineering. In such a case there can be but one straight and narrow path under any circumstances, whether it be one of military discipline or one of civil construction, and that is to either execute a correct estimate and swear to it, or to decline to act and to even resign if required so to do, in preference to committing one's self to such dishonest practices. If there is anything that the engineering profession demands more than any other profession, it is honesty. It requires square men with backbone and unflinching courage, and no man need fear, nor regret the loss of a position which requires him to be dishonest, and much less need he regret the association of men given to dishonorable and fraudulent practices, however high their position.

A doubting saver of souls, a hesitating guardian of the health, or a timid public prosecutor can better be tolerated than a civil engineer who knows not the weight of unadulterated honesty. Parsons, doctors, and counselors can be judged, but the engineer knows no higher authority. He is the judge. If there be any one thing that every young man who aspires to become a successful and self-respecting member of the honorable profession of engineering should base his career upon, it is honesty, pure and simple, unwavering and undoubted.

That conflict does exist between assistant and chief engineers, or between city engineers and street commissioners or superintendents of public works, or between city or state engineers and the comptroller, is evident from the cases that have been cited in various parts of this book.*

* *See* cases in Sec. 445, *supra*.

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CHAPTER XIX.

MATTERS OF DOUBT AND DISPUTE SUBMITTED TO ARBITRATION.

THE APPOINTMENT OF ARBITRATORS AND AN UMPIRE.

519. Provision that Disputes shall be Submitted to Two Arbitrators and an Umpire.

Clause: "It is further agreed that if any dispute or difference shall arise between the said owner or his architect and the builders with respect to any matter or thing arising out of or in anywise relating to the contract, and not by these conditions expressly agreed to be determined by the architect, that such difference or dispute shall, immediately after it has arisen, be referred to the final determination and award of two competent persons or arbitrators, one of whom shall be chosen by the said owner and the other by the builders, and of an umpire to be named by the two arbitrators, and the award of the arbitrators, or of their umpire, if they disagree, shall be final and conclusive as to the matters referred to them for so much as such award shall be made in writing under their or his hands or hand, and ready to be delivered to the said owner and the builders within.....calendar months after such reference, or within such further time, not exceeding.....calendar months, from the time of such reference, as the arbitrators or their umpire shall by writing, under their or his hands or hand, from time to time appoint. Such award of said arbitrators or umpire shall be condition precedent to a final settlement for the work done under this contract and to any liability on the part of the owner, company, or city for any sum or sums of money not previously and voluntarily paid by him [it]. The costs and charges attending such reference shall be in the discretion of the arbitrators or their umpire, and shall be paid as they or he, by their or his award, shall direct.

"And it is hereby further agreed that if either party shall fail, neglect, or refuse to choose or select an arbitrator as above provided within ten days after written notice from the other party, or the two arbitrators shall be unable to agree upon an umpire within ten days after they have failed to come to an agreement, then it is mutually agreed that the president of the American Society of Civil Engineers shall be and hereby is authorized to select such arbitrator or umpire, at the request of either party to the contract, and without notice to the other party, which arbitrator or umpire so chosen shall be and is hereby endowed with all the powers of those selected and appointed as described hereinbefore [or hereinafter]."

Clause: "If on the completion of the work there shall remain

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between the engineer and the contractor any difference or dispute upon any of the matters or things referred to or specified in clause No. , "Engineer's Determination," or as to payments to be made to the contractors, the same shall be referred to the award and decision of Mr. ....., Mem. Am. Soc. C. E., or, failing him, to some other engineer to be mutually agreed upon, or in case of failure to agree upon an engineer, to some other engineer to be appointed by the president of the American Society of Civil Engineers, whose decision shall be final and conclusive between the parties. The arbitrator shall have power to determine the costs of any proceeding under this clause."

It will not be out of place to discuss come of the difficulties met in such a submission and some of the safeguards to be observed.

In leaving such questions to arbitrators it would seem best to name them, and to provide for their selection in case of failure to act, as in case of death or incompetency. If their appointment is merely provided for and requires in any way the assistance and co-operation of the contractor, and he refuses to take part in the selection of arbitrators, there is no way, it seems, to compel him to do so. Moreover, he may revoke the submission at any time before the award is made. When the decision of all matters is left to the engineer in charge, he usually acts at once without the formality of having to qualify or of being selected, and when he has rendered his estimate it is then too late to question its validity and conclusiveness, or to revoke the power conferred upon him to settle the disputes.

To avoid these questions in a submission to arbitration, the award of the arbitrators should be made a condition precedent to liability on the part of the owner, and to any right to recover on the part of the contractor.

To be entitled to the protection of such an arbitration clause, the party seeking its protection must show that he took steps for the selection of arbitrators.[1] *

520. Certain Matters to be Considered in a Submission to Arbitration. —In adopting this clause, which submits important questions and disputes to arbitration, several questions arise which should be ascertained and settled before it is finally inserted in the contract. It should be ascertained, first, that the subject matter is a proper one for arbitration ; secondly, have the parties to the contract power to submit the questions in dispute to arbitration? thirdly, are the arbitrators named competent to act in that capacity? fourthly, the agreement should be made a submission to arbitration, and not a mere appraisal ; fifthly, the rules or laws by which the arbitrators are to be governed and the means by which the award is to be enforced should he described and set forth.

[1] Williams *v.* Shields (Com. Pl.), 9 N. Y. Supp. 502.

* *See also*, in regard to arbitrators, the following sections, viz.: Revocation of Submission, Secs. 347–357 and 400–406 ; Decision of Questions of Law, Sec. 436; Fraud, Partiality, Corruption, or Wilful Misconduct, Secs. 418–443 and 516; Correction of Mistake in Award, Secs. 483–490, *supra*.

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521. What Questions may be Submitted to Arbitration.—Any matter that is the subject of a dispute or controversy and that is a lawful subject matter of a legal contract may become a proper question to submit to arbitration by the proper authorities. The dispute should not be, though perhaps it could be, one which is a matter of fact; the courts hold sometimes that there must be the element of doubt or ignorance as to the matter in dispute, in order to make the arbitrator's decision final and conclusive.[1] *

A finding of a referee on conflicting evidence that a contractor had performed extra work, for which he was entitled to compensation, will not be reversed, as against evidence, merely because the contractor did not present his bill for extras till after he had received his final payment on the contract.[2]

522. What Parties may Submit Questions to Arbitration.—In general any person who can contract may be a party to a submission to arbitration as to his own affairs. If he be incapacitated from making a contract, he certainly cannot be held under a contract to abide the award of arbitrators. The liability of any party under an award may in general be measured by his contract obligation. An infant may avoid it or not, according to his election when he becomes of age; with a married woman it depends upon whether she has the independent and individual power to contract with regard to her own estates, and whether she can convey her own property. Bankrupts, insane persons, idiots, and other like persons cannot submit their affairs to arbitration without the consent and approval of their assigns or guardians.[3]

An agent cannot without express authority submit his employer's affairs to arbitration, not even when he has instructions to settle out of court. A factor, broker, or commission merchant cannot bind his principal by a submission, nor can matters of public interest and trust be submitted to arbitration by an officer to whom they are intrusted.[4] An officer of the United States cannot submit the affairs of the government to arbitration unless authorized so to do by special act of Congress.[5] However, a principal may adopt or ratify the unauthorized acts of his agent in submitting his affairs to arbitration, and such ratification may be implied from circumstances.[6]

It may be doubted if authority to an engineer or public officer to prepare and enter into a contract for the construction of works would authorize him to insert in the contract such a clause for the submission of disputed questions to arbitrators unless the contract form employed had been adopted

[1] Amer. & Eng. Ency. Law, vol. i. p. 658 and vol. xxix. p. 948, *and cases cited.*
[2] Porter *v.* Swan (City Ct. Brook.), 35 N. Y. Supp 1037.
[3] 1 Amer. & Eng. Ency. Law 648-9.
[4] Mann *v.* Richardson, 14 Amer. Law Reg. (N. S.), 578.
[5] 1 Amer. & Eng. Ency. Law 652.
[6] 1 Amer. & Eng. Ency. Law 653-4.

* *See* Sec. 525, *infra.*

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by the city or department of the government on whose behalf it was executed. It seems that the engineer or officer should be specially authorized to make such a stipulation for arbitration. Contracts containing clauses for arbitration and referring matters to the engineer's determination are frequently made, and so far as the author knows the question of their validity has never been raised or decided in the higher courts.

In the contract forms adopted by some of the governmental departments and by nearly every municipal corporation, it is the custom to provide that the engineer, or a board of three or more disinterested persons, shall determine all questions in dispute, and these are usually held to be valid and binding in our courts. The bringing suit by the government or city against the contractor, or the use of such a stipulation as a defense, might be such an adoption of that part of the contract as would constitute a ratification of the engineer's act in embodying it in the contract;[1] but if a contractor brought suit against the government or a city, and the latter sought to avoid the clause by pleading that the engineer had no power to make such a submission, there is nothing to prevent it from so doing. How far the existence of a general custom to employ such a clause in construction contracts might prevail in establishing authority to insert such a clause would depend upon the justice and the usage of the government or city in previous contracts for similar work. This may be a good reason why disputes and questions arising in government work are rarely left to disinterested arbitrators, but to the engineer in charge of the work, and it may be cited as some evidence that the decision of an engineer is not regarded strictly as a submission to arbitration.

A corporation which can sue, be sued, appear in court, defend, and prosecute to final judgment and execution, has power to submit a demand made against it to arbitration. It is well settled that private and municipal corporations, towns, and villages, unless forbidden by their charters, can submit matters in dispute to arbitration.[2] Selectmen, supervisors, county courts, overseers of the poor, and the common councils of cities have been accorded powers to compromise suits and to submit questions to arbitration.[3] It has even been held that the council of a city could intrust the selection of the arbitrators to the city attorney.[4] It has been held, however, that the charter of the city of New York gave the Common Council no power to settle claims against it.[5] A committee made up of delegates from the selectmen of two or more towns cannot bind their respective townships by a submission if each one is not expressly authorized to submit the affairs of the township to arbitration.[6] If a city attorney, without authority,

[1] Connett v. City of Chicago, 114 Ill. 233; Anderson v. Miller (Ala.), 19 So. Rep. 802.

[2] 1 Amer. & Eng Ency. Law 649; 15 Amer. & Eng. Ency. Law 1051, and references given; Walnut Tp v. Rankine (Ia.), 23 Reptr. 750 [1886]; Dalrymple v. Whitingham, 26 Vt. 345 [1854].

[3] 1 Amer. & Eng. Ency. Law 650–654.

[4] Kane v. Fond du Lac, 40 Wis 495.

[5] McGuinness v. New York, 26 Hun 142.

[6] Haddam v. East Lyme (Conn.), 5 Atl. Rep. 368.

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submits a question to a reference, the other party cannot defend a suit by the city to enforce the award on the ground of its illegality, since the action brought by the city is a ratification of the agreement by the attorney.[1]

An award and decision that a contractor was entitled to pay for extra work rendered by a board of health who had been designated by a street-cleaning contract as a board of arbitration to decide disputes in regard to the work done, was held binding upon the city.[2]

A partner has no power by virtue of his relation as a partner to bind his co-partner by a submission to arbitration of a co-partnership matter so as to make the award in pursuance of such agreement binding on the firm. So when a firm of mason contractors had a dispute as to the meaning of the expression "face of the work that shows to be measured, and none else," it was held that one partner could not bind the firm by agreeing that a certain person should decide it.[3] The award would have been binding on the partner signing the submission,[4] and he would have been individually liable for the whole of the award.[5] Persons who are joint heirs and joint tenants bind themselves only when they submit matters of joint interest and joint liability to arbitration.[6]

The powers and duties of executors, administrators, and guardians legally appointed are such as to authorize them to submit to arbitration matters over which they have control.[6] Parties having capacity to submit to arbitration cannot object to an award because some of the parties to it were married women and minors.[7]

523. What Parties may Act as Arbitrators.—Before naming certain parties as arbitrators in a submission it should be ascertained that they are competent to act as such, which raises the question as to who may be arbitrators. Any person may be an arbitrator if he be mutually selected by the parties to the dispute. He can have no secret interest in the matter to be determined, and should be guilty of no misconduct.*

A remote or trifling interest in the controversy will not disqualify the arbitrator, and misconduct may be any acts or relations cultivated that may tend to bias the arbitrator or to influence him in his judgment. Such acts are manifest partisanship, cultivation of intimate relationships, accepting hospitality of one party, or expressing an opinion before the hearing, etc.

Competency to act as treated above has reference only to the legal capacity; that parties should select arbitrators of ability and integrity, competent to skillfully and intelligently investigate, consider, and decide the

[1] Connett *v.* Chicago, 114 Ill. 233.
[2] Smith *v.* Philadelphia, 18 Phila. (Pa.) 177.
[3] St. Martin *v.* Thrasher, 40 Vt. 461 [1868].
[4] 1 Amer. & Eng. Ency. Law, 852.
[5] Russel on Arbitration, p. 29.
[6] 1 Amer. & Eng. Ency. Law 854.
[7] Fortune *v.* Killebrew (Tex.), 35 S W Rep. 986.

* *See* Secs. 365, *supra*, and 508–518, *infra*.

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questions before them, and able to make and properly execute a complete award, need hardly be suggested.

524. What Constitutes a Submission to Arbitration.—At common law a submission to arbitration could be oral, in writing, or under seal. The laws of some states require that it be in writing, and if the validity of a sealed instrument is to be determined, or if the title to real estate[1] is to be affected by the award, the submission must be under seal. A submission to determine or settle the boundary line between two estates where no land is conveyed need not be in writing.[2]

If the submission be a part of a construction contract it will be in writing, and usually under seal, so that the question will not often arise as regards the contract stipulation, but parties to construction contracts frequently get into disputes over questions arising about the works, and *then and there* verbally agree to submit it to other parties, and almost before they realize it have committed themselves to an arbitration. In general such an agreement will hold, although revocable at any time before the award is made, and the award has frequently been upheld although the submission did not comply with the requirements of the statute as to the number of arbitrators or by being in writing.[3] A simultaneous or a subsequent written submission will supersede any former verbal agreement to refer.[4]

A parol submission must be clearly established. A common law submission may be in any form of words; it need only express an intention to submit certain questions to the determination of certain arbitrators and to abide by their award. It must be clear that the submission is for the purpose of settling the question in dispute, or it is not a submission to arbitration. The submission must contain the essential elements of a contract: it must be definite in its terms as to the parties, the matters submitted, the number and names of the arbitrators,[5] or their mode of selection, and an undertaking clearly expressed or implied to abide by the result of the arbitration.[6] The submission must be mutual, and be made by all the parties to the controversy.[7] It must be certain as to the subject-matter and definite as to what it includes, though the courts will try to supply deficiencies so far as the circumstances will permit.[8] The documents and papers submitted to arbitration may be considered in determining the extent of the submission.[9]

If there are statutory regulations governing submissions to arbitration, such agreement should conform strictly with the requirements of the

[1] Fort *v.* Allen (N. C.), 14 S. E. Rep. 685 [1892].
[2] Stewart *v.* Cass, 16 Vt. 663; Bowen *v.* Cooper, 7 Watts (Pa.) 311.
[3] 1 Amer & Eng. Ency. Law 655.
[4] Symonds *v.* Mayo, 10 Cush. 39 [1852].
[5] Northwestern G. L. Co. *v.* Channel (Minn.), 55 N. W. Rep. 121.
[6] Greiss *v.* State Invest. & Ins. Co. (Cal.), 33 Pac. Rep. 195; Des Moines *v* Des Moines W. W. Co. (Ia.), 64 N. W. Rep. 269; Reeves *v.* McGlochlin, 2 Mo. App. Rep. 1154.
[7] 1 Amer. & Eng. Ency. Law 657.
[8] Com. *v.* Pejepscut Props., 7 Mass. 399.

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statute, notwithstanding the fact that the courts have frequently shown a disposition to give a liberal and comprehensive construction to submissions,[1] and though awards insufficient to authorize the entry of a final award under the statute have been upheld as a common-law award.[2]

525. A Submission to Arbitration should be Distinguished from an Appraisal.—In drafting the agreement to arbitrate, care should be taken to make it a submission to arbitration and not a mere appraisal. "To constitute a submission to arbitration there should be at least a matter of doubt or a controversy which requires more than a mere operation of measurement, calculation, or investigation to determine. A matter of uncertainty which merely requires the services of an engineer or accountant or of an expert to determine is not usually regarded as a subject of an arbitration, and the results obtained are frequently held not to have the conclusiveness of an award."[3] Mr. Fry, in his book on "Specific Performance of Contracts," says that "the persons nominated to value are sometimes, though inaccurately, spoken of as arbitrators. Arbitrators are appointed to settle a pre-existing dispute—valuers to ascertain the value of the subject-matter of a sale."[4] *

In regard to matters left to engineers on construction work the decisions cannot be reconciled, they are so much at variance. Some hold the determination of the engineer final to the extent of his employment, even when his decision is not made a condition precedent to recovery by the contractor.[5] † A like difference of opinion exists in regard to appraisals.[6]

The binding effect of a contract stipulation to refer all questions and disputes that may arise in the course of the construction of works to the engineer in charge or to a board of arbitration is not recognized as a submission to arbitration by some courts on the ground that no dispute has arisen, and therefore there could never have been any submission of a dispute or difficulty that has never arisen. Many cases hold that the stipulation of a construction contract for the determination of disputes not yet arisen, but which may come up in the course of the work, is not a submission to arbitration, because there can be no submission of a controversy that has not arisen, or that has no existence. ‡ If, however, the parties have attended such a hearing under such a stipulation or have allowed the engineer to render his decision or award under it without protest or revoking the *quasi*-submission, the award made will be valid and binding, for they will be held to have adopted the submission previously drawn up and executed. After the award has been made

[1] 1 Amer. & Eng. Ency. Law 654–57; Kendrick *v.* Tarel, 26 Vt. 416 [1854].
[2] Dockery *v.* Randolph (Tex.), 30 S. W. Rep. 270; Greer *v.* Canfield (Neb.), 56 N. W. Rep. 883.
[3] 1 Amer. & Eng. Ency. Law 659, *and cases cited.*
[4] Fry's Spec. Performance, § 341, p. 152.
[5] Amer. & Eng. Ency. Law 659.
[6] 1 Amer. & Eng. Ency. Law 659; M.. K & T. Ry. Co. *v.* Elliot, 56 Fed. Rep. 772.

* *See* Sec. 348, *supra.* † *See* Chap XII, and Chap XIII, Secs. 335–417, *supra.*
‡ *See* Chap. XII, Secs. 335–366, *supra.*

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neither party can retain the benefits of the arbitrators' decision and avoid its effect as a bar to the original cause of action based on the controversy, by showing the arbitrator's misconduct.[1] If either party has notice of misconduct of an arbitrator, and instead of revoking the submission he goes on to a final hearing and finding by the arbitrators, he must be regarded as waiving his right to object.[2] In a contract for the purchase of machinery by a railroad it was recited that "if a satisfactory price cannot be agreed on between the parties, each shall select an arbitrator, and these shall select a third, who shall fix the price of the machines, and whose decision shall be final," it was held that this was a submission to arbitration and not a stipulation for a mere appraisal.[3]

The way to avoid the question as to arbitration is to make the appointment and certificate or award a condition precedent to any right to payment to the contractor and to any liability on the part of the company or to any action by the contractor for the price or value of his work done or materials furnished by him. Such a condition precedent must be performed before any action can be brought, for the debt in that case does not arise upon the completion of the job, but upon the performance of the contract and the condition precedent which it contains.[4] *

The conclusiveness and binding effect of an engineer's decision often fails when disputes have been left to his decision on the ground that no dispute has arisen as described in the contract, and therefore no award could properly be made. †

526. What Rules Govern the Arbitration.—In the absence of statutory requirements the parties may by the terms of their submission agree that the hearing shall be conducted and that the award be made in accordance with the rules and regulations and by-laws of any association or society or by any professional code of ethics, as those of a church or engineering society to which the parties belong,[5] and the award is none the less binding when made pursuant to such rules and regulations.[6] They may agree that no oaths shall be administered to arbitrators and that the testimony of unsworn witnesses shall be received.[7] Likewise the oaths of the arbitrators may be waived by the parties, but if the statute require that the oath be administered, the consent to waive it must be in writing.[8]

527. Parties are Entitled to a Hearing and to Notice of the Same.—In the absence of a stipulation to the contrary the arbitrators must grant the parties a hearing, and in each other's presence, and they should have ample

[1] Orvis *v.* Wells F. & Co. (C. C. A.), 78 Fed Rep 110.
[2] Seaton *v* Kendall, 61 Ill. App. 289.
[3] M., K & T. R. Co. *v.* Elliott, 50 Fed. Rep. 772.
[4] 1 Amer. & Eng. Ency. Law 669-70.
[5] Payne *v.* Crawford (Ala.), 10 So. Rep. 911.
[6] Payne *v.* Crawford, *supra.*
[7] Russell *v.* Seery (Kan.), 35 Pac. Rep. 812.
[8] Flannery *v.* Sahagian (N. Y. App.), 31 N. E Rep. 319; *In re* Grening, 26 N. Y. Supp. 117; Erie Tel. & Teleph. Co. *v.* Bent, 39 Fed. Rep. 409 [1889].

* *See* Secs. 342-348, 345 and 407-417, *supra.* † *See* Sec. 369, 414, *supra.*

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notice of the time and place, and no hearing should be granted to one party without notice to the other party. Affidavits, statements of account, estimates, and other documents should not be received by one party without the knowledge of the other party.[1]

Notice need be given and the attendance of the parties requested only at meetings at which evidence oral or written is received. At the consultation or when the award is drawn up and signed, or at a meeting for the sole purpose of viewing the works or premises, the parties need not be invited.[2]

It has been held that notice should have been given of a meeting called solely to inspect the works, but which was attended by one of the parties, and at which various inquiries were made of persons present.[3] The sureties under a contract it seems are not entitled to notice, if the parties themselves or their attorneys are notified.[4]

If a party attends a hearing and presents his case he cannot afterwards object to the award, for the reason that he had no formal notice of the meeting.[4] Either party may waive his right to a notice of a hearing. An agreement in the submission that the arbitrators may proceed *ex parte*, if either party fails to appear, does not render the submission irrevocable.[5]*

528. Conduct of the Hearing.—So long as an arbitrator or umpire conforms to the submission and to the statute law governing arbitrations, he may conduct the hearing at such time and place, and in such manner as seems to him most fair and reasonable, and the courts will not review his discretion if he has acted according to the principles of justice and with fairness to both parties. He may change the time and place of hearing or adjourn it at the request of either party as he sees fit, or he may refuse to postpone it if he has good reason.

If he has good reason to believe that either party is absenting himself from the hearings to defeat the arbitration, he may give peremptory notice of his intention to proceed with the hearing without him. If the party does not then appear or give a very satisfactory excuse, and if the party continue to absent himself, he may for good cause proceed without him.[6] The fact that one party has caused some needless delay is not sufficient cause for the arbitrator to close the case without giving him due notice. He should not at any time unexpectedly make an award without some notice to the parties that the hearing is at an end.[7] He should hear all the evidence offered by both parties that is material to the question at issue.[8]

[1] 1 Amer. & Eng. Ency. Law 685.
[2] Adams *v.* Bushey, 60 N. H. 290; Straw *v.* Truesdale, 59 N. H. 109, Roloson *v.* Carson, 8 Md. 208 [1855].
[3] Wood *v.* Helme, 14 R. I. 325; Knowlton *v.* Mickles, 29 Barb. (N. Y.), 465; *but see* Hall *v.* Norwalk F. I. Co. (Ct.), 17 Atl. Rep. 356.
[4] 1 Amer. & Eng. Ency. Law 686.
[5] Boston & L. R. Corp. *v.* Nashua & L. R. Corp., 139 Mass. 463.
[6] *Cases cited in* 1 Amer. & Eng. Ency. Law 682.
[7] 1 Amer. & Eng. Ency. Law 681.
[8] 1 Amer. & Eng. Ency Law 680.

* *See Secs.* 492–498, *supra*, Clauses waiving the right to a notice.

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Sometimes the stipulation recites that the engineer is appointed on account of his skill and knowledge of the subject in dispute, and although not generally expressly so stipulated, yet in fact it is almost universally the case in engineering and architectural contracts that the arbitrators are selected because of their special knowledge and understanding of the subject independent of any evidence presented by the parties. When it has been so declared expressly, it has been held that the arbitrator might properly refuse to hear evidence and decide the questions presented upon his own knowledge and skill.[1] So it has been held that an engineer or arbitrator might in his discretion comply with a request of either party to go and view the premises.[2] His refusal to hear testimony that estimates furnished by his assistants were wrong, has been upheld by the courts.[3]

529. Arbitrators must Determine Questions Themselves, Cannot Leave Them to Others.—Arbitrators cannot delegate their powers and duties to others, nor can they elect or appoint a substitute to act for one of their number who fails or refuses to serve. They may not delegate their power to decide matters embraced in the decision to others, not even to the court which appointed them. They cannot provide for the settlement of future disputes by another tribunal, or agree to abide the decision of a third party or to be bound by the decision of some other engineer as to a question of construction, or that of some lawyer on a point of law.[4]

It is no objection to an award that the arbitrators took advice relative to the questions before them if they decided on their own judgment. They may secure the assistance and council of engineers, surveyors, lawyers, accountants, and experts, and may employ their opinions and results as evidence, and adopt them as their own conclusions if assured that they are correct. They must not leave matters to the final determination of others, but the decision rendered must be the result of the arbitrator's own deliberations and judgments.[5]

The valuation of a mine may be founded upon the report of an expert sent by the arbitrator to visit it, and certificates of work may be based upon estimates made by assistant engineers, surveyors, and accountants, these duties being held purely ministerial, and therefore capable of being delegated.[6] *

Under a reference to two disinterested persons together with W., as surveyor, with the privilege to call in a third party, it was held not to make the surveyor an arbitrator, but to designate him merely as a surveyor to assist them in their estimates and measurements.[6]

[1] *Cases collected in* 1 Amer. & Eng. Ency. Law 681.
[2] Mundy *v.* Black, 9 C. B. N. S. 557.
[3] Sweet *v.* Morrison, 116 N. Y. 19 [1889].
[4] 1 Amer. & Eng. Ency. Law 678–686.
[5] 1 Amer. & Eng. Ency. Law 678.
[6] Crawford *v.* Orr, 84 N. C. 246; *but see* State *v.* Bayonne (N. J.), 8 Atl. Rep. 295.

* *See Secs.* 500–505, *supra.*

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530. The Arbitrators must Act Together.—When a dispute is left to the judgment and determination of three arbitrators, or to two arbitrators and an umpire to be selected by the arbitrators, the three must act together as a body in determining any and all questions. A finding by two only will not be binding on the parties.[1] If the submission provide for the concurrence of the three arbitrators an award signed by two will not be final, even though the third, while refusing to sign, state that "it is all right."[2] If private matters be submitted to three persons, and there is no express nor implied authority that a less number may decide questions submitted, an award by two of them will be void.[3] In public matters a majority may make the award, but they must act together and all take part in the proceeding.[4] Therefore, if the arbitrators are appointed in pursuance of a company's charter and a majority sign the award, which purports to be the act of all, it is valid.[5] An award made under a submission to two arbitrators and an umpire to be selected by them, is valid, although it is signed by only one arbitrator and the umpire.[6] It should be clear that the reference is to the three as arbitrators, and that the umpire is regarded as an arbitrator merely, and not as a judge between the two arbitrators selected.[7]

Under a submission to three arbitrators, with power to any two to make the award, and notice of a meeting is sent to one who refuses to attend and take part, it was held that the other two may proceed, and their award will be valid;[8] but if the submission provides that an award of the majority shall be final, all three must be present at every stage of the hearings.[9] If one refuse or fail to act, the others can make no valid award. It is well established that all must be present throughout each and every meeting, not only for the purpose of hearing the evidence and arguments, but for consultation and the determination of the award. Both parties are entitled to the exercise of the judgment and discretion and to the benefit of the views, arguments, and influence of each one of the arbitrators they have selected at every stage of the arbitration.[10]

When questions are left to the judgment of two architects, the judgment cannot be rendered solely upon the knowledge and inspection of one of the architects, though the other architect had been fully informed thereof. Each must be informed independently and from his own examinations and inspections.[11]

[1] Stose *v.* Heisler (Ill.), 11 N. E. Rep. 161 [1887].

[2] Weaver *v.* Powel (Pa.), 23 Atl. Rep. 1070.

[3] Hubbard *v.* Great Falls M Co. (Me.), 12 Atl. Rep. 878 [1888]

[4] 1 Amer. & Eng. Ency. Law 684; *but see* Moore *v.* Mattoon (Ill. Sup.), 45 N. E. Rep. 567, *a report by three commissioners.*

[5] Darma *v.* Horicin I. M. Co., 22 Wis. 691; *see also* Newcomb *v.* Wood, 97 U. S. 581 [1878].

[6] Stringer *v.* Toy (W. Va.), 10 S. E. Rep. 26 [1889].

[7] Savannah, etc., R. Co. *v.* Decker (Ga.), 21 S. E. Rep. 372.

[8] 1 Amer. & Eng. Ency. Law 684.

[9] Doherty *v.* Doherty (Mass.), 19 N. E. Rep. 352 [1889]; Kent *v.* French (In.), 40 N. W. Rep. 713 [1889]; *and see* Balles *v.* Bass F. & M. W'ks (Ind.), 28 N. E. Rep. 319 [1891].

[10] 1 Amer. & Eng. Ency. Law 683; Burr *v.* Chandler (N. J.), 20 Atl. Rep. 733 [1890].

[11] Benson *v.* Miller (Minn.), 57 N. W. p. 943.

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531. Matters Left to Two Arbitrators, with Power to Call in an Umpire. —When matters are left to two arbitrators, and in case of dispute or disagreement it is provided that a third arbitrator or umpire shall be called in, the umpire must sit with the arbitrators and hear testimony offered. An award by the umpire without hearing the case anew is invalid.[1] The parties are entitled to notice of the time and place of such hearing,[2] but they may expressly waive their right to a rehearing when the umpire may use the evidence offered the arbitrators.[3] The award may be signed by the umpire alone, or by the umpire and one of the arbitrators.[4]

When the contract requires that in case the arbitrators cannot agree they shall appoint an umpire or referee, it is the duty of the umpire to decide those matters only which the arbitrators failed to determine or agree upon.[5] The umpire and one arbitrator cannot return an award conclusive upon the parties about matters with respect to which no differences have arisen.[6] Without express authority in the submission, the arbitrators have no implied power to call in an umpire to make a decision as to their differences.[7]

The award must be the result of the arbitrator's or umpire's judgment;[7] it must not be determined by lot or by chance, or by striking an average. In the selection of an umpire the appointment must be the joint act of all the arbitrators, and be based upon the concurrent judgment of them all, and should be in writing.[8] The appointment may be embodied in the award.[9] Therefore when questions are submitted to three arbitrators, of whom two were to be selected by the parties, and those two were to choose the third, all three to be competent civil engineers, and the two could not agree upon a third, it was held that a choice by lot was not made in the exercise of the judgments of both arbitrators, but was a result of chance, and therefore was invalid.[9] A somewhat different rule seems to have been held in the English courts, which have held that when two persons have been proposed to which neither arbitrator made objection, a choice by lot was valid.[10]

So when two arbitrators were unable to agree as to the amount of the award, and they arrived at a decision by dividing by two the aggregate sum which each thought the contractor was entitled to, the award was held void, both from the method adopted and because the submission provided for the choice of a third arbitrator in case of a disagreement.[11] However, there are numerous cases in which arbitrators have awarded the average or exact

[1] *In re* Grening, 26 N. Y. Supp. 117.
[2] 1 Amer. & Eng. Ency. Law 691.
[3] Sheffield *v* Clark, 73 Ga. 92.
[4] 1 Amer. & Eng. Ency. Law 689.
[5] Manufacturers' & B F. Ins. Co. *v.* Mullen (Neb.), 67 N. W. Rep. 445.
[6] Allen-Bradley Co *v.* Aderson & N. Dist. Co. (Ky.), 35 S W. Rep. 1123.
[7] Harvester, etc., Works *v.* Glens Falls Ins. Co. (Cal.), 33 Pac. Rep. 633.
[8] 1 Amer. & Eng. Ency Law 681, *et seq.*
[9] Hart *v.* Kennedy (N. J.), 20 Atl. Rep. 29 [1890].
[10] *Cases collected*, 1 Amer & Eng. Ency. Law 690.
[11] Luther *v.* Medbury (R. I.),26 Atl. Rep. 37.

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mean of several sums named by witnesses, and they have been held valid, the presumption being that the arbitrators exercised their own judgment and were convinced that their decision was right.[1] Likewise, the decision of an umpire must be the result of his judgment. He may not adopt the opinion of one of the arbitrators, but must hear the case and come to his own conclusions.[2] The award of the umpire should be in writing and signed; if one or both arbitrators sign it, it will amount to their approval of his decision.[3]

The mode or method adopted by the umpire and by which he arrives at his conclusions cannot be questioned in the absence of collusion, corruption, or partiality.[4]

532. The Award.—The award or certificate must be possible, and must not require the parties to do an illegal act, as to change the course of a river or to obstruct navigation; but an award which orders one party to pay a sum of money which he does not possess is not an impossibility in the eyes of the law.[5]

The award should be so certain and explicit as to the amount of money to be paid or the acts to be performed that a specific performance can be ordered and enforced. If the award is in regard to the title to real estate or boundary lines, it should be so definite that an officer can give possession and designate the limits by metes and bounds. It must be certain as to persons required to perform the award, and as to those who are to receive its benefits, and as to the time of performance.[6]

All the questions in dispute and submitted must have been considered and decided, or the award will be void.[6] It will be presumed that the award disposes of all matters submitted, and includes nothing else.[7] An award is set aside by an agreement in writing between the parties to submit the matter in controversy to different arbitrators made subsequent to its rendition.[8]

533. Compensation of Arbitrators and Costs of Arbitration.—An arbitrator, or engineer acting as such, may make a reasonable charge for his services, and is entitled to pay for every day he is necessarily employed on the case, including the time of deliberation.[9] He may collect the full amount from either party to the submission, and each arbitrator should sue for his own fees and charges.[9] He may award fees to himself and he may have a lien on the award for the amount of his fees. He may even retain the award in his hands until his fees are paid.[9] If two cases are identical as to

[1] 1 Amer. & Eng. Ency. Law 685; Hartford F. I. Co. *v.* Bonner M. Co. (C. C. A.), 56 Fed. Rep. 378.
[2] 1 Amer. & Eng. Ency. Law 691.
[3] Hartford F. I. Co. *v.* Bonner M. Co., *supra*.
[4] 1 Amer. & Eng. Ency. Law 704.
[5] 1 Amer. & Eng. Ency. Law 699.
[6] Jackson *v.* Ambler, 14 Johns. Rep. 96 [1817].
[7] Seaton *v.* Kendall, 61 Ill. App. 289; *and see* People *v.* Benton, 7 Barb. 209.
[8] Payne *v.* Crawford (Ala.), 14 So. Rep. 854.
[9] 1 Amer. & Eng. Ency. Law 686–88; *see also* Alexander *v.* Collins (Ind. App.), 28 N E. Rep. 190 [1891].

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the subject-matter, and they are tried in the same time that one would require, the arbitrators are, it seems, entitled to fees as for but one case.[1]

The court may on motion or exception inquire into the fairness of the charges made even when the arbitrators were authorized to fix their own compensation.[2]

Generally, but not universally, it is the law that the arbitrator may award the costs of the arbitration.[3] If the award makes no mention of the costs, it seems they may be recovered from the defeated party.[4] The compensation of an arbitrator should not depend upon the amount of the award.[5]

[1] Butcher v. Scott, 1 Pa. L. J. Rep. 311.
[2] Kelly v. Lynchburg & D. R. Co. (N. C.), 15 S. E. Rep. 200.
[3] Stewart v. Greer (Del.), 32 Atl. Rep. 328.
[4] 1 Amer. & Eng. Ency. Law 687.
[5] Thomas v. Caulkett, 57 Mich. 392.

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CHAPTER XX.

EXTRA WORK OR EXTRAS. ALTERATIONS, ADDITIONS, OMISSIONS, AND SUBSTITUTIONS.

EXTRA WORK OR EXTRAS. STIPULATIONS TO AVOID EXTRA WORK.

534. Provision that Extra Work shall Be Ordered in Writing, and that Owner or Engineer may Make Alterations, Additions, and Omissions to the Work.

General clause: "No part of the works shall be altered from that shown on the drawings, or described in the specifications, nor shall any work in the nature of extra or additional work, or any work not contemplated by the specifications, drawings, or plans be performed without the express written order of the owner or engineer; but should it be deemed expedient by the engineer, at any time while the works are in progress, to increase or decrease the dimensions, quantity of material, or work, or alter the situation or levels, or vary the form or dimensions of any part of the said work, or vary in any other way the work herein contracted for, the owner or engineer shall have full power so to do, if done in accordance with the said contract, and to order and direct any such increase, diminution, alteration, or extra work to be made or performed, and without in any way vitiating or affecting the said contract; and the contractor shall, in pursuance of such order and directions as he may receive in writing from the said owner or engineer, execute the works thereby ordered and directed, and the difference in expense occasioned by any such increase, diminution, or alteration so ordered and directed shall be added to or deducted from the amount payable under this contract, and the said engineer shall ascertain the amount of such additions or deductions; but if any extra, additional, or different works be proceeded with or executed by the contractor, without previous orders given in writing under the hand of the said engineer, as hereinbefore referred to, no charge for the same will be allowed."

535. Extra Work or Extras should be Avoided or Controlled.—When a tricky contractor discovers that he has a determined engineer or architect to deal with, one who is a competent judge of good materials and of good work, and who requires him to live up to the terms of his contract and specifications strictly, his scheme is usually to work the job for all the "extras" there are in it.[1] So successful and profitable has the practice been to a certain class of contractors, that works are frequently taken at the bare cost of

[1] An interesting little book on the subject is "Scamping Tricks." By John Newman, 1891.

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construction, the contractors depending for their profits upon the extras that the job will afford. In view of these facts it is a study in drafting construction contracts to make stipulations like the foregoing clause that shall keep extra work within reasonable limits and prevent unreasonable charges for work rendered necessary by changes due to unforeseen difficulties and dangers or, if possible, to avoid all extras of whatever description.

A variety of provisions, stipulations, and conditions have been employed to effect this purpose, but only a few will be given as being in general use and deserving special notice. Some have limited the compensation which the contractor should receive strictly and absolutely to the price named in the contract; while others have provided that no extra pay whatever should be demanded or allowed unless the work was ordered in writing and weekly or monthly estimates [statements] rendered therefor, or except for work ordered by the owner [or by his engineer or architect duly authorized], and the price or value thereof agreed to by the parties, and the agreement endorsed upon and made a part of the original contract. Yet another form has left the question of what were extras, and the compensation the contractor should receive, to the determination of the engineer or to arbitration.

Any one of these conditions, clearly expressed, would answer its purpose if literally enforced, *i.e.*, if not modified or changed by subsequent agreements, and if both parties insisted upon its performance and execution. Pretty much all the trouble over extra work, under a contract containing such clauses, comes from parol agreements substituted and which change the terms of the provision, or from a lax enforcement of its terms, amounting to a waiver.

It is very dangerous to the binding effect of a construction contract to be content with a lax enforcement of its terms and stipulations. One instance of indulgence leads to another, and several instances may constitute a waiver of the whole effect of a provision. Assenting once unqualifiedly to dispense with the performance of a provision requiring written orders for extras may open the door to a suit for a whole bill of extras. An owner or an officer of a company cannot be too careful in the exercise of his powers as dictator on works in the process of construction which have been placed in charge of and under the immediate superintendence of an engineer or architect. Any interference or change either in the contract or the works without notifying and consulting the person in charge and considering the express terms and provisions of the contract are certain to cause trouble and unlooked-for complications.

The question as to what are extras must, of course, depend upon the particular circumstances of each case, examples of which will be given in a section following, but it is proposed now to consider the effect of the ordinary provisions of a construction contract whose object is to determine, limit, or avoid extra work. If the question of extras cannot be determined, and it is impossible to ascertain whether the work was within the

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contract or in excess of it, the presumption of law is that it was required by the contract.[1]

536. Provision Limiting the Recovery of the Contractor to the Contract Price.

Clause: "It is distinctly understood, intended, and agreed that the said sum of.....dollars ($....) shall be the price of, and be held to be the full compensation for, all works embraced in or contemplated by the said contract, or which may be required by virtue of any of its provisions or conditions, and the contractors shall not, upon any pretext whatever, be entitled, by reason of any change, alteration, or addition made in or to such works, or in the said plans or specifications, or by reason of any, or the exercise of any, of the powers vested in the governor.....by the act entitled....., or in the commissioners or engineers by this contract or by law, to claim or demand any further sum for extra works or as damages or otherwise, the contractors hereby expressly waiving and abandoning all and every such claim or pretension to all intents and purposes whatever, except as provided in the section of the contract relating to alteration in grade or line of the location."

537. Express Waiver of All Claims for Extra Work.—Such a clause is a waiver of all claim for payment of extra work,[2] but the adoption of it is an expensive one to the owner and onerous to the contractor. The owner may depend that the contractor will allow a very liberal estimate for everything in a contract by which he undertakes to overcome all the obstacles and unforeseen difficulties that may be met, and in which he may be called upon for alterations and additions for which he will receive no extra compensation. The proprietor loses the advantage of a close estimate of the cost of the work, and it is therefore not a favorite stipulation.

538. No Claims for Extra Work unless Ordered in Writing and Notice Given Thereof.—The provision that has found the greatest favor is that which provides for extra work, and which requires the price thereof to be agreed upon and indorsed in writing upon the contract. Some good examples of such clauses are given in the sections following.

539. Provision that Extra Work must be Ordered in Writing, Signed, Prices Agreed upon and Indorsed, and Periodical Statements Rendered.

Clause: "It is mutually agreed and understood that no claim whatever will be made by the said party of the second part (said contractor) for any extra work or extra materials, or for a greater amount of money than is herein stipulated to be paid, unless in each and every case such extra work and materials shall have been previously ordered in writing and the price agreed upon and entered therein, and the agreement duly executed and signed, by the owner, commissioner, board, or company, or by his [its] engineer or architect, duly authorized in writing, and notice of such claims shall have been given to the said owner.....or company within ten days after the beginning of such

[1] Crocker *v.* United States, 21 Ct. of Cl. 255.

[2] Berlinquet *v.* The Queen, 13 Canada Sup. Ct. 26 [1877].

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extra work or the furnishing of such extra materials. The cost of such extra work or materials shall be included in the progress certificate next succeeding the completion of such extra work or the delivery of such extra material.

"And the said contractor(s) hereby expressly waive(s) all claims or demands to any pay or allowances for any alterations, additions, or extra work or extra materials, unless in each case such extra work or materials shall have been furnished upon said written order, the price therefor, and the time of completion thereof agreed upon and entered therein, the same order signed or duly authorized in writing, and due notice of said work given."

540. Provision that Extra Work shall be Ordered in Writing and the Price Determined.

Clause (short form): "No claims for extra work will be allowed unless ordered in writing and signed by the owner or commissioner or board of public works, and the price for such agreed upon in advance; and all claims for extra labor or materials, or for damages, or for any other matter or thing for which the contractor may consider himself entitled to extra remuneration, must be made in writing before the extra labor or materials are furnished, or at the time the damages occur or the cause for the claim arises, and no claim will be considered which has not been so presented to the engineer or owner, ... or board."

541. Provision that Extra Work shall be Ordered and Claim Presented.

Clause (short form): "The contractor further agrees that he shall have no claim for compensation for extra work, unless the same is previously ordered in writing and endorsed in writing upon the contract by said engineer, and unless the claim for the same, when so ordered, is presented to the said owner, commissioner, or board before the....day of the month following that during which each specific order is complied with (or as soon as practicable after work is done and before the final estimate)."

542. Provision that Extra Work shall be Certified to Be for Public Good and the Price Thereof Limited.

Clause: "No claim for extra work shall be considered or allowed unless the same is approved and ordered by the engineer, and the said commissioner or board shall authorize in writing such extra work, and shall certify that it is, in their opinion, for the public interest that such extra work be done, stating in a certificate their reasons therefor. The aggregate price to be paid for extra work authorized or ordered under and by virtue of the foregoing provision of this contract shall not exceed the sum of one thousand dollars on any one order. All claims for extra work done in any month shall be made to the engineer, in writing, before the 15th day of the following month."

543. Provision that if Parties are Unable to Agree upon Price, Contractor shall Not Interfere with Third Party Doing Work.

Clause: "And the said part... of the second part further agrees that if he [they, or it] and the said commissioner are or shall be unable to agree, as aforesaid, upon the price or prices to be paid for

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any extra work which may be authorized as aforesaid, the said part... of the second part will not in any way interfere with or molest such other person or persons as the said engineer, commissioner, or board may employ to do such extra work; and that the said part... of the second part will suspend such part of the work herein specified, or will carry on the same in such manner as may be ordered by the said engineer, so as to afford all reasonable facilities for doing such extra work; and no other damage or claim by the said part... of the second part shall be allowed therefor, other than an extension of the time specified in this contract for the performance of said suspended work, as much as the same may have been, in the opinion of the engineer, delayed by reason of the performance of such extra work."

544. Provision that Contractor will Not Interfere with Other Contractors.

Clause: "And it is further expressly agreed and understood that if the contractor[s] is [are] unable or refuse(s) to undertake, perform, and complete the additional or extra work required by reason of such alterations or otherwise, or the parties cannot agree upon a price for such extra work, or upon the time to be allowed for its completion, he [they] will not in any way interfere with or molest such other person or persons as the engineer, owner, board, or company may employ to do such work, and will suspend such part or parts of the work herein specified, or will carry on the same in such manner as may be ordered by the engineer, owner, ..., or company, to afford all reasonable facilities for doing such work; and no other damage or claim by the said contractor therefor shall be allowed, except such extension of the time specified in this contract for the performance thereof as shall be agreed upon, or as the engineer or architect may deem reasonable."

545. No Recovery can be Had for Work Done, and Not Ordered as Required by the Contract.—These stipulations are in very common use in engineering and architectural contracts. They are inserted to insure that a record shall be kept of all extra work and to protect the company or owner from claims for extra work that have been completed, and perhaps covered up and concealed, or so incorporated with the other work as to be no longer distinguished. Without such provisions the proof of the amount, character, and value of the extra work would depend upon oral evidence, in the production of which the contractor would be supported by a courtroomful of employees and servants, while the company might be limited to the testimony of their engineer, and he perhaps regarded as an interested party.

The provisions are manifestly for the protection of the company, and are reasonable and equitable to all parties concerned. Their validity cannot be doubted, and such a provision is a condition precedent to any liability on the part of the company for work done outside of the contract,[1] the nonperformance of which will preclude recovery by the contractor.[2]

[1] Roscoe's Digest of Bldng. Cases 32, *and English cases cited;* Howard *v.* Pensacola & A. R. Co., 5 So. Rep. 356; White *v.* S. R. & S. Q. R. Co., 50 Cal. 417 [1875]; Woodruff *v* R. & P. R. R. Co., 108 N. Y. 39 [1888]; Shaw *v.* Wolverton W. W. Co., 6 Exch. 137.

[2] Flood *v.* Morrisey, (N. B.) 4 Pugsley

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The stipulations when taken alone, unqualified by subsequent agreement, have always been held binding and conclusive. When the contract provides that no claim shall be made or allowed for extra work unless it is performed under written contracts or under orders signed by the engineer or architect, no contract can be implied, or presumed, to pay for work done without such written order, in contradiction to the provision.[1] Nor can evidence be introduced to prove labor and materials furnished beyond the requirements of the contract, without procuring the written agreement and the price and signature of the superintendent, as required by the contract.[2]

The fact that the company has taken possession of the works, or of the structure containing them, when completed, and has had the benefit of the extra work, will not render it responsible for its value.[3]

If extra work has been done without observing the formalities required by the contract with regard thereto, and it has been paid for through a mistake of the engineer in including it in his estimate of work regularly done under the contract, the excess so paid for extra work may be recovered back.[4] If it is required by a special act of legislature that work shall be ordered and undertaken in a certain manner, and extra work has been done which was not ordered in the manner prescribed by the act, no recovery can be had for it, though done with the approbation of the engineer.[5]

546. Conditions Precedent to Liability must be Strictly Performed.—The general rule of contruction, "that when certain requisite forms or conditions are prescribed that are to be executed or to be performed precedent to liability or the promise to pay on the part of the company, they must be strictly complied with and performed," applies here as to other provisions and stipulations.[6] Their terms must be carefully executed or expressly

& B. 5 [1880]; Thames I. Wks. *v.* Royal Mail Co., 18 C. B. (N. S.) 358; Baltimore Cem. Co. *v.* Coburn, 7 Md. 202.

[1] Vanderwerker *v.* V. C. R. Co., 27 Vt. 130; Russell *v.* Bandeira, 13 C. B (N. S.) 149; Baltimore Cem. Co. *v.* Coburn, 7 Md. 202; Gillison *v.* Wannamaker, 140 Pa. St. 358 [1891]; Wortman *v.* Kleinschmidt, 12 Mont. 316; Shaw *v.* First B. C., 44 Minn. 22; White *v.* S. R. & S. Q. R. Co., 50 Cal. 417 [1875]; Thames Iron Works *v.* The R. M. P. Co., 8 Jurist (N. S.) 100; Kirk *v.* Bromley Union, 2 Phill. 640; Richards *v.* May, L. R. 10 Q. B D. 400; O'Keefe *v.* St. Francis Church, 59 Conn. 551 [1890]; O'Brien *v.* New York, 139 N. Y. 543, 142 N. Y. 671; Lee *v.* Brayton (R. I.), 26 Atl. Rep. 256, *the contractor can have no lien;* Meyers *v.* Sarl, 3 El. & El. 306; Howard *v.* Pensacola, etc., R. Co., 24 Fla. 560; Illinois Inst. *v.* Platt, 5 Ill. App. 567; Duncan *v.* Miami Co., 19 Ind. 154; Taff Vale R. Co. *v.* Nixon, 1 H. L. Cases 111. 7 Hare 136; Bently *v.* Davidson, 74 Wis. 420; Condon *v.* Jersey City, 43 N. J. Law 452; Ahern *v.* Boyce, 19 Mo. App. 552; Woodruff *v.* Rochester & P. R. Co., 108 N. Y. 39; Ferrier *v.* Knox Co (Tex.), 33 S. W. Rep. 896; *and see* Abbott *v.* Gatch, 13 Md. 314; Franklyn *v.* Darke, 3 F. & F. 65; Miller *v.* McCaffrey, 9 Pa. St. 245; Houston R Co *v.* Trentem, 63 Tex. 442; Fitzgerald *v.* Beers, 31 Mo. App. 356.

[2] Sutherland *v.* Morris, 45 Hun 259 [1887]; Wortman *v.* Kleinschmidt, 12 Mont. 316.

[3] Woodruff *v.* R & P. R Co., 108 N. Y. 39 [1888]; Hommersham *v* Waterworks, 6 Exch. 137 [1851] Sharpe *v.* San Paulo Ry. Co., 8 Ch. App. 607; Boston Elec. Lt. Co. *v.* Cambridge (Mass), 39 N. E. Rep. 787; *semble* Wortman *v.* Kleinschmidt (Mont.), 30 Pac. Rep. 280; *but see* Tyron *v.* White & C Co., 62 Conn. 161.

[4] Duluth *v.* McDonnell (Minn.). 63 N. W. Rep. 727.

[5] Hemmersham *v.* Water Works Co., 6 Exch. 137; O'Brien *v.* Mayor of N. Y., 139 N. Y. 543.

[6] Vanderwerker *v.* Vt. Cent. R. Co., 27 Vt. 130; Russell *v.* Bandeira, 18 C. B. (N. S.) 149.

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waived to give the contractor any rights to recovery. If the contract provides that no extra charges shall be made unless a written agreement be attached to the contract, it has been held to require the order not only to be written, but to be attached as stipulated, and that the contractor could not recover (on the contract), even though the work was done at the request of the owner.[1] *

547. An Unsigned Sketch or Plan is Not a Written Order.—A stipulation that the cost of changes or extra works should be determined by supplemental contract was held to require them to be specified in writing, or an express waiver of the provision shown, or no claim for extra work could be maintained.[2] So the giving of a *plan* of extra work which is necessary to the security of the work is not a compliance with a stipulation requiring that no alterations should be paid for unless ordered in writing. The owner is not bound by such a direction and order.[3] When it was stipulated that for all extra work written directions should be given under the hand of the architect, a *sketch* made by the architect, and not signed by him, is not such a direction as complies with the contract;[4] but when city building inspectors ordered changes, a sketch of which was prepared by the architect, and the contractor was directed to make such changes so that the building should conform to the city ordinances, it was held that there was no express contract in writing for the extras, yet it was the duty of the owner to see that the order was obeyed, from which arose an obligation to pay for the work necessary therefor, done with his consent under the direction of his architect.[5]

548. Progress Certificates of Work Done are Not Written Orders for Extra Work.—Certificates of work performed are not written orders, and will not satify the clause requiring work to be ordered in writing. They have been held insufficient, even when the contract has made the certificate pre-eminent.[6] Thus under a clause "that no alterations or additions shall be made without a written order from the engineer, and that no allegations by the contractor of knowledge of, or acquiescence in, such alterations or additions, on the part of the company or their engineers, shall be accepted or available as equivalent to the certificate of the engineer or in any way superseding the necessity of such certificate as the sole warranty for such alterations and additions, it was held that the neglect to order extras in writing, as required by the contract, was not cured by the engineer's having included them in his certificate.[7]

[1] Abbott *v.* Gatch, 13 Md. 314.
[2] Trustees *v.* Platt, 5 Bradw. (Ill.) 567.
[3] Stuart *v.* Cambridge, 125 Mass. 102
[4] Myers *v.* Sarl, 30 L. J. Q. B. 9 [1860]; *but see* Wood *v.* Fort Wayne, 119 U. S. 312 [1886].
[5] Cunningham *v.* Fourth Bap. Ch. (Pa.), 28 Atl. Rep. 490.
[6] Tharsus S. & C. Co. *v.* McElroy, 3 App. Cas. 1040 [1878], in which the engineer's decisions were not final and conclusive
[7] Tharsus S. & C. Co. *v.* McElroy, 3 App. Cas. 1040; Lamprell *v.* Billericay Union, 3 Exch. 283; Gillison *v.* Wanamaker, 140 Pa. St. 358 [1891]; Brunsdon

* *See* Sec. 559–568, *infra.*

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549. Want of Written Order may be Cured by Final Certificate, if Certificate Partakes of the Nature of an Award.—Some of the English cases have made a distinction between progress certificates and the final certificate.[1] Progress certificates have been regarded as simple statements of matters of fact, such as the weight or measure of the materials delivered, or of the work done, and their contract prices, and the payments under them as provisional and subject to adjustment and revision when the contract is completed and the final estimate rendered.[2] Interim or progress certificates are not given the weight of adjudications, the final estimate alone being accorded the final and conclusive effect of an award.[3] If such extras are included in the progress certificates the omission to order them in writing is not cured, but if included in the final certificate, or the award, the necessity of a written order is done away with.[4] *

When the engineer had been made sole umpire with respect to the amount, state, and condition of the works actually executed, and also of any and every question that may arise concerning the construction of the present contract, or the said plans, drawings, elevations, and specifications, or the execution of the works thereby contracted for, or in anywise relating thereto, should be final and without appeal; and where a submission has been made to the judgment and discretion of the engineer, the English courts have repeatedly held that the engineer's or architect's certificate was conclusive for the sum certified, even though it did include extra work which had not been ordered in writing as required by the contract.[5]

It is equally conclusive upon the company and the contractor, and neither party can raise the question whether there was sufficient order in writing.[6]

The ground upon which the decisions were supported was the finality of the engineer's decisions, he having been made a *quasi*-arbitrator of not only the nature, quality, and quantity of the works, but also of the meaning and construction of the contract and specifications. In every case known to the author where this decision has been rendered, the engineer's powers have been extended to the interpretation of the contract, and his judgment thereof has been made final and conclusive.[7]

v. Staines Local Bd., 1 Cab. & El. 272; Goodyear *v.* Weymouth, 35 L J. C. P. 12.

[1] Emden's Law of Building and Building Leases, 215.

[2] Tharsus S. & C. Co. *v.* McElroy, L. R. 3 App. Cas. 1045.

[3] *But see* Chicago S. F. & C. R. Co. *v.* Price, 138 U. S. 185 [1891]; *and* Price *v.* Chicago, etc., R. Co., 39 Fed. Rep. 307 [1889].

[4] Tharsus Sulphur & Copper Works *v.* McElroy & Sons, L. R. 3 App. Cas. 1040; Lamprell *v.* Billericay Union, 3 Ex. 283; Abells *v.* Syracuse (Sup.), 40 N. Y. Supp. 233, part payment had been made; *but see* Brunsdon *v* Staines Local Bd., 1 Cab. & El. 272, where the fact that weekly bills were to be delivered for extras was regarded as a saving clause.

[5] Lepthorne *v* St. Aubyn, 1 C. & E. 486 [1885]; Commissioners *v* Water Commissioners, 5 Irish Rpts. C. I. 55 [1871]; Goodyear *v.* The Mayor, 35 L. J C. P. 12; *see also* Kirk & R. *v.* The E. & W. India Co., 55 L. T. R. (N. S.), 245 [1886].

[6] Emden's Law of Building, etc., 217, and *English cases cited.*

[7] Commissioners *v.* Water Commissioners,

* *See* Secs. 465–490, *supra.*

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If the architect's or engineer's decision as regards the value of the extras and addition is made final and conclusive, it might be that the courts would ignore the stipulation for a written order and allow the contractor to recover for all that the certificate included; but to say the least, it is doubtful. Justice Willes in one decision said: "It is true that the architect, if he does his duty, has no power to certify for extras not ordered in writing; but by the terms of the contract, if he has allowed for extra and additional work without the production of such an order, though he has decided erroneously, that is a matter for which the company have to blame themselves for selecting him." "Suppose," said he, "that in dealing with the extras the architect had disallowed an item for which the contractor had received a written order, would that be binding on the parties? Certainly it would, for they put him in the position of an arbitrator having power to disallow it."[1]

The court seems to have regarded the denial of any liability on the part of the company as an effort to affect the contractor by the breach of duty of the engineer for giving certificates for work not ordered in writing as required; and to have applied the rule that a contract should be so expounded as to carry into effect the intention of the parties, and that the intention was to be collected not from the language of a single clause of the covenant, but from the entire context. That if the contractor had safely omitted a thousand dollars' worth of work by direction of the engineer, and the engineer had so certified, there would be no doubt that the contractor could not recover for the omissions, and that it was a poor rule that did not work both ways; that, therefore, the obligation should be extended equally to additions as to omissions.[2] The justice who delivered the opinion said: "By their agreement the parties have constituted the architect their tribunal to decide whether there was a written order for extra work and what was the nature of it, and his certificate assumes that there was such a written order," and against it there is no appeal.[3] The agreement referred to was the ordinary clause making the engineer the exclusive judge of the execution of the works and of everything connected with the performance of the contract, and that his certificate should be binding and conclusive on both parties.

In another case, where the architect's decisions were to be final only as to the measures made during the progress of the work and other questions and disputes, including the allowance of extras and additions and any other matters arising under or out of the contract, were left to further arbitration before another person, it was held that a certificate for final balance

supra; Goodyear *v.* The Mayor, *supra*; Lepthorne *v.* St. Aubyn, *supra*.

[1] Goodyear *v.* The Mayor, 35 L. J. C. P. 12; *and see* Marks *v.* Northern Pac. R. Co. (C. C. A.), 76 Fed. 941.

[2] Commissioners *v.* Commissioners, 5 Irish R. (C. L.) 55–66.

[3] Commissioners *v.* Commissioners, *supra*.

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could not include extras that had not been ordered in writing and weekly bills delivered as required by the contract.[1]

When a contract, after specifying certain works to be done for a gross sum, provided that extra work which the company or its engineer should by any writing under his hand require to be executed, should be deemed to be included in the contract, and should be paid for at a certain rate, and that the contractor should not be entitled to make any claim for any alteration or addition which he made without such written and signed instructions, it was held by the Vice-Chancelor of England and affirmed by the House of Lords that a suit for an account of the moneys due to the contractor, in respect of the works done under the contract, was a proper subject of jurisdiction in equity.[2]

550. English and American Practice Compared. — These English cases illustrate the difference in the status of American and English engineers. In England the parties are held strictly to their agreement to abide by the engineer's decision. It is a frequent practice to refer any and every question as to the work and the contract to the engineer, and the courts enforce the obligations assumed by the parties as they would any other contract obligation. The American courts have often given a less rigid construction to this provision of contracts and have been more indulgent to contractors, and the effect may be seen in our public works and our general construction. English engineering works are said to be executed strictly in accordance with the plans and specifications and the contract. If the attorney through ignorance or inadvertence has failed to express things clearly, then the engineer interprets them as they should be. The English courts seem to have been more alive to the interests involved and to have encouraged enterprise and development and to protect capital. While it is presumed that the American courts have less need to encourage the rapid progress of our country they have had more sympathy with the weaker party and on the side of the oppressed, an inherent trait of a democratic people. The American cases cannot be reconciled; some having followed the more liberal American decisions and others having adopted the more stringent and rigorous application of the English law.

551. Provision Relating to Extra Work, Alterations, and Omissions, Ordered by the Owner or Engineer.

"Clause: It is further agreed by and between the parties hereto that should the said owner, board, committee, council, or company require any alterations, changes, deviations, omissions, or additions in, to, or from the said plans and specifications or works, or any extra work to be done, which may be deemed necessary for the proper construction and completion of the whole work herein contemplated, they may authorize and empower the engineer or architect [or the engineer or architect, with the written consent in every case of the said owner or company, shall

[1] Brundsen v. Local Board, 1 C & E. 72 [1884].

[2] Nixon v. Taff Vale R. R. Co., 7 Hare 136.

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have the full power and authority], from time to time and at all times to make and issue such further drawings, and to give such further instructions and directions in writing and over his hand, as may appear to him necessary or proper for the guidance of the contractor, and for the good and sufficient execution of the works, according to the terms of the specification; and the contractor shall receive, execute, obey, and be bound by the same, according to the true intent and meaning thereof, and as fully and effectually as though they had accompanied or had been mentioned or referred to in the specification; and the engineer or architect may [within limits consistent with the nature of the contract], make such changes in the forms, dimensions, grades, and alignments or position of any of the works as the interest of the work shall seem to require; or he may order any of the works to be omitted, without the substitution of any other works, in lieu thereof, or may order additional works to be executed; and the contractor[s] shall, in pursuance of such orders and directions, execute the works in conformity therewith, but he [they] shall not otherwise make any alterations, variations, omissions, substitutions, or additions in, from, or to the works."

552. Engineer's Authority to Direct Alterations, Additions, or Omissions is Not Authority to Order Extras except in the Manner Required by Contract.—The existence of a clause in the contract to the effect that the work shall be under the supervision and direction of the engineer,[1] or that the engineer may direct alterations in, additions to, or deductions from the work, or that he may make other modifications in the amount and character of the work contracted for, authorizes the engineer to order extra work, but only in the manner required by the contract terms. If the contractor execute work outside of the contract without insisting that it be ordered in the manner required by his contract he cannot recover either at law or in equity.[2]

Express stipulations are rigidly construed by the courts, and even though a contractor has bound himself to perform certain works according to specifications and drawings, and the architect has power to direct additions and omissions, he cannot recover for work done under the direction of the architect unless he can show that the architect had authority to order the work.[3] If such authority is not shown the contractor has no case, even though he plead that the deviations were by direction of the company's architect or engineer.[4] In the United States court a different rule has been maintained in at least one case, where it was held that a provision which required that claims for extra work must be made within ten days after the

[1] Murphy *v.* Albina (Oreg.), 29 Pac. Rep. 353 [1892].

[2] White *v.* S. R. & S. Q. R. Co., 50 Cal. 417 [1875]; Trustees *v.* Platt, 5 Bradw. 567; *and see also* 1 Redfield on Rys. (4th ed.) 411; Kirk *v.* Guardians, 2 Phila. 640; Thayer *v.* V. C. Ry. Co., 24 Vt. 440; Herrick *v.* V. C. Ry. Co., 27 Vt. 673; Richards *v.* May, L. R. 10 Q. B. D. 400; Abbott *v.* Gatch, 13 Md 314; Stuart *v* Cambridge, 125 Mass. 102; Sutherland *v.* Morris, 45 Hun 259.

[3] Rex *v.* Peto, 1 Y. & J. 37.

[4] Cooper *v.* Langdon, 9 M. & W. 60; Emden's Law of Building, etc., 220; *and see* Denver & R. G. Ry. Co. *v.* Nels (Colo.), 14 Pac. Rep. 105 [1887].

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completion of the work, or before the next monthly payment, did not prevent the contractor from recovering for extra work caused by alterations of the plans made by *one party* in pursuance of a clause empowering it to make such alterations. That though the work required to make such an alteration was in one sense extra work, yet, if it was caused by an alteration of the plan by the proper authorities, it was to be paid for at the contract rate for work of its class, and that orders to make alterations under such circumstances was equivalent to a written order by the party or the engineer.[1]

If the architect has by agreement or orders induced the sub-contractors to use a different material for plastering from that specified in the contract, without the knowledge of the contractors, the latter have been held not liable for damages because such substituted material was defective;[2] and though the building contract requires a written order for any change which affects the cost of the building, or time of its completion, yet the contractor is not responsible for a delay caused by a change in the plans of the building, made at the owner's oral request.[3]

553. Without Special Authority, the Engineer or Architect cannot Render His Employer Liable for Extra Work.*—The fact that the engineer, architect, or superintendent has orally ordered extra work to be done, when the contract requires that it shall be ordered in writing, will not render the company or owner liable therefor, nor enable the contractor to recover for such extra work performed.[4] If the contractor has performed extra work upon the assurance of the engineer or architect that it will be allowed by the company or owner without the requisite formality, he must look to the engineer or architect for compensation. He cannot recover from the company either in a court of law or a court of equity;[5] and it seems that the architect may render himself personally liable for the value of extra work ordered by him without authority of the owner, whether he falsely or in good faith and under a mistaken belief represents to the contractor that he has the requisite authority.[6] †

However, verbal assurances by an engineer of a bridge company to a

[1] Wood *v.* Fort Wayne, 119 U. S. 312 [1886].

[2] Robinson *v.* Baird (Pa.), 30 Atl. Rep. 1010.

[3] Focht *v.* Rosenbaum (Pa. Sup.), 34 Atl. Rep. 1001.

[4] Vanderwerker *v.* V. C. Ry. Co., 27 Vt. 125 [1854]; Woodruff *v.* R. & P. R. Co., 108 N. Y. 39 [1888]; Pashby *v.* The Mayor, 18 C. B. 2 [1856]; Barker *v.* Troy & R. R. Co., 27 Vt. 766; O'Keefe *v.* St. Francis Church, 59 Conn. 551 [1890]; Ahern *v.* Boyce, 19 Mo. App. 552; Rens *v.* Grand Rapids (Mich.), 41 N. W. Rep. 263 [1889]; *but see* Elgin *v.* Joslyn, 136 Ill. 525; *and see* Commissioners *v.* Motherwell, 123 Ind. 364.

[5] Woodruff *v.* R. & P. R. Co., 108 N. Y. 39; Randell *v.* Trimmen, 18 C. B. 786 [1856].

[6] Randell *v.* Trimmen, 18 C. B. 786; *and see* Woodruff *v.* R. & P. R. Co., 108 N. Y. 39; *also* Hall *v.* Crandall, 29 Cal 567 [1865]; Ludbrook *v.* Barrett, 46 L. J. C. P. D. 798.

* *See* Secs. 37, 39, 370–380, *supra*, and Sec. 768, *infra*.
† *See also* Secs. 275, 515, *supra*, and 842, *infra*.

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materialman that *if* he would supply lumber to the contractor for the bridge, he would get his money as soon as the contract was completed, does not render the engineer liable for the bill of the lumber, as it is a verbal undertaking to answer for the debt of another and is void, being within the statute of frauds.[1]

An engineer has no power by virtue of his position to bind the city, his company, or employer by his contracts.[2] There is nothing in his general duties that will authorize him to order alterations or additions, or to employ others to do work which, by express contract, belongs to the contractor to perform.[3] He must have special authority to bind his company and to render them liable. As Judge Redfield of Vermont, in a very early case, has said: "No one could for a moment be led into any misapprehension as to the extent of an engineer's authority to charge his company by varying its existing contracts and making new ones. The engineers were there (upon the works) for no such purpose; they had no such agency except under specific limitations and restrictions contained in the contract."[4] Though the engineer be an agent of the company, if he is not a party to the contract and takes no part in the negotiations, and is intrusted with no special duty with regard to it, he cannot bind his employer by any statement or representation which he may make with reference to it.[5]*

Such a special duty is conferred by a power of attorney authorizing an engineer or agent to act for the owner in all matters relating to a building contract and the construction of the building. Under such a power of attorney the engineer is authorized to order the removal of stones which

[1] Engleby *v.* Harvey (Va.), 25 S. E. Rep. 225.

[2] Gardner *v.* B. & M. Ry. Co., 70 Me. 181 [1879]; McIntosh *v.* Hastings (Mass.), 31 N. E. Rep. 289; Rens *v* Grand Rapids (Mich.). 41 N. W. Rep. 263 [1889]; Meridian W. W. Co. *v* Schulber (Miss.), 17 So. Rep. 167; Sexton *v.* Cook Co., 114 Ill. 174; Murphy *v.* Albina (Oreg.), 29 Pac. Rep. 353 [1892]; Woodruff *v.* R. & P. R Co., 108 N. Y. 40 [1888]; Shaw *v.* Wolverton W. W. Co., 6 Exch. 137; O'Brien *v.* Mayor of N. Y., 139 N. Y. 542; Baltimore Cem. Co. *v.* Coburn, 7 Md. 202; Starkweather *v.* Goodman, 48 Conn. 101; Sexton *v.* Cook Co., 114 Ill. 174; Hommershaw *v.* Wolverton W. W. Co., 6 Exch. 137; Reg. *v.* Starrs, 17 Can. Sup. Ct. 118; Sharpe *v.* San Paulo R. Co., L. R. 8 Ch. 605, *note.*

[3] Vanderwerker *v.* V. C. R. Co., 27 Vt. 125 [1854]; Baum *v* Covert, 62 Miss. 113 [1884]; Engleby *v.* Harvey (Va.). 25 S. E. Rep. 225; Alexander *v.* Robertson, 86 Tex. 511; McKey *v.* Nelson, 43 Ill. App. 456; *and see* Wendt *v.* Vogel, 87 Wis 462; Bowe *v.* United States, 42 Fed. Rep. 761.

[4] Vanderwerker *v.* V. C. R. Co., 27 Vt. 125 [1854]; *accord*, Rex *v.* Peto, 1 Y. & J. 37; Cooper *v.* Langdon, 9 M. & W. 60; Dist. of Columbia *v.* Gallagher, 124 U. S. 505.

[5] Wolf *v.* The Des Moines & Ft. D. Ry. Co., 64 Iowa 380; Campbell *v.* Day, 90 Ill. 363; *but see* Becket's Building, pp. 17-20; *and* Adlard *v.* Muldoon, 45 Ill. 193; Kimberly *v.* Dick, L. R. 13 Eq. 1; Hall *v.* Holt, 2 Vern. 322; Wyatt *v.* Marq. Hertford, 3 East 147. The latter cases are English cases, which give more extended powers to engineers than do the American contracts. Some English cases have held that the architect could employ all proper and reasonable means to carry out the intention of his employer. Johnston *v.* Kershaw, L. R. 2 Ex. 82; Richardson *v.* Anderson, 1 Camp. 43, *note;* Robinson *v.* Mollett, L. R. 7 H. L. 802. It has been held that he could employ a surveyor to make out the quantities. Moon *v.* Guardians, etc., 3 Bing. N. C. 817; Mayor *v.* Eschbach, 17 Md. 276; *and see* Taylor *v.* Hall, 4 Ir. R. C L. 467; Wigglesworth *v.* Dallison, 1 Sm. L. C. (7th ed.) 606.

* *See* Sec 849A, *infra.*

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were sunk below the surface of the building site unbeknown to either the owner or contractor.[1]

Even in the absence of a clause requiring extras to be ordered in writing or weekly accounts to be rendered, the engineer cannot order extra work or change the contract terms without special authority, which must be shown by the contractor. When orders have been given for additional work by the engineer, either within or entirely without the contract, the ordinary principles of the law of agency will apply. In general, the architect or engineer is an agent entrusted only with power to see that the works contemplated by the contract are properly executed and completed; he cannot therefore bind his employer to pay for any additional work.[2] It is also true of a city engineer.[3]

554. Who May Authorize Extra Work or Order Alterations on Behalf of the Parties.—It has been shown that the engineer or architect cannot, unless expressly or impliedly authorized, order work or materials outside of or in addition to those called for in the contract, whether the contract requires that such extras shall be ordered in writing or not; and notwithstanding he has power by the terms of the contract to direct alterations, additions, and changes, he cannot render his company liable for extras by verbal orders when the contract forbids their being ordered in any other way than in writing. A provision that work shall be under the supervision of a committee on streets and the engineer in charge, confers no authority upon them, or any of them, to change or modify in any essential particular the provisions of the contract.[4]* Modifications of contracts by unauthorized officers are not binding upon the city.[5] Extra work done at their request cannot be recovered for.[6]

555. Boards, Councils, Committees, and Corporate Bodies must Act as a Unit.†—In law nobody can make changes in a contract or create new obligations thereunder, except the parties thereto or their authorized agents.[7] It is sometimes important to know who are authorized agents to order extra work or alterations in the contract, plans, and specifications.

Cases in which doubt most frequently arise are those of associations, in-

[1] Michaud *v.* McGregory (Minn.), 63 N. W. Rep. 479.

[2] Emden's Law of Building, etc., 220.

[3] Murphy *v.* City of Albina (Oreg.), 29 Pac. Rep. 353; *semble*, Rens *v.* Grand Rapids (Mich.), 41 N. W. Rep. 263 [1889]; *but see* Mulholland *v.* Mayor (N. Y.), 20 N. E. Rep. 856

[4] Bonesteel *v.* Mayor, 22 N. Y. 162; Rens *v.* City of G. R., 73 Mich. 237; Dillon *v.* Syracuse, 9 N. Y. Supp. 98; Genovese *v.* Mayor, 55 N. Y. Super. Ct. 397; *but see* Board *v.* O'Connor (Ind.), 35 N. E. Rep. 1006.

[5] Dillon's Mun. Corp., § 451, *note* 1; Bonesteel *v.* Mayor, 22 N. Y. 162 [1860]; Hague *v.* Philadelphia, 48 Pa. St. 527; O'Harra *v.* New Orleans, 30 La. Ann. (Pt. 1) 152.

[6] Addis *v.* Pittsburgh, 85 Pa. St. 379 [1877]; O'Brien *v.* City of N. Y., 139 N. Y. 542; Sexton *v.* Cook Co., 114 Ill. 174; Benton Co. *v.* Patrick, 54 Miss. 240; Campbell *v.* Day, 90 Ill. 363; Gibson Co. *v.* Motherwell I. Co., 123 Ind. 364, *contra; and see* Eigeman *v.* Posey Co., 82 Ind. 413.

[7] Bray *v.* Loomer (Conn.), 23 Atl. Rep. 831.

*See Secs. 38–39, 370–380, *supra*, and Sec. 768, *infra*. † *See* Secs. 39, 40, and 48, *supra*.

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corporated or otherwise, where the contractor has to deal with boards or committees, who are themselves the representatives or agents of a city, company, church, or society, or its governing board. It is a well-settled rule that the affairs of a corporate body, private or municipal, can be transacted only at a corporate meeting, regularly convened, and that the acts of individual members in no way bind the corporation. The only existence of the common council of a city is as a board, and its members can do no valid act except as a board.[1] The board must act as a unit, and only at meetings regularly called.[2] Promises by individual members of a municipal board to pay existing debts of the board made at different times and places, and without that joint official deliberation which the law requires, are not binding upon the city.[3] A written order for materials and supplies signed by the majority of the members of a school board with promises to ratify the contract at the next meeting of the board is not binding, if the board fail or refuse to ratify the contract, even though the materials have been delivered.[4] The agreement to ratify is void, being against public policy,[5] and the members have no authority to act except when together in session. The same rule has been held for street commissioners [6] and for county commissioners,[7] and may be taken to be general.[8]

If the power to contract is conferred upon two or more bodies they must all meet for consultation and deliberation and act together. When they have done so the vote of the majority will control, even if one of the bodies did leave before the vote was taken.[9]

Knowledge obtained by members of a city council as individuals, that a demand had been made for extra compensation for work done, is not to be charged to them when they voted to accept the work, unless the demand was made of the council when the vote was taken.[10] Yet a notice to a councilman of a defect in a street has been held a notice to the city, although the

[1] Murphy *v.* Albina (Oreg.), 29 Pac. Rep. 355 [1892]; *citing* 1 Dillon's Munic. Corpus. 455, *note;* Board of Com'rs. *v.* Bunting (Ind.), 12 N. E. Rep. 151; 15 Amer. & Eng. Ency. Law 1028; Dey *v.* Jersey City, 19 N. J. Eq. 412; Butler *v.* Charleston, 7 Gray 12; Turnpike *v.* Craver, 45 Pa. St. 386; *In re* St. Helen's Mill Co., 3 Sawy. 88; Zottman *v.* San Francisco, 20 Cal. 96; Gashweiles *v.* Willis, 33 Cal. 11; Schumm *v.* Seymore, 24 N. J. Eq. 143; Commonwealth *v.* Hurd (Pa.), 35 Atl. Rep. 682; City of Waco *v.* Prather (Tex.), 37 S. W. Rep. 312.

[2] 15 Amer. & Eng. Ency. Law 1029; *cases cited in* Fleming *v.* Village of Suspension Bridge, 92 N. Y. 368 [1883].

[3] Strong *v.* Dist. of Columbia, 4 Mackey (D. C.) 242; *accord.* Shaw *v.* First B. C. (Minn.), 46 N. W. Rep. 146, 44 Minn. 22; *and see* Kerfoot *v.* Cromwell Mound Co., 115 Ill. 502; Miller *v.* McCaffrey, 9 Pa. St. 245; Board of Com'rs. *v.* Bunting (Ind.), 12 N. E Rep. 151 [1887]. *changes in plans.*

[4] McCortle *v.* Bates, 29 Ohio St. 419; *and see* Manfs. Fur. Co. *v.* Kremer (S. D.), 64 N. W. Rep. 528.

[5] *See* Mayor *v.* Britton, 12 Abb. Pr. (N. Y.) 367, *note;* and Britton *v.* Mayor, 21 How. Pr. (N. Y.) 251.

[6] Schumm *v.* Seymour, 24 N. J. Eq. 143.

[7] Potts *v.* Henderson, 2 Ind. 327.

[8] *See* Moser *v.* White, 29 Mich 59; *and see* Heman Const. Co. *v.* Loevy, 2 Mo. App. Rep 1123; Eigeman *v.* Posey Co., 82 Ind. 413; Campbell *v.* Brackenridge, 8 Blackf. (Ind.) 471; Archer *v.* Allen Co., 3 Blackf. (Ind.) 501.

[9] Gildersleeve *v.* Bd. of Ed., 17 Abb. Pr. (N. Y.) 210.

[10] Murphy *v.* Albina (Oreg.), 29 Pac. Rep. 353.

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member was not at the time sitting in the council.[1] Knowledge of a councilman is not knowledge of the council.[2] *

It therefore follows that the assent of individual members of a city council or board to changes ordered by the engineer is not binding upon the city unless ratified by the council at a regular meeting, nor is a ratification of such orders to be implied from acceptance and use of the works.[3] If the charter provides that no improvement shall be ordered "except by ordinance, which shall set aside a specific appropriation for the work ordered, based upon an estimate of its cost," the contractor is bound to take notice of the amount of the appropriation, and he cannot recover for extras ordered by the engineer in excess of the appropriation.[4] If a corporation or association act through a building committee, and a major part of that committee concur or act in making a contract or changing its terms, it will be binding upon the committee and company within the scope of the committee's authority.[5] The majority of such a committee may constitute a quorum to do business.[6]

If an act creating a board of commissioners empowers them to contract for specific works, and further provides that the work may be intrusted to engineers of the department of public works, as the commissioners shall direct, but declares that in no event shall the city be held in any action brought under any contract made by the commissioners to any greater or other liability than that expressed therein, it prohibits the contractor from bringing an action for the increased cost of the work contracted for, and occasioned by errors of the engineer in giving erroneous grades, lines, and centers.[7]

556. Ordinances, Resolutions, and Appropriations cannot be Changed by Members of the Bodies Creating Them.—Contractors doing public work under the supervision of a committee or engineer, but authorized by ordinance or a resolution of a public board, should keep strictly within the ordinance or resolution directing the work. The work undertaken by the contractor should comprise only those things authorized by the act or resolution, and the appropriation made should not be exceeded by the cost of the work performed. Orders and directions by the committee or engineer

[1] Logansport *v.* Justice, 74 Ind. 378; Frazier *v.* Borough of B. (Pa.), 33 Atl. Rep 691.

[2] Frazier *v.* Borough of B. (Pa.), *supra; see also cases cited in* Woodruff *v.* Roch. & P. R. Co., 108 N. Y. 39.

[3] Murphy *v.* Albina (Oreg.), 29 Pac. Rep. 353; Sexton *v.* Cook Co. 114 Ill. 174; Benton Co. *v.* Patrick, 54 Miss. 240; Shaw *v.* 1st Bap Ch., 44 Minn. 23; *see* Murdough *v.* Revere (Mass.), 42 N. E. Rep. 502.

[4] Perkinson *v.* St. Louis, 4 Mo. App. 322; Louisiana *v.* Miller, 66 Mo 467, where engineer undertook to order a sidewalk.

[5] McNeil *v.* Boston Chamber of C., 154 Mass. 277; Howard *v.* School, 78 Me. 230.

[6] Damon *v.* Granby, 2 Pick. (Mass.), 345; *see also* Meth. Epis. Parish *v.* Clarke, 74 Me. 110.

[7] O'Brien *v.* City of New York (N. Y. App.), 35 N. E Rep. 323; *accord*, Trenton Loco. Co. *v.* United States, 12 Ct. of Cl. 147.

* *See* Sec. 849A *infra.*

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in charge should be carried out with caution, for authority to contract, or to make important changes increasing the cost of the work, or doing away with important parts of the work, are acts which councils, boards, etc., cannot delegate to others.[1] The committee having such work in charge cannot order work to be continued beyond the stage named in the resolution, nor can they by approving such an extension ordered by the architect render the city or county liable for such work or for damages suffered by undertaking such work.[2] They cannot require nor properly request the contractor to stop work pending an injunction suit, and the contractor cannot recover for delay due to granting such request.[3]* They cannot change the site of a structure and render the county responsible for the extra expense attending the change, even when they have been authorized to select and submit the site to the county board before the contract was awarded.[4]† In an action for extra work under a contract, it is error to exclude evidence tending to show that the extra work was either directly forbidden or unauthorized by the only responsible officials empowered to authorize such extra work.[5]

557. The Acts of Individual Members may be Ratified or Adopted by the Board.—When a contractor has in good faith performed his contract and the city has had the benefit thereof, there is a strong equity in his favor entitling him to the benefit of a ratification upon slight evidence if the ratifying body has general power over the subject-matter of the contract.[6] The formal action or resolution of the common council is not therefore always necessary to establish the assent of a municipal corporation to a change and modification of a contract; but such assent may be implied from its acts relating to the contract work, unless the contract is required to be made in a prescribed manner by statute or charter, when it must be annulled in the same manner.[7]

Acts of the engineer or of individual members of a council or board may be ratified by an express vote of the board at a regular meeting or by some acts which amount to an adoption of the unauthorized act.[8] An action brought upon the contract made by an unauthorized person,[9] or the appropriation of the benefits of such a contract, when restitution is possible,

[1] Potts *v.* Henderson, 2 Ind. 327; Mathews *v.* Alexandria, 68 Mo. 115.

[2] Sexton *v.* Cook Co (Ill.), 114 Ill. 174 [1891]; *and see* Bass Fd'y Wks. *v.* Parke Co., 115 Ind. 234.

[3] Mathewson *v.* Grand Rapids (Mich.), 50 N W. Rep. 651; *but see* Walker *v.* Fitchburg, 102 Mass. 407; *and see* Phila., etc., R. Co. *v.* Howard, 13 How. 307; s c, 1 Am. Ry. Cas. 70.

[4] Hague *v.* Philadelphia, 48 Pa. St 527 [1865]; *and see* Damon *v.* Granby, 2 Pick. (Mass.) 345; *and* Shaw *v.* First B. C. (Minn.), 46 N. W. Rep. 146.

[5] Fisher *v.* Williamsport, 1 Pa. Super. Ct. Rep. 386.

[6] Moore *v.* Mayor, 73 N. Y. 238.

[7] Dillon's Munic. Corp'ns (4th ed.), § 453; Norwalk Gas. Lt. Co. *v.* Norwalk (Conn.), 28 Atl. Rep. 32.

[8] Silsby Mfg Co. *v.* Allentown (Pa.), 26 Atl. Rep. 646.

[9] Buffalo *v.* Bettingen, 76 N. Y. 393; Jones *v.* Gilchrist (Tex.), 27 S. W. Rep. 890.

* *See* Sec 689, *infra*

† *See* Sec. 48, *supra.*

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may amount to an adoption of that contract.* Therefore when a committee of a common council employed a builder to prepare plans and specifications for a structure, which they had not the power to do, it was held that an appropriation and use of the plans by the council was a ratification of the committee's act in employing the builder.[1]

Acceptance and occupancy of a public building by a county is not such a ratification as will enable the builder to recover an amount in excess of that appropriated, though caused by changes and additions in the original plan;[2] but if the extra work and materials ordered by a commissioner, under whose direction the work was to be done, are rendered necessary by the action of the city authorities subsequent to the making of the contract, and if without such extra work and materials the contract requirements could not have been fulfilled, then the city is liable.[3] †

Acts of acquiescence do not, as is sometimes carelessly said, ratify an unauthorized contract; but, in the language of the better authorities, they do authorize judges and juries to presume consent or ratification. A man's conduct may be such as, in the light of human experience or of business, accompanies or indicates consent or approval.[4] The use of a structure alone may not be evidence of acceptance, but it may be evidence if accompanied by silence and the absence of complaint, where to complain would be natural and suitable, or if accompanied by circumstances indicating acquiescence.[5] A void contract may be ratified and made binding by the action of the school district in completing the building left unfinished by an absconding contractor; by furnishing the same with seats, desks, and other necessary schoolhouse furniture; by occupying the same for school purposes; and by insuring the same.[6]

If extra work has been done for a corporation with knowledge of the majority of the directors, and upon assurances of one of them that the company will pay for it, and upon the after assurance that there had been a meeting at which the company had in fact agreed to pay it, this is sufficient to raise an obligation on the part of the company to pay for such work as it has received the benefit of, regardless of whether the director had authority to make such assurances or whether he told the truth or not.[7]

558. Engineer's Authority to Order Extras may be Established by Implication, Ratification, or Adoption.—Authority to make changes in the speci-

[1] Peterson *v.* Mayor, 17 N. Y. 449.

[2] Richard *v.* Warren Co., 31 Iowa 381.

[3] Dillon's Munic. Corp'ns (4th ed.) § 451, *note* 1; Messenger *v.* Buffalo, 21 N. Y. 196 [1860]; Board *v.* Newlin (Ind.), 31 N. E. Rep. 465; *and see* Cunningham *v.* Fourth B. C. (Pa.), 28 Atl. Rep. 490; *semble*, Steffin *v.* St. Louis (Mo.) 36 S. W. Rep. 31.

[4] Delafield *v.* Illinois, 26 Wend. (N. Y.) 192; Mayor *v.* Reynolds, 20 Md. 1.

[5] Wilson *v.* School Dist., 32 N. H. 188; *and see* Davis *v* School Dist., 24 Me. 349.

[6] School Dist. *v.* Sullivan (Kan.), 29 Pac. Rep. 1141; *but see* Nichols *v.* State (Tex.), 32 S. W. Rep 452; *and* Reichard *v.* Warren Co., 31 Iowa 381.

[7] Tryon *v.* White & Co., 62 Conn. 161, two justices dissenting; *see also* Cunningham *v.* M. S. & F. C. R. Co., 18 N. Y. Supp. 600 [1892], *and cases cited.*

* *See* Sec. 377, *supra.*

† *See* Secs. 643 and 701, *infra.*

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fications or contract and to order extra work or additional materials may be implied sometimes by reason of the parties' acts or consent, expressed or implied, before or after the order was given. Such authority may be implied from previous orders that have been honored and settled or paid for, or it may be established by a subsequent ratification or adoption by the parties. If an engineer or architect has been allowed on several prior occasions to make similar changes or orders at an extra cost to the contractor, and the owner has, without protest or reservation, paid for such work or materials or delay, then he cannot, in fairness, refuse to pay for a later order or charge without notice to the contractor of an intention not to pay. Such is the law. It was so held when the owner of a building had ratified the acts of his architect as many as seventeen times, in making changes in the plans and specifications, and even when the change in question entailed an extra expense of over $4,000.[1] The fact, however, that the owner has on one occasion paid for work done without proper authority does not create a contract to pay for other unauthorized work ordered by the architect.[2]

The fact that there has been a course of dealing in which the engineer has made purchases and ordered things, and the contractor, acting on the faith of his having proper authority, has supplied work and materials, is sufficient to make the owner or employer responsible for such orders, and neither can abrogate the contract made by the engineer on the ground that he did not possess such authority in fact.[3] The ratification must be fully established, and the mere act of the company taking possession and making use of the works will not amount to a ratification of the engineer's acts or agreements on behalf of the company, in the absence of knowledge on its part of the engineer's promises on its behalf.[4]

If the engineer assumes to act as agent of the owner and makes orders with his knowledge and consent, such knowledge and consent will amount to a ratification and the owner will be bound.[5] The owner must have full knowledge of the material facts concerning the engineer's acts on his behalf, and if with such knowledge he does not disavow them within a reasonable time he will be held to have ratified them.[6] He must have had an opportunity to repudiate or ratify the engineer's unauthorized acts,[7] and the fact

[1] Jackson A. I. Wks. *v.* Rouss, 15 N. Y. Supp. 137.

[2] Sexton *v.* Cook Co., 114 Ill. 174; Starkweather *v.* Goodman, 48 Conn. 101; O'Keefe *v.* St. Francis' Ch., 59 Conn. 551 [1890].

[3] Levy *v.* N. Y. Cent. & H. R. R Co., 24 N. Y. Supp. 124; Mo. Pac. Ry. Co. v. Simons (Tex.), 25 S. W. Rep. 996; *see also* Shinn *v.* Hicks (Tex.), 4 S. W. Rep. 486 [1887]; Smith *v.* Bd. Miami Co. (Ind.), 33 N. E Rep. 243; *and see* Tallman *v.* Kimball (Sup.), 26 N. Y. Supp. 811, *a mechanic.*

[4] Hommersham *v.* Water Works, 6 Exch. 137 [1851]; Woodruff *v.* R. & P. R. Co., 108 N. Y. 39 [1888]; *semble*, Baum *v.* Covert, 62 Miss. 113 [1884]; *and see* Michigan S Co. *v.* Iron Range & H. B. R. Co. (Mich.), 59 N. W. Rep. 646; *and see* Keim *v.* Lindley (N. J.), 30 Atl. Rep. 1063.

[5] Crockett *v.* Chattahoochee B. Co. (Ga.), 21 S. E. Rep. 42; Wallis *v.* Robinson, 3 F. & F. 307.

[6] *Cases collected in* 1 Amer. & Eng. Ency. Law 441.

[7] Williams *v.* Storms, 6 Cold. (Tenn.) 203.

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that he did not instantly repudiate them on being informed is not of itself a ratification.[1] Neglect to give notice of a disavowal does not amount to a ratification unless the party who keeps silent when he ought to speak is benefited or the other party is injured thereby.[2] As to what is a reasonable time must depend upon the circumstances of each case and the conditions in which the parties are placed. It would seem proper that an owner should have time to confer with his architect and get his side of the story. The fact that an owner has received a written statement or bill of extras without objecting at the time will not, it seems, estop him from afterwards, within a reasonable time, making objections to them, or to afterwards deny his architect's authority to order them, it not appearing that the owner had committed any act to induce the contractor to expect or to rely upon his paying for them.[3]

If the unauthorized acts of the engineer are to the advantage or profit of his company, it seems his employer may elect to adopt them or not; and so long as the condition of the parties is unchanged the contractor cannot prevent such acts from being adopted because he prefers to treat the agreement as invalid.[4] It was so held where a city engineer changed the grade of a street that had been fixed by ordinance. The court held that the city might repudiate the act of the engineer or ratify it by adopting the irregular grade, and having done so, no third person as a property owner could intervene to avoid the contract.[5] Part payment of an estimate containing extra work ordered without authority has been held to amount to a ratification.[6]

The fact that the company has paid other claims created by the engineer without authority, but to other parties than the contractor, will not render the company liable to pay *him* for unauthorized work unless the fact had been known to the contractor at the time he did the work, and was a factor in inducing him to believe that the engineer had the necessary authority.[7] To establish the authority of the engineer to hire and discharge his assistants, it may be shown that the person who formerly held the position of engineer had, with the employer's knowledge, hired and discharged his assistants.[8]

It seems that authority to enter into a contract on behalf of a company confers authority to extend the time of performance.[9]

It has been held that a submission to arbitration of a claim for extra

[1] Miller *v.* Excelsior Stone Co., 1 Ill. App. 273; Caswell *v.* Cross, 120 Mass. 545.

[2] Whittemore *v.* Hamilton, 51 Conn. 153, Johnston *v.* Berry, 3 Ill. App. 256.

[3] Starkweather *v.* Goodman, 48 Conn. 101 [1880]; *and see* Sharpe *v.* San P. Ry. Co., 8 Cal. App. 607.

[4] Andrews *v.* Ætna Life Ins. Co., 92 N. Y. 596.

[5] McKnight *v.* Pittsburgh, 91 Pa. St. 273 [1879].

[6] Abells *v.* Syracuse (N. Y. Sup.), 40 N. Y. Supp. 233 [1896], Follett and Green, J.J., *dissenting*.

[7] Vanderwerker *v.* V. C. Ry. Co., 27 Vt. 125 [1854].

[8] White *v.* San Antonio W. W. Co. (Tex.), 29 S. W. Rep. 252.

[9] Locust Mt. W. Co. *v.* Yorgey (Pa.), 13 Atl. Rep. 956 [1888].

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work which had been ordered by a superintendent of the works was a ratification of his agreement to compensate the contractor for the extra work.[1]

559. Liability for Extra Work may be Assumed by a New or Supplemental Agreement. — Liability for extra work is probably most frequently created by the employer or company agreeing or undertaking to regard certain work as extra or to pay the contractor an additional sum or price for its performance when the question is raised as to who shall bear the expense of work not strictly and clearly within the terms of their contract. When the employer has so agreed to pay an extra price, he cannot insist after the work is done that the written contract included it and required the contractor to do it at his own expense.[2] Such an agreement is regarded either as an independent collateral agreement or as an abandonment or waiver of the original contract, or such part of it as the new agreement refers to, and a substitution of the new terms agreed to; more often the latter.[3]

560. Contract Stipulations Modified or Rescinded by Subsequent Agreement.—Evidence of a prior or contemporaneous agreement or understanding between two parties to a contract is not admissible to vary the terms of a written agreement, because it is presumed that the contract contains all the terms of the agreement, but evidence of subsequent agreements modifying, changing, or even rescinding a written agreement is admissible.*

Illustrations are afforded in almost every piece of construction where the parties, acting upon previous understandings, undertake to do certain things in a written contract that they would not have assumed to do if they had realized the worthlessness of their claims for remuneration therefor. An instance is shown in the case where a company had verbally promised the contractor, either at the time the contract was executed or in the preliminary negotiations concerning it, to construct a slope wall against an embankment as his work advanced which would have prevented damage. It was held that the promise could not be shown because of the rule that such parol evidence was inadmissible to control or vary a contract in writing.[4]

The owner of a building which had been erected under a contract and specifications that did not require the builder to do the papering was not allowed to prove an oral agreement made at the time of the written contract that $50 should be deducted from the contract price in consequence of the omission of the papering.[5]

[1] Jones *v.* Gilchrist (Tex.), 27 S. W. Rep. 890; *see also* Davis *v.* Ford (Md.), 32 Atl. Rep. 280.

[2] Stewart *v.* Ketcltas, 9 Bosw. (N. Y.), 261 [1862].

[3] Lynch *v.* Henry (Wis.), 44 N. W. Rep. 837; *see also* Osborne *v.* O'Reilly (N J.), 9 Atl. Rep. 209 [1887]; Ruegge *v.* Gates (Wis.), 38 N. W. Rep. 181 [1888]; Brown *v.* Everhard, 52 Wis. 205; *but see* Chicago & Gt. E. R. Co. *v.* Vosburg, 45 Ill. 311; McGraw *v.* P. & L. E. R. Co., 2 Cent. Rep. 565.

[4] Boyle *v.* Agawam Canal Co., 22 Pick. (Mass.), 381 [1839].

[5] McGuinness *v.* Shannon (Mass.), 27 N. E. Rep. 881 [1891]; *see also to the same effect* Hills *v.* Rix (Minn.), 46 N. W. Rep.

* *See* Chap. V, Secs. 122–131, *supra.*

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561. Simple Contracts and Those Under Seal may be Changed by Parol.—If the contract is written but not sealed, and it is not one which the law requires shall be executed in writing, the parties themselves may, at any time before it is performed, by mutual consent, agree orally either to waive, dissolve, rescind, or annul the original contract or in any manner agree to amend, add to, or subtract from, or change or qualify the terms of the former agreement.[1] *

By the common-law contracts under seal could not be modified, waived, or discharged by a new parol agreement; but to-day in England and in the United States, where the new procedure prevails, and where the use of private seals is abolished, an executory sealed contract may be modified, discharged, or rescinded by a subsequent parol agreement founded upon a sufficient consideration.[2] By ignoring this rule of the common law the chief object of executing a contract under seal has been frittered away. A contract under seal was an instrument of a higher dignity than a simple agreement, and it could be changed, released, or rescinded at law only by an instrument equally ceremonious and important. A court of equity was not bound by the same rules as a court of law, and in it the rule was otherwise, and where the jurisdictions of law and equity are blended and an equitable defense can be interposed a parol release of a sealed contract will be respected.[3] The tendency throughout the United States is to apply the same rule to sealed instruments that is applicable to simple instruments. In many cases it is held that the new parol agreement must have been carried out in full in order to discharge the former sealed contract;[4] that the agreement must be executed or have been followed by actual performance. The ground of these decisions is probably that the parol contract is lacking a consideration if there has been no performance.[5] It is frequently held in construction contracts where the undertaking to make changes or furnish

297; Bupp *v.* O'Connor (Tex.), 21 S. W. Rep. 619; *but see too* Pishkos *v.* Wortek (Tex.), 18 S. W. Rep. 798; Thomas *v.* Hunt (N. Y.), 3 Transp. App. 191 [1867].

[1] 28 Amer. & Eng. Ency. Law 587; *cases in* 17 Amer. & Eng. Ency. Law 447, *note;* Badders *v.* Davis, 88 Ala. 367 [1889]; Bartlet *v.* Stanchfield, 148 Mass. 394 [1889]; O'Donnell *v.* Clinton, 145 Mass. 461; Bishop *v.* Busse, 69 Ill. 403; McGran *v.* N. Lebanon R. Co., 29 Pa. St. 82; Toledo S. L. & K. R. Co. *v.* Levy (Ind.), 26 N. E. Rep. 773 [1891]; Greene *v.* Paul, 155 Pa. St. 126; West *v.* Platt, 127 Mass. 367; Onderdonk *v.* Gray, 19 N. J. Eq. 65; Maher *v.* Davis, etc., Co. (Wis.), 57 N. W. Rep. 357; West Haven W. Co. *v.* Redfield, 58 Conn. 39; Baum *v.* Covert, 62 Miss. 113 [1884]; Fitzgerald *v.* Fitzgerald Constn. Co. (Neb.), 59 N. W. Rep. 838; Groffam *v.* Pierce, 143 Mass. 386; O'Brien *v.* Fowler (Md.), 11 Atl. Rep. 174 [1888]; Kalman *v.* Baylis, 17 Cal. 291; McCreery *v.* Day, 119 N. Y. 1; Robinson *v.* Hyer (Fla.), 17 So. Rep. 745; *and see cases under seal which have been varied by parol,* McCreery *v.* Day, *supra;* Badders *v.* Davis, *supra;* Cook *v.* Murphy, 70 Ill. 96; Randel *v.* Chesapeake & D. C. Co., 1 Harrington 233 [1833], Morrill *v.* Colehour, 82 Ill. 618.

[2] *Cases collected in* Amer. & Eng. Ency. Law, vol. 3, p. 890; vol. 20, p. 742; vol. 21, p. 68; vol. 28, 539.

[3] McCreery *v.* Day, 119 N. Y. 1.

[4] McCreery *v.* Day, *supra;* Voege *v.* Ronalds, 31 N. Y. Supp. 353; Sigourney *v.* Sibley, 21 Pick. (Mass.) 101; Monroe *v.* Perkins, 9 Pick. (Mass.) 298 [1830]; Benson *v.* Shotwell (Cal.), 37 Pac. Rep. 147.

[5] Hasbrouck *v.* Winkler, 48 N. J. Law 431; Albert *v.* Ziegler, 29 Pa. St. 50.

* *See* Secs. 130–131, *supra.*

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extras is the consideration for the parol agreement to pay additional compensation, that a sealed instrument may be modified or rescinded by parol.[1]

562. The Agreement to Waive or Rescind should be Supported upon a Sufficient Consideration.—Without doubt a contract to waive, dissolve, rescind, or annul a contract in writing or under seal, or to in any manner alter, add to, or subtract from, or qualify its terms requires a consideration to support it as much as does any other contract.[2] If no consideration passes at the time the contract is made—*i.e.*, if nothing is paid to induce the owner to consent to the changes proposed, and it is not clearly proven that the agreement was bilateral, a mutual exchange of promises—then the consideration must be the performance of the work required by the alterations, and until the contractor has performed such work he cannot demand compensation therefor. It has been held that the original consideration may be imported into the oral agreement,[3] and that no consideration was necessary; but at best such decisions must be regarded as doubtful law, and they have not been followed.[4]

Where the agreement to vary or rescind is mutual between the parties, the consideration for the promise of either party is the renunciation by the other party of his rights under the contract. Each party abandons his rights in consideration that the other party will do likewise.[5] If the contract has been executed and wholly performed on one side as by the contractor, then the owner no longer has any such rights to forego, and the contract cannot be rescinded by a simple agreement unless it is founded upon some new consideration, which would amount to an accord and satisfaction.[6] If the change is entirely on one side—*i.e.*, imposes new obligation upon only one party only—it will not hold unless the contract has been rescinded, for it lacks the necessary consideration.[7]

So in case of a breach of the original contract, the rights of either party may have been destroyed, so that the consideration would be wanting.[8] If the change be followed by actual performance of the substituted agreement it will hold, whether made before or after breach of the original contract.[9] *

563. Consideration may be Founded upon a Claim.—As there are no degrees of validity in valuable considerations, it follows that almost any pretense to a claim will be a good consideration, whether the claim would

[1] *See cases in* 3 Amer. & Eng. Ency. Law 891; *and* Hallenbeck *v.* Kindred (N. Y.), 15 N. E. Rep. 887 [1888].

[2] Amer. & Eng. Ency. Law, vol. 20, p. 744; vol. 21, pp. 69, 70; vol. 28, p. 538.

[3] Lynch *v.* Henry, 75 Wis. 631.

[4] Eq. L. Assur. Soc. *v.* Smith, 25 Ill. App. 471; Brown *v.* Catawba Riv. Lumb. Co. (N. C.), 23 S. E. Rep. 253.

[5] Brown *v.* Catawba Riv. Lumb. Co., *supra;* 21 Amer. & Eng. Ency. Law 69, *and* vol. 3, p. 889.

[6] *See* Foster *v.* Dawber, 6 Exch. 839; Hill *v.* Smith, 34 Vt. 535; McCormick Harv. M. Co. *v.* Wilson (Minn.), 40 N. W. 571 [1889], *and cases cited.*

[7] 3 Amer. & Eng. Ency. Law 890.

[8] *Semble*, 28 Amer. & Eng. Ency. Law 537.

[9] McCreeder *v* Day, 119 N. Y. 1; McClay *v.* Gluck (Minn.), 40 N. W. Rep. 875 [1889].

* *See* Secs. 69 and 122-131, *supra.*

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have been successful or not.[1] The contractor, when he finds he is not making any money on a job, may under the plea of misrepresentations or some other frivolous pretense refuse to proceed with the work, or threaten to rescind the contract; and if the owner or principal contractor promise additional compensation under such circumstances, it will be supported upon the claim as a consideration.[2] So when a contractor claimed that he had made a mistake of $500 in his estimate of the cost and price of a building which he was under contract to erect, whereupon the owner verbally agreed to pay him $500 in addition to the contract price, it was held that the new and subsequent agreement was founded upon sufficient consideration, and was therefore binding on the owner;[3] and when a contractor has undertaken to do work which turned out to be different and much more difficult than was expected, and he had given notice to the company that he could not carry out his undertaking at the price agreed upon, and had quit work, and the company, to induce him to complete the work, promised to pay him additional compensation for his work, it was held that the company were bound to pay the extra price.[4]

There are cases to the contrary which hold that the contractor by performing his work has done no more than he was obliged to do by the original contract, and that, therefore, it could not be a consideration for a new and subsequent agreement.[5]* It was, therefore, held in New York that when a party was under contract to do work for another for $1000, a subsequent agreement to pay $1500 for the same work was as barren of consideration as a promise to pay a man for doing nothing at all.[6] These cases maintain that when a contractor is bound by his written contract to do certain work, a promise to pay extra compensation for the same work is not binding as a legal contract. It was so held when a contractor had been promised extra pay for hard-pan excavations, which the court held were included in earth excavations.[7] A promise to pay additional compensation to the contractor if he will refrain from an intended breach of the contract has been held without consideration.[8]

[1] Carter White Ld. Co. *v.* Kivlin (Neb.), 66 N. W. Rep. 536; Dovale *v.* Ackerman (Sup.) 37 N. Y. Supp. 959; 3 Amer. & Eng. Ency. Law 837.

[2] Osborne *v.* O'Reilly, 42 N J. Eq. 467 [1887]; Cook *v.* Murphy, 70 Ill. 96; Munroe *v.* Perkins, 9 Pick. (Mass.) 298; Hart *v.* Lauman, 29 Barb. (N. Y.) 410; *and cases cited in* 3 Amer. & Eng. Ency. Law 891; *and see* Watkins *v.* Hodges, 6 Har. & J. (Md.) 45; McHenry *v.* Brown (Minn.), 68 N W. Rep. 847.

[3] Cook *v.* Murphy, 70 Ill. 96 [1873].

[4] Hart *v.* Lauman, 21 Barb. (N. Y.) 410; Osborne *v.* O'Reilly, *supra;* Holmes *v.* Doane, 9 Cush. 135; Wilgus *v.* Whitehead, 6 W. N. of C. 537; Munroe *v.* Perkins, 9 Pick. (Mass.) 298 [1830].

[5] 3 Amer. & Eng. Ency. Law 891, note 1.

[6] Seybolt *v.* N. Y., L. E. & W. R. Co., 95 N. Y. 562.

[7] Nesbitt *v.* Louisville, C. & C. R. Co. (S. C.), 2 Spears 697; *and see* Colcock & Co. *v.* L., C. & C. R. Co., 1 Strob. (S. C.), 329; Morril *v.* Colehour, 82 Ill. 618; Widiman *v.* Brown (Mich.), 47 N. W. Rep 231 [1890]; Fitzgerald *v.* Fitzgerald & M. C. Co. (Neb.), 59 N. W. Rep. 838; McCarty *v.* The Hampton Bldg. Assn., 61 Ia. 287 [1883].

[8] King *v.* Duluth, M. & N. Ry. Co (Minn.), 63 N. W. Rep. 1105.

* *See* Sec. 66, *supra*, and 574, *infra*.

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The cases cannot be reconciled, but in every contract a consideration must be found, and whether a court will discover a consideration in any particular case will depend probably upon the precedents already established in that jurisdiction and upon the circumstances attending the case in hand.

There is no doubt but that a good-faith compromise of a real claim is a good consideration for a contract. The law favors the settlement of controversies, and will find a consideration for the agreement to settle such claims in the mutual agreements of the parties to abide the result of the compromise.[1] The claim must be such a one as can reasonably be regarded as serious, and the parties must believe that it is a good claim. If the party knows or ought to know that the claim has no foundation it will not be a sufficient consideration.[2] The trouble is, in a construction contract a court cannot determine whether a claim made by a contractor on account of misrepresentations, mistakes, etc., has any valid ground or not unless he puts the matter to trial. The proper way to avoid the question is to make no promises except such as are to be performed for a consideration, and to enter them upon the contract in the manner prescribed in it.

564. The Owner, City or Company may by Express Agreement on Its Part become Liable for Extra Work, though Not Ordered in Writing.—From what precedes it is evident that when a contract provides that no extra work is to be paid for except by contract in writing, the parties may verbally rescind this provision and agree to alterations.[3] It has been held even that a written contract may be modified by a subsequent verbal agreement, though the contract recites that no modifications shall be made, except in writing.[4]

Every effort should be made by the company and engineer to preserve the contract intact, to meet its obligations, and perform its part of the contract to the letter, and to give the contractor no opportunity to escape its binding force. If the agreement is mutual between the parties, they may by mutual consent verbally rescind any of its stipulations, and enter into a new or subsequent oral agreement as to changes, alterations, or extras.[5] Whether the agreement was rescinded or not depends upon the intention of the parties, which is a question for the jury to determine [6] from the conduct of the parties and all the circumstances.[7] The parol agreement to rescind may even be inferred from the acts and declarations of the parties.[8]

[1] Richardson & Co. *v* Hampton (Ia.), 31 N. W. Rep. 871.

[2] *See cases collected* 3 Amer. & Eng. Ency. Law 838; Read *v.* Hutchins, 71 Me. 590 [1880].

[3] McFadden *v.* O'Donnell, 18 Cal. 160 [1861]; Lewis *v.* Yagel, 77 Hun (N. Y.), 337, *and other cases supra*; Close *v.* Clark (Com. Pl.), 9 N. Y. Supp. 538; Trustees *v.* Platt, 5 Bradw. 567; Ford *v.* United States, 17 Ct. of Cl 60; Donlin *v.* Daegling, 80 Ill. 608; Bartlett *v.* Stanchfield, 148 Mass. 394; Condon *v.* Jersey City, 14 Vroom 452; *and see* Hogan *v.* Burton (Sup.), 7 N. Y. Supp. 722; Clark *v.* Pope, 70 Ill. 128; Rude *v.* Mitchell, 97 Mo. 365; Porter *v.* Swan, 17 N. Y. Supp. 351.

[4] A. J Anderson E. Co. *v.* Cleburne W., I. & L. Co. (Tex.), 27 S W. Rep. 504

[5] Morrill *v.* Colehour, 82 Ill. 618; Cook *v.* Murphy, 70 Ill. 96; Kelman *v* Baylis, 17 Cal. 291; McFadden *v.* O'Donnell, 18 Cal. 160 [1861].

[6] Nob'e *v.* Ward, L. R. 2 Exch. 135; 5 B. & A. 65; Blount *v.* Guthrie (N. C.), 5 S. E. Rep. 890.

[7] *See* Musselbach *v.* Norman, 122 N. Y. 578.

[8] Chanteau *v.* Jupiter I. W'ks (Mo.), 7

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It is not necessary that the written contract be expressly annulled, that the owner may render himself liable for extras ordered orally. If he neglect to give a written order for the extra work, but expressly agrees to pay for it as extra work, the contractor may recover upon the subsequent promise so made, although it seems he cannot recover for it in an action on the written contract.[1]

565. The Stipulation for a Written Order may be Waived.—The stipulation for a written order may be waived by the parties, and changed by a parol agreement or a verbal order;[2] and it is error to exclude evidence offered of a verbal request for additions and a verbal promise to pay therefor on the part of the owner.[3] Such evidence should go to the jury on a question of waiver of the stipulation that no charge should be made for extras unless ordered in writing and the price thereof agreed upon.[4]

566. The Order must be More than a Mere Request that the Work be Done.—A contractor who intends to rely upon the abandonment of the written agreement or its rescission, and the substitution of a parol contract, should ask the court to submit the question of the abandonment and substitution to the jury, and must prove it to their satisfaction,[5] and proof that extra work was done at the request, or with the knowledge and consent, express or implied, of the owner, will not alone entitle the contractor to recover, without the owner has waived the written order required by the contract, or has made an independent promise to pay for it.[6] When alterations and changes are merely assented to, and there is no agreement as to their value or cost, the presumption is that no increased cost was contemplated.[7] The mere fact of assenting to extras should not deprive an owner of the protection of his contract, and render him liable to extra charges.[8]

The owner must have been expressly informed, or must necessarily have known from the nature of the work that the alterations would increase the expense.[9] No recovery can be had for extra work and materials unless fur-

S. W. Rep. 467 [1886]; Blount *v.* Guthrie (N. C.). 5 S. E Rep. 890.

[1] O'Brien *v.* Fowler (Md.), 11 Atl. Rep. 174 [1888]; Badders *v.* Davis, 88 Ala. 367 [1889]; Davis *v.* Badders (Ala.), 10 So. Rep. 422.

[2] McLeod *v.* Genius, 31 Neb. 1 [1890]; Erskine *v.* Johnson, 23 Neb. 261 [1888]; Porter *v.* Swan, 17 N. Y. Supp. 351; Abells *v.* Syracuse (Sup.), 40 N. Y. Supp. 233; Elgin *v.* Joslyn, 36 Ill. App. 301; *and see* Illinois Inst. *v.* Platt, 5 Ill. App. 567; Ahern *v.* Boyce, 19 Mo. App. 552; Baltimore Cem. Co. *v.* Coburn, 7 Md. 202; Kirk *v.* Bromley Union, 17 L. J. Ch. (N. S.) 127.

[3] Porter *v.* Swan, 17 N. Y. Supp. 351; Demarest *v.* Haide, 52 N. Y. Super. Ct. 398; Lange *v.* Johnson (Wis.), 57 N. W. Rep. 1109.

[4] Bartlet *v.* Stanchfield, 148 Mass. 394 [1889]; Mowry *v.* Starbuck, 4 Cal. 274; *see* Mulholland *v.* New York, 20 N. E. Rep. 856 [1889]; *and* Truckee Lodge *v.* Wood, 14 Nev. 293.

[5] Flood *v.* Morrisey, 4 Pugsley & B. (N. B.) 5 [1880]; Maas *v.* Hernandez (La.), 19 So. Rep. 269.

[6] Wortman *v.* Kleinschmidt (Mont.), 30 Pac. Rep. 280; Abbott *v.* Gatch, 13 Md. 314; Beswick *v* Platt (Pa.), 21 Atl. Rep. 306; Dobson *v.* Hudson, 1 C. B. (N. S.) 659; *but see* Moran *v.* Schmitt (Mich.), 67 N. W Rep. 328; Baum *v.* Covert, 62 Miss. 113; Cannon *v.* Wildman, 28 Conn. 491.

[7] Badders *v.* Davis, 88 Ala. 367 [1889]; Bryant *v.* Stillwell, 24 Pa. St. 314; Jones *v.* Woodbury, 11 Monroe 167 [1850]; Lovelock *v.* King, 1 Moody & R. 60.

[8] Lovelock *v.* King, 1 Moody & R. 60; Trustees *v.* Bledsoe, 5 Ind. 133; Wilmot *v.* Smith C. & P. 453.

[9] Lovelock *v.* King, 1 Moody & R. 60.

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nished at the request of the owner;[1] and the request must have been made with knowledge or imputed knowledge that the work was not comprehended in the written contract and that the cost would be increased thereby.[2]

When a structure is being built for a fixed price, recovery cannot be had for extra work merely by proving that the work was done at the owner's request, and that it was accepted when finished; such a request has been held to be merely a notice that the contract called for the work.[3] The mere oral directions or suggestions of the employer or owner to do increased work will not sustain a claim for extra work, unless a new contract is proven.[4] If a contractor has undertaken to erect a structure according to plans, and agrees afterwards to changes, but makes no arrangements as to a new or different price, his recovery will be confined to the original contract price. If the changes require extra work and material, it will be presumed that they were included in the price agreed upon in the contract, or were done at the same rate.[5]

If the parties have proceeded with the work without any regard to the stipulation for a written order for extras they will be held to have waived it.[6] The acts of the parties must not be inconsistent with terms of the written agreement,[7] but the fact that parties have had dealings that were inconsistent with the contract, and have substituted such dealings for the provisions of their contract, will not bind them to the substituted acts when it appears to have been done through a mistake or misunderstanding of the terms of their agreement, and that they mutually abandoned such a course and conformed to the terms of their written contract when they discovered their departure from its provisions.[8] A request and an oral promise to pay for the extra work done, are strong evidence of a waiver of the requirements of the contract as to written orders, and of the substitution of an oral contract in its stead resting upon sufficient consideration.[9]

567. Knowledge of Owner that Contractor is Doing Work as Extra Work, a Strong Factor in Determining the Responsibility.—The cases have gone so far as to hold that if the contractor had a right, or good and sufficient reasons, to understand that the owner expressed a consent to be liable, irrespective of the written contract, and furnished the work and materials on that understanding, the owner is bound to pay for it.[10] If the owner knows

[1] Springdale C. A. *v.* Smith, 32 Ill. 252 [1863].

[2] Bett *v.* Cook, 3 Cranch C. Ct. 666 [1829]: *semble*. Thorn *v.* Roman (Ala.), 7 So. Rep. 428 [1890]; Johnson *v.* Weston, 1 F. & F. 693 [1860]; Bartholomew *v.* Jackson, 20 Johns (N. Y.) 28.

[3] Collyer *v.* Collins, 17 Abb. Pr. 467.

[4] *See* Simpson *v.* New York, etc., R. Co., 51 N. Y. Super. Ct 419; Franklin *v.* Darke, 3 F. & F. 65; Thorn *v.* Roman (Ala.), 7 So Rep. 428 [1890].

[5] Chicago & Gt E. R. R. Co. *v.* Vosburgh, 45 Ill. 311.

[6] Meyer *v.* Berlandi (Minn.) 54 N. W. Rep. 937; Baumister *v.* Patty's Execs., 35 Wis. 217 [1874].

[7] Quinn *v.* Parke, etc., Co. (Wash.), 37 Pac. Rep 288.

[8] Howard *v.* Pensacola & A. R. Co , 5 So. Rep. 356.

[9] Bartlett *v* Stanchfield, 148 Mass. 394 [1889]: McLeod *v.* Genius (Neb.), 47 N. W. Rep. 473 [1890]; Ford *v.* United States, 17 Ct. of Cl. 60.

[10] West *v.* Platt. 127 Mass. 367; O'Donnell *v* Clinton, 145 Mass. 461 ; Clark *v.* Smith, 14 Johns. (N. Y.) 324 ; Lovelock *v.* King,

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that the contractor will charge extra for work he is doing, and assents to the same, and permits him to perform the work without objection, he will be liable for it, and will be taken to have waived a stipulation forbidding extra work without a written order.[1] If the contractor has rendered an estimate of cost of certain extras, alterations, etc., and subsequent to receiving it the owner orders the same, he will be held liable for the price thereof according to the estimate.[2]* In another case it was held that when a company had stood by and seen work performed, it would be held to have assented to it; that to thus desire or permit their engineer to order alterations and additions, and to stand by and see expenditures going on, and to take the benefit of those expenditures, and then to refuse payment therefor on the ground that the expenditures were incurred without proper orders having been given for the purpose, would be a fraud on the part of the company for which it would be answerable to the jurisdiction of a court of equity.[3] So when it was shown that during the progress of a building a process was ordered by the architect that was more expensive than that required by the contract, and the order was given in the presence of and with the knowledge of the owner, and the builder's subcontractor was told that it was to be extra work, it was declared sufficient evidence of an agreement to pay extra compensation for it, and of authority to the architect to make the contract with him.[4] An early Maryland case seems to have adopted a similar rule by deciding that if alterations were made with the consent or by the order of the owner they were chargeable to him, though he would not be liable for changes directed by a joint owner, with whom he was to pay pro rata for his share.[5] To the same effect is a New Hampshire case, which held that if the contractor deviate from the contract, and the company acquiesce with notice and allow the contractor to proceed with the work, the contractor might recover on a *quantum meruit*.[6] Another case holds that mere knowledge of the owner that extra work is being done without objection on his part does not imply a contract on his part to pay for it, yet it is evidence competent to be given to a jury tending to prove that there was an agreement that the extra work should be paid for by the owner.[7]

If the architect has testified that the owner had expressly ordered the items for which he claims extra pay, it will be sufficient to sustain the finding of a referee in favor of the claim, although the contractor did admit

1 Moody & R. 60; Rees *v.* Lines, 8 Car. & P. 126

[1] McLeod *v.* Genius (Neb.), 47 N. W. Rep. 473 [1890]; Cooper *v.* United States, 8 Ct. of Cl. 199; Bartholomew *v.* Jackson, 20 Johns. (N. Y.) 28.

[2] McCormick *v.* Connolly, 2 Bay (S. C.) 401.

[3] Hill *v.* So. Staffordshire Ry. Co., 11 Jurist (N. S.) 192 [1865]; *semble*, Yeisley *v.* Bundel (Pa.), 15 Atl. Rep. 854 [1888].

[4] Wallis *v.* Robinson, 3 F. & F 907; *accord* Jones *v* Woodbury, 11 B. Mon. (Ky.) 172; Childress *v.* Smith (Tex.), 37 S. W. Rep. 1076.

[5] Berry *v.* Thompson, 6 H. & J. 89.

[6] Bailey *v.* Woods, 17 N. H. 365.

[7] Belt *v* Cook, 3 Cranch C. Ct. 666 [1829].

* *See* Sec. 580, *infra*.

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that without these extras the work would not have been well done, as this did not show that they were necessary to the completion of his contract.[1] If the owner had ordered extra work, outside of and additional to the work covered by the written contract, and no price was fixed by the contract or was agreed upon at the time of the order, the contractor may recover what it is reasonably worth.[2] When changes had been made in the plans and dimensions of work by the principal contractor and architect unbeknown to the subcontractor until after the work was done, it was held that the latter was entitled to recover for the extra work required by the change without a written order.[3]

568. If Amount of Work or Materials is Reduced by Changes.—If the changes, on the other hand, have reduced the amount of work called for, they have been held a good answer on the part of the company to a complaint for services and materials furnished under a specific contract.[4] A Connecticut case, in which a builder, by consent or request of the owner, substituted a cheaper material than was required by the contract, no reduction being agreed to or demanded at the time, it was held that no reduction in the contract price should be made, but that the owner should pay the full amount.[5]

569. If the Work be Plainly and Clearly Outside of the Contract, the Contractor may Recover Extra Compensation Therefor.—If the work done were wholly independent of the written contract and has been ordered and accepted by the owner, he must pay for it.[6] In such case it cannot be called an addition or be classed as extra work within the meaning or requirements of the original contract, but in legal phraseology may be entirely *dehors* the contract, being so foreign to it as to amount to a new agreement, in which a written order will not be necessary, but the builder be entitled to maintain an action on the new or an implied agreement,[7] as for additional work in removing obstacles unknown to the parties when the contract was made,[8]

[1] Cassidy *v.* Fontham, 14 N. Y. Supp. 151.

[2] Baum *v.* Covert, 62 Miss. 113 [1884]; O'Brien *v.* Fowler (Md.), 11 Atl. Rep. 174 [1888]. That an owner may by his conduct be estopped from enforcing the provision against a contractor who has relied and acted on his conduct, *see* Duner *v.* Steubing, 120 N. Y. 232 [1890]; Baum *v.* Covert, 62 Miss. 113 [1884]; Rhodes *v.* Thomas (Ind.), 3 Carter 638; Smith *v.* Gugerty, 4 Barb. 614; Holloway *v.* Frick (Pa.), 24 Atl. Rep. 201.

[3] Fitzgerald *v.* Beers, 31 Mo. App. 356.

[4] Everroad *v.* Schwartzkopf (Ind.), 23 N. E. Rep. 969.

[5] Brabazon *v.* Seymour, 42 Conn. 555; *accord*, Kingsley *v.* Brooklyn, 78 N. Y. 200, where shorter piles were driven than were specified; *but see* Trustees *v.* Platt, 5 Bradw. 567.

[6] Chambers *v.* King, 8 Mo. 517; Boody *v.* R. & B. R. Co., 24 Vt. 660; Stewart *v.* Ketaltas, 9 Bosw. (N. Y.) 261 [1862]; McCormick *v.* Connolly, 2 Bay (S. C.) 401; Escott *v.* White, 10 Bush. (Ky.) 169; Andrews *v.* Lawrence, 19 C. B. (N. S.) 768; Dubois *v.* Delaware, etc., C. Co., 12 Wend. (N. Y.) 334; Hasbrouck *v.* Milwaukee, 21 Wis. 217; *and see* Owens *v.* Butler Co., 40 Iowa 190; Duncan *v.* The Board, 19 Ind. 154; Mowry *v.* Starbuck, 4 Cal. 274.

[7] Emden's Law of Building, etc., 219, *and references;* Busse *v.* Agnew, 10 Ill. App. 527.

[8] Michaud *v.* McGregor (Minn.), 63 N. W. Rep. 479; *and see* Wood *v* Fort Wayne, 119 U. S. 312 [1886]; Ford *v.* United States, 17 Ct of Cl. 60; Palmer *v.* Stockwell, 9 Gray 237; St. John *v.* Potter, 19 N. Y. Supp. 230; Lee *v.* Brayton (R.

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or for work required to tear down and rebuild an important part of structure properly erected.[1] *

The work must be clearly beyond or outside of the contract, and done under a subsequent or antecedent direction in the same manner as if no written contract had been entered into.[2] If the work is not under the contract at all, its value cannot be recovered in an action on the contract;[3] but whatever the action, the work must be positively shown to be entirely separate and outside of the contract, and that it was done under orders distinct from it. This can scarcely be done without the production of the contract itself, to show how much it comprised.[4] Other cases maintain that the work must have been expressly authorized by the owner, or that it was so distinct from the work required by the contract that the contractor might recover for it under a contract implied from its acceptance and use.[5] The pleadings should show that the extra work was expressly authorized by the owner or that it was not included in the contract.[6] The claim for extra work must stand upon its own merits, as if the special contract did not exist.[7] When the extra work was absolutely necessary to the successful prosecution of the undertaking, it was held that the owner was liable for its cost.[8] Therefore, when a price was named in the contract for earth excavations, and an additional compensation was fixed for rock excavations, it was held that no extra pay could be recovered for hard-pan excavations. That if extra work was claimed on a *quantum meruit* it must be shown that the work was not included in the contract.[9]

In general, therefore, the question whether work is extra work and outside of the contract can be decided only by referring to the written contract, which must be produced in support of the contractor's claims for additional compensation,[10] besides proving a separate and distinct contract with the owner or company to do the work sued for;[11] but if the order or agreement be collateral to the written agreement—as, for example, if it be clearly shown that while certain work was in progress under a contract for the inside work of a

I.), 26 Atl Rep. 256; Abells *v.* Syracuse (Sup.), 40 N. Y. Supp. 283.

[1] Board *v* O'Connor (Ind.), 35 N. E. Rep. 1006; Fay *v.* Muhlker (Com. Pl.), 20 N. Y. Supp 671.

[2] Emden's Law of Building, etc., 219 *and English cases cited.*

[3] Hinkle *v.* San Francisco, etc., R. Co., 55 Cal. 627.

[4] Emden's Law of Building, etc., 219.

[5] Duncan *v.* The Board, 19 Ind. 154; Belt *v* Cook, 3 Cranch C. Ct. 666 [1829]; *and see* Jemmison *v.* Gray, 29 Iowa 537; McCormick *v.* Connelly, 2 Bay (S. C.) 401.

[6] Duncan *v.* The Board, 19 Ind. 154; Jeans *v.* Bolton (Super.), 24 N. Y. Supp. 916.

[7] Thornton *v.* Place, 1 Wood & R. 218; Fletcher *v.* Gillespie, 3 Bing. 637.

[8] Seymour *v.* Long Dock Co., 5 C. E. Green (N. J.) 397; *but see* Williams *v.* Fitzmaurice, 3 H. & N. 844.

[9] Nesbitt *v.* Louisville, C. & C. R. Co., 2 Spears (S. C.) 697; *see also* Drhew *v.* Altoona, 121 Pa. St. 401–421.

[10] Leake's Digest of Contracts p. 178; Buxton *v.* Cornish, 12 M. & W. 426; Edie *v.* Kingsford, 14 C. B. 759; Roscoe's Digest of Bldg. Cases 36, *and cases cited;* Emden's Law of Building, etc., 222; Vincent *v.* Cole, M. & M. 257 [1828].

[11] Eccles *v.* Southern, 3 F. & F. 142.

* *See* Sec. 584, *infra.*

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building, verbal orders were given for the execution of alterations and improvements on the outside of the building—the contract need not be produced to support a claim for compensation for the work.[1] If it be not positively shown that the work was entirely separate from that included in the written contract, and was in fact done under a distinct order, the contractor must produce his original contract, since it may throw some light, not only as to whether the items sought to be recovered for were included in it, but also as to the rate upon which the parties had agreed.[2] It seems it is not necessary to furnish the plans and specifications in order to have a witness testify as to the value of the extra work.[3]

The burden of proving that certain work was extra work,[4] or that it was entirely outside the contract,[5] is on the party affirming it to be so, usually the contractor.[6]

570. Effects of Alterations and Changes.—The most perplexing cases, and probably those that have wrought the greatest hardships and injustice to contractors and builders, are those in which extra work has been caused by alterations and changes by which the work has been increased in quantity, or if not made greater it has been made more difficult, or the more profitable and easier portion of it omitted. When such changes have been made the question whether or not the contractor is entitled to extra compensation is often a difficult problem. Before considering this question it may be well to consider the effect of alterations and changes on the contract.

571. Provision Limiting the Effect of Alterations on the Original Contract.

> Clause: "And it is also agreed and understood that such alterations, omissions, or additions shall in nowise affect, vitiate, or make void this contract or any part thereof, except what is necessarily affected by such changes, and is clearly the evident intention of the parties hereto."

The necessity of this clause will not be very apparent from what follows, and it is frequently omitted; but as an extra safeguard it may be used especially in those jurisdictions where the effect of changes is not well established by law.

572. Effect of Changes when No Rights to Make Alterations have been Reserved—Changes which do Not Destroy the Original Contract.—A question that has no doubt often occurred to contractors in their work is, "to what extent a company or its engineer can change, add to, or omit from the contract, and yet require the contractor to execute it in matter and form." There are two circumstances and conditions under which changes, additions,

[1] A retaining-wall for an embankment has been held extra work under a contract to grade a street. Abells *v.* Syracuse (Sup.), 40 N. Y. Supp. 233.

[2] Emden's Law of Building, etc., 222, *and English cases cited; see* Weber *v.* Hauke, 4 Mich. 193 [1856].

[3] Weber *v.* Hauke, *supra; and* Abells *v.* Syracuse (Sup.) 40 N. Y. Supp. 233.

[4] Dickinson *v.* Prince, 61 Ill. App. 385.

[5] Howard *v.* Gobel, 62 Ill. App. 497.

[6] Buxton *v.* Cornish, 1 D. & L. 581; Vincent *v.* Cole, Moody & M. 257.

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or omissions may be made, viz.: (1) Under a mutual agreement between the parties when those parts of the contract which conflict with the new agreement are mutually rescinded or annulled; (2) under an express stipulation of the contract by which power has been reserved to the owner or his engineer to make changes.

When no power has been reserved to make alterations, ordinary stipulations and provisions such as are required by the conditions that arise in construction work may be added to an original contract without varying or abrogating its conditions.[1] A special and subsequent agreement for extra work will not amount to an abandonment of the original contract[2] so as to allow a general action for all the work regardless of the prices fixed by the contract.[3]

If the deviations from the original plan have been made by mutual consent of the parties, but the conditions and stipulations of the original contract have been respected, such as those fixing the times and amounts of payments, and no new express contract was entered into, the contractor cannot regard the original contract as rescinded and recover for what his work is reasonably worth, though he may be allowed to recover for the extra work and extra materials furnished, upon a *quantum meruit*.[4] If no price was agreed upon for the extra work a recovery can be had for it on a *quantum meruit*.[5] Nor will the omission of certain items by consent of both parties amount to a rescission of the entire contract. The remainder of the contract will remain in full force.[6]

Stipulations and provisions may be waived by the parties without destroying the other conditions and stipulations of the contract. It was so held when a contractor had received monthly estimates of work done and gave receipts therefor, as under the contract, after alterations had been made, thus treating the contract as subsisting. The court held he could not thereafter avail himself of such changes and recover upon a *quantum meruit*, ignoring the contract.[7] If contractors are permitted to continue and complete works which have not been finished within the time specified in the contract, the owner will be held to have waived this condition, but such a waiver does not destroy the other conditions, but leaves them intact.[8]

[1] Andre *v.* Bodman, 13 Md. 241; Adams *v* Nichols, 19 Pick. 275; White *v.* Soto, 82 Cal. 654; McFadden *v.* O'Donnell, 18 Cal 160; McKinney *v.* Springer, 3 Ind. 59; Cook *v.* Murphy, 70 Ill. 96; Morrill *v.* Colehour, 82 Ill. 618.

[2] Mather *v.* Butler, 28 Iowa, 253; Aiken *v.* Bloodgood, 12 Ala. 221 [1847]; Ellmaker *v* Ins Co., 6 W. & S. 439; Smith *v.* Bristol, 33 Iowa 24.

[3] Mather *v.* Butler, *supra;* McGran *v.* North Lebanon R. Co., 29 Pa. St. 82 [1857]; *see also* O'Reilly *v.* Kerns, 52 Pa. St. 214; Clark *v* Mayor, 4 N. Y. 338.

[4] Goodwin *v.* McCormick, 6 N. Y. Supp. 662 [1889]; *accord*, Pepper *v.* Burland, Peake N. P. Cas. 103; Robson *v.* Godfrey, Holt N. P. Cas. 236; *see also* Haynes *v.* 2d B. Ch., 88 Mo. 285; Dubois *v.* D. & H. Canal Co., 4 Wend. (N. Y.) 285; Elgin *v.* Joslyn, 136 Ill. 525; Bozarth *v.* Dudley, 44 N. J. Law 304; McCormick *v.* Connolly, 2 Bay (S. C.) 401; Menne *v.* Neumeister, 25 Mo. App. 300.

[5] Aiken *v* Bloodgood, *supra.*

[6] Menne *v.* Neumeister, 20 Mo. App. 300; *and see* 19 Sol. J. & Rep. 571.

[7] McGran *v.* North Leb. R. Co., 29 Pa. St. 82.

[8] Flynn *v.* Des Moines, etc., R. Co., 63

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The changing of the route of a railroad which is the subject-matter of a construction contract,[1] or a parol agreement to pay the contractor's men their wages,[2] or an extension of the time for completion of the contract,[3] or a change in the process of construction[4] have been held *not* such changes or modifications of the original contract as will enable a contractor to recover for his work on a *quantum meruit—i.e.*, its reasonable value—but he has been held to be limited to the contract prices of the contract. So far as the work has been done in pursuance of the original contract, the contract price will hold even though the work was done in part under the contract and in part under a parol modification of such contract.[5] As far as the contract can be traced in the work performed and the materials furnished, the contract price will control.[6] The written contract must be pursued and applied so far as it can be traced in the intention of the parties.[7] The old agreement being incorporated into the subsequent agreement, the contract in its entirety must be construed with reference to its terms,[8] and it will determine the meaning and extent of the new stipulations.[9] The alterations, unless otherwise expressed or mutually understood, must be executed in their proper connection with the original contract with reference to and in modification of which they are made.[10]

The English rule is well expressed by Mr. Emden[11] in much the same language. He says: "When work is to be done and materials supplied under a building contract for certain estimated prices, and there is subsequently a deviation from the original contract by consent of the parties, the contract and estimate are not on that account excluded, but are to be the rule of payment so far as the special contract can be traced, and for any excess the party is entitled to sue as upon a *quantum meruit*, although the

Iowa 491 [1884]; Edgerly *v.* Farmers' Ins. Co., 43 Iowa 587; Wood *v.* Miller, 55 Iowa 168; Thomas *v.* Fleury, 26 N.Y. 26 [1862]; Barclay *v.* Messenger, 43 L. J. Ch 449.

[1] McGran *v.* N. Lebanon R. Co, 29 Pa. St. 82; *and see* Jones *v.* Woodbury, 11 B. Monroe 167 [1850].

[2] Andre *v.* Bodman, 13 Md. 241.

[3] Haynes *v.* 2d B. Church, 88 Mo. 285; Flynn *v.* The Des Moines & St. L. R. Co., 63 Ia. 491 [1884].

[4] New Haven W. Co. *v.* Redfield (Conn.), 18 Atl. Rep. 978.

[5] Garver *v.* Daubenspeck, 22 Ind. 238 [1864]; Robson *v.* Godfrey, 1 Stark. 275; Goodwin *v.* McCormick, 6 N. Y. Supp. 662; Clark *et al. v.* The Mayor, 4 Comst. (N. Y.) 338.

[6] Wright *v.* Wright, 1 Litt. 179 [1822]; Mather *v.* Butler, 28 Iowa 253; Marshall Fdy. Co. *v.* Pittsburgh Trac. Co., 138 Pa. St. 266.

[7] McCauley *v.* Keller, 130 Pa. St. 53 [1889]; Bertrand *v* Byrd, 5 Ark. 651 [1844]; Cook *v.* Murphy, 70 Ill. 96; Pepper *v.* Burland, Peake N. P. Cas. 103; Robson *v.* Godfrey, Holt N. P. Cas. 236; Ranger *v.* Gt. Western, 5 H. L. Cas. 72; De Boom *v.* Priestly, 1 Cal. 206; Chicago, etc., R Co. *v.* Vosburg, 45 Ill. 311; Jones *v.* Woodbury, 11 B. Mon. (Ky.) 167; Andre *v.* Bodman, 13 Md. 241; Tinker *v.* Geraghty, 1 E. D. Smith 687; Sullivan *v.* Sing Sing, 122 N. Y. 399; Goldsmith *v.* Hand, 26 Ohio St. 101; McKinney *v.* Springer, 3 Ind. 59; White *v.* Oliver, 36 Me. 92; Tibbetts *v.* Huskins, 16 Me. 288; *and see* Pattison *v.* Luckley, L. R. 10 Exch. 330, 29 Amer. & Eng. Ency. Law 973.

[8] Carr *v.* Wallachian Pet. Co., L. R. 1 C. P. 636.

[9] Malone *v.* Phil. & R. R. Co., 157 Pa. St 430; Lawall *v.* Rader, 24 Pa. St. 283 [1855].

[10] McCauley *v.* Keller, 130 Pa. St 53 [1889]; Wright *v* Wright, 1 Litt. 179 [1822]; *and see* Boody *v.* Rutland R. Co., 24 Vt. 660; Andre *v.* Bodman, 13 Md. 241.

[11] Emden's Law of Building, etc., 224.

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time for completing the payments under the original contract has not expired when the action is commenced. But," says he, "if the work to be carried out under the original contract has been so entirely abandoned, and there is such a total deviation that the terms are not applicable to the new work, and it is impossible to trace the contract and to say to what part of it the new work should be applied, the builder is entitled to recover by measure and value for all the work as if there had been no contract at all."[1]

If the extra work is of the same kind or character as that required by the contract, the contract rate or price will fix the compensation of the contractor.[2] It was so held when the completion of the work had been prevented by the owner or company.[3] If the plan has been so changed as to embrace some other description of work not contemplated by the original contract, or if the value of the extra work cannot be determined by the prices agreed upon in the contract, then the contractor may recover the reasonable value of such extra work.[4]

If the subsequent agreement affects only certain parts or provisions of the original contract, expressly or impliedly leaving the original contract in all other respects to stand, it must be constructed upon the basis of and in reference to the original contract.[5]

573. Changes which Modify or Extinguish the Original Contract.—If two independent contracts have been made at different times with regard to the same thing, or to perform the same work, and at different prices, the second agreement will hold and extinguish the first one.[6] A new contract may be considered a condonation of old injuries, unless, at the time of making the new contract, the contractor insisted upon his adverse claims.[7] If the terms of the latter agreement are inconsistent with those of the former it will be construed to discharge the prior contract.[8]

A contract to complete a building by a certain day may be so modified and mixed up with a subsequent agreement for extras as to render it impossible to complete it within the time appointed, in which case it may operate as a waiver and discharge of the original agreement as to the time of completion so that no penalties could be claimed for the delay.[9] For delay caused

[1] Emden's Law of Building, etc., 224, *and English cases cited*

[2] Chicago & Gt. E. R. Co. *v.* Vosburgh, 45 Ill. 311; Eigeman *v.* Posey Co., 82 Ind. 413; Norton *v.* Browne, 89 Ind. 333.

[3] Koon *v.* Greenman, 7 Wend. 121.

[4] Chicago & Gt. E. Ry. Co. *v.* Vosburgh, 45 Ill. 311 [1867]; *see also* Hummer *v.* Lockwood, 3 G. Gr. 90; McMaster *v.* The State, 108 N. Y. 542; Murphy *v.* United States, 13 Ct. of Cl. 372; Merchants' Exch. Co. *v.* United States, 15 Ct. of Cl. 270; Griffin *v.* Miner, 54 N. Y. Super. Ct. 46; McCormick *v.* Connolly, 2 Bay (S. C.) 401.

[5] Leake's Digest of the Law of Contracts, 788-9; *accord*, McSorley *v.* Prague, 137 N. Y. 546; Hutchinson *v.* Cullum, 23 Ala. 623.

[6] Howard *v.* W. & S. R. Co. (Md.), 1 Gill 311; *accord*, Memphis, etc., R. Co. *v.* Wilcox, 48 Pa. St. 161.

[7] M'Intosh *v.* Midland Cos. Ry. Co., 3 Ry. Cas. 780.

[8] Patmore *v.* Colburn, 1 C. M. & R 65; 28 Amer. & Eng. Ency. Law 538, 3 Amer. & Eng. Ency. Law 891; *and see* Lafferty *v.* Jelley, 22 Ind 471.

[9] Thornhill *v.* Neats. 8 C. B. (N. S.) 831, 2 L. T. Rep. 539 [1860]; Boody *v.* R. & B. R. Co., 24 Vt. 660; Jones *v.* St. Johns Coll., L. R. 6 Q. B. 115; Ellis *v.* Hamlen, 3 Taunt. 52; Robson *v.* Godfrey, Holt's N. P. Cas. 236.

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by verbal changes in the plan by the owner the contractor is not responsible, even though the contract requires all changes to be in writing.[1] If the changes are so marked that the original contract can be hardly recognized, it may be regarded as abandoned and the contractor may recover the reasonable value of his work and materials.[2]

Whether the new contract is a substitute for the old one and operates as a rescission or discharge of it, is a question of intention of the parties and is to be ascertained from their correspondence, conduct, and declarations.[3] When it is evident from an inspection of the two contracts that the parties intended that the subsequent contract should be supplemental to the original contract, it will not supersede the latter except in so far as the new one is inconsistent with the original agreement.[4] Therefore if a written contract for construction work has been materially modified by a subsequent parol agreement, a decision by the engineer who was made the final arbiter of disputes between the parties cannot stand if he entirely ignores the parol agreement.[5]

574. Original Contract Rescinded or Reduced to a Parol Agreement.—The rescission of a written contract by a parol agreement requires clear and positive proof,[6] and an agreement to rescind a contract has been held to imply a total rescission.[7] A mutual agreement between the parties to make certain alterations in a contract cannot in itself be regarded as an agreement to rescind the entire contract, for that would be manifestly contrary to the intention of the parties as usually expressed upon construction work. However, a material modification of a written contract by a subsequent parol agreement will reduce the whole transaction to a simple parol agreement, consisting of the new terms agreed upon and what remains unchanged of the original contract.[8] If the original contract under seal and subsequent written [parol] contract not under seal relative to the same subject-matter cannot be executed together, then the whole contract becomes parol.[9] If no provision for an extension of time of the completion of works on account of additions and changes is made in the original contract, the mere making of a parol agreement to extend the time in consideration of such changes

[1] Focht *v.* Rosenbaum, 176 Pa. St. 14 [1896]; *and see* Van Buskirk *v.* Stow, 42 Barb 9; Bimbauer *v.* Gleason, 48 Hun 614; Adams *v.* Cosby, 48 Ind. 153.

[2] Pepper *v.* Burland, Peake 103; Aust'n *v.* Keating, 3 W. R. 288; Ford *v.* Smith, 25 Ga. 675; Smith *v.* Coe, 2 Hilt. 365; McKinney *v.* Springer, 3 Ind. 59.

[3] Rogers *v.* Rogers, 139 Mass. 440; *see* Ford *v.* Smith, 25 Ga. 675.

[4] Uhlig *v.* Barnum (Neb.), 61 N.W. Rep. 749; *semble*, West Haven W. Co *v.* Redfield 58 Conn. 39.

[5] Malone *v.* Phil. & R. R. Co., 157 Pa. St. 430.

[6] Falls *v.* Carpenter (N.C.), 1 Dev. & B. Eq. 237; Rockcliffe *v.* Pearce, 1 F. & F. 300.

[7] Thompson *v.* Lyons, 54 N. Y. Super. Ct. 101.

[8] Carr *v.* Wallachian Pet. Co., L. R. 1 C. P. 636; Malone *v.* Phil. & R. R. Co. (Pa.), 27 Atl. Rep. 756; Lawall *v.* Rader, 24 Pa. St. 283 [1855]; *and see* De Boom *v.* Priestly, 1 Cal. 206.

[9] Lawall *v.* Rader, 24 Pa. St. 283 [1855]; Smith *v.* Smith, 45 Vt. 433 [1873]; Vicary *v.* Moore, 2 Watts & S. 45; Thornhill *v.* Neats, 8 C. B. (N. S.) 831; *and see* Ellmaker *v.* Ins. Co. (Pa.), 6 Watts & S. 439; *and* Howard *v.* W. & S. R. Co. 1 Gill (Md.) 311.

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has been held to reduce the entire contract to a simple agreement, upon which assumpsit will lie.[1] *

A change in a contract by which a slate roof is substituted for a shingle roof at an additional cost of $35 has been held to reduce the contract, which was under seal, to a simple agreement.[2]

Damages may be recovered for the breach of such an agreement.[3] Such an agreement to extend the time of completion should not be made at all if it can be avoided, but the contractor is advised to do what seems to him the proper thing to do, which is, of course, to complete his contract as expeditiously as is consistent with good work, within the terms of his contract. If it seems necessary or advisable to extend the time of completion it should be done in writing upon the contract and expressly incorporated into it as a part and parcel of the same, the consideration recited, and the change signed, sealed, and witnessed, so as to keep the contract a specialty and equally binding with the original, but not until the consent of the surety has been obtained.

While the making of alterations or additions in the work by the contractor will sustain a promise by the owner to extend the time of performance or pay additional compensation, it will *not* when the contract provides for such alterations and additions as the owner may direct.[4]

575. Alterations of Terms of Contract may Change Form of Action by Contractor.—The change in the nature of the contract from a specialty in writing and under seal to a simple instrument may change the form of action by the contractor when he seeks to recover for his work on the job. If the common-law rules of pleading prevail, and he brings an action of covenant on the original contract, he cannot show the subsequent parol agreement,[5] and would not, therefore, recover for the extra work due to the alterations. If he will recover for such extra work, loss of time, or delay, he should not only declare upon the special or original contract, but his declaration should be upon the general counts; *i.e.*, for work and labor furnished to the owner at his request, and of which he has received the benefit.[6] In some courts compensation for the extra work may be recovered under a *quantum meruit* (the common counts) whether the written contract has been abandoned, or it has been fully executed, but the price named in the contract, so

[1] Daegling *v.* Schwartz. 80 Ill. 320; Smith *v.* Smith, 45 Vt. 433 [1873]; *but see* Barclay *v.* Messenger, 43 L. J. Ch. 449; *and* Haynes *v.* 2d Bap. Ch., 88 Mo. 285.

[2] Lawall *v.* Rader, 24 Pa. St. 283.

[3] Hill *v.* Smith, 34 Vt. 535; *and see* Izard *v.* Kimmel (Neb.), 41 N. W. Rep 1068 [1889]; Freeland *v.* Bacon, 7 N. Y. Supp. 674; The B. & M. R. Co. *v.* Penny, 38 Iowa 255 [1874].

[4] Tinker *v.* Geraghty, 1 E. D. Smith 687 [1853].

[5] Phillips & C. C. Co. *v.* Seymour, 91 U. S. 646; *semble*, Elting *v.* Dayton, 17 N. Y. Supp. 849.

[6] Frecher *v* Greeseka, 5 Iowa 472; Buch *v.* Chapman, 2 G. Gr. 41; *semble*, Wright *v.* Wright, 1 Litt. 179 [1822]; Smith *v.* Smith, 45 Vt. 433; Daegling *v.* Schwartz, 80 Ill. 320 [1885].

* An excellent reason for having a clause in the contract providing that changes, additions, and reductions shall not abrogate or vitiate the contract.—ED.

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far as it is applicable to the extra work done, will hold with regard to it, unless a price was agreed upon at the time it was ordered.[1]

Massachusetts practice would seem to indicate that the contractor must sue upon the special contract if under seal, unless he has a right to avoid or rescind it. If the seal has been added without the contractor's authority, he may have an action on a *quantum meruit* if his abandonment can be justified.[2] Another case holds that if the contract has been terminated the contractor must show another engagement by the company,[3] or that he was prevented from completing his contract by the employer.[4] A Missouri case holds that interference by the owner with the progress of the work done under a covenant will not allow an action of assumpsit; that the contractor cannot waive the contract and sue upon a *quantum meruit*,[5] although he may recover for extra work not embraced in the contract or for services rendered independent of the contract.[6] When the action has been brought upon the contract instead of a *quantum meruit*, and all the proof has been introduced without objection, showing the right of the contractor to recover, the court may, if necessary, permit an amendment of the petition so that it shall conform to the proof.[7]

A court of equity will not, ordinarily, decree the specific performance of a contract with variations, additions, or new terms made and incorporated into it by parol agreements and depending upon parol evidence to prove its terms.[8]

Contractors get into tight places, and they will go to the furthermost limit to escape. They will delay the work, make excuses, bluff and blow, and complain bitterly to provoke retaliation or to induce the company to some overt act of rescission. They will even refuse to proceed with the work on some frivolous pretense. An engineer should at such times forbear taking any fatal step until every expedient has been exhausted. The rule should be to keep the contract whole.

576. Effect of Changes and Alterations on Liability of Surety.—In assenting to changes and parol modifications of construction contracts it is well to consider carefully the effect that such changes may have upon the surety of the contractor. If the new agreement be inconsistent with the original and discharge it, or if it is a material alteration, the surety will be discharged. Not being a party to the new agreement, he is not bound by it, and he is not liable under the old agreement, for it has been discharged.[9]

[1] Mather *v.* Butler, 28 Iowa 253; *semble*, Lawall *v.* Rader, 24 Pa St. 283 [1855]; Sherwin *v.* Salpaugh, 24 Vt. 347 [1852]; Aiken *v.* Bloodgood, 12 Ala. 221 [1847]; Irwin *v.* Schultz, 46 Pa. St. 74 [1863].

[2] Cook *v.* Gray, 133 Mass. 106; Simmons *v.* Lawrence, 133 Mass. 298; Ford *v.* Burchard, 130 Mass. 424.

[3] Hyland *v.* Giddings, 11 Gray 232.

[4] Basset *v.* Sandborn, 9 Cush. 58.

[5] Clendennen *v.* Paulset, 3 Mo. 230; Chambers *v.* King, 8 Mo. 517; *and see also* Lebeanne *v.* Hill, 1 Mo. 42; Little *v.* Mercer, 9 Mo. 216.

[6] Lloyd's Law of Building, 179, 180, *and cases cited.*

[7] Homan *v.* Steele, 18 Neb. 652 [1886].

[8] Whitaker *v.* Vanschoiack, 5 Oreg. 113 [1873]; *see also* 22 Amer. & Eng. Ency. Law 1062.

[9] 3 Amer. & Eng. Ency. Law 892.

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The surety should be consulted in regard to any proposed changes and his consent obtained; for if he is not, he will no longer be bound, and the court will not inquire whether it is, or is not, to his injury.[1] * An agreement subsequent to the execution of a contract to refer questions of damages for nonperformance and delay to arbitration is not binding upon the contractor's surety.[2]

A reservation of the right to make changes in the plans of a building implies, as against the surety, that the changes shall be such as might have reasonably been contemplated by the parties when making the contract.[3] †

577. Effect of Changes Ordered under a Clause Reserving the Right to Make Alterations.—When the contract provides that alterations directed by the engineer shall be made as directed, such alterations are within the jurisdiction of the engineer. Ordinary alterations directed will not abrogate the contract or substitute a new one. Work done after the job has been taken off the contractor's hands has been held not to have been done under the contract, and payment might be recovered in assumpsit.[4]

Whether or not both parties in making alterations and changes and neglecting to insist on the strict performance of the terms of their contract intended to set aside the contract and disregard its provisions is a question for the jury; and when such a question is at issue, evidence may properly be admitted to show that alterations and changes were made even though the contract provided for such changes. In a case decided, evidence was admitted that the foundation walls were carried to a much greater depth than intended in the plans, or called for in the specifications and contract, and under the direction of the owner's authorized agent and under a promise to pay for them; that granite instead of brick was used for building the basement walls; that North Haven brick instead of Springfield brick were used in construction walls; that granite instead of brownstone trimmings were used throughout the building, and that slate instead of galvanized iron was used upon portions of the roof. The contract provided for changes and extras, and required that the foundations should be dug down until a proper and suitable bed should be reached; also that no claim should be made for extra work unless ordered in writing, and such claims were rendered in writing before the next ensuing payment. The court held that to show an abandonment of the contract the contractor must show that the contract was departed from, and also that the contract was not followed in making such departure; that the first step was to show the deviation, and the next to show it was not made under the contract; that the first was

[1] 3 Amer. & Eng. Ency. Law 892; Judah *v.* Zimmerman, 22 Ind. 388.

[2] Cooke *v.* Odd Fellows, 1 N. Y. Supp. 498 [1888].

[3] O'Rourke *v.* Burke (Neb.), 63 N. W. Rep. 17; *and see* Dorsey *v.* McGee (Neb.), 46 N. W. Rep. 1018 [1890].

[4] 2 Wood's Law of Railroads 998; *citing* O'Reilly *v.* Kerns, 52 Pa. St. 214.

* *See* Secs. 20-22, *supra.*

† *See* Sec. 20, Chap. I., *supra.*

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admissible as a preliminary step or as laying the foundation for the second; that the number of such changes and their extent was a circumstance that the jury might properly consider, and that the contract might properly be found to have been abandoned because: 1. All the various alterations were made without any requirement of the architect as required by contract, but were all done at the request of the owner. 2. The parties wholly ignored the paragraph that no extra work should be recognized unless a statement of it were rendered to the architect. 3. That the parties ignored the provisions, as to date and penalty for completion, and that as to an allowance of additional time, but acted upon mutual agreements. 4. That they employed outside parties to do portions of the work which was included in the contract. 5. That payments were not made according to terms of contract, nor upon the certificate of architect as required.[1] This case shows the consequences of lax enforcement of contract and the results of indulgences in business affairs.

When a contractor agrees that alterations and additions may be made in work under a contract it must be taken that only such changes as may ordinarily arise in such work are contemplated. It cannot be presumed, unless expressly stated that a contract to erect a structure can be construed as a contract to build the foundations only, or that a reservation that alterations and omissions may be made, or that in case the quantities of the work estimated shall be increased or diminished, the work shall be performed at the contract prices and no claim for damages or prospective profits shall be made in either case, authorizes the entire abrogation and repudiation of the contract.[2] Nor does a provision to the effect that in case the work is suspended, no claim for prospective profits or for work not done should be allowed, but that the contractor should be allowed to complete the work when it was resumed, authorize or contemplate the annulment of the contract. Such a stipulation will not protect the owner from liability for prospective profits when the contractor has been denied the right to complete the work when it was resumed.[3]

So it has been held that a clause providing that "all loss or damage arising out of the nature of the work aforesaid or from action of the elements or from any unforeseen obstructions or any difficulties that may be encountered in the prosecution of the work, also for any and all expenses which may be incurred in consequence of the temporary suspension of any part of the work, shall be incurred by the contractor without extra charge to the city," did not apply to the obstructions and difficulties due to or created by changing the place of crossing a river, resulting from increased depth of water and quicksand.[4] A further provision that the contractor

[1] O'Keefe *v.* St. Francis Church, 59 Conn. 551 [1890].

[2] Donolds *v.* The State, 89 N. Y. 36 [1882]; s. c., 84 N. Y. 361.

[3] Donolds *v.* The State, *supra.*

[4] Wood *v.* Fort Wayne, 119 U. S. 312 [1886].

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shall have no claim upon the city for any delay in delivery of pipes or other materials from the manufacturers was held not to apply to delay and expense of altering defective pipe-castings furnished by the city, the defects which could not be discovered until put in service.[1]

A comparatively recent case in Illinois held that where changes, alterations, and additions were more than such as were incidental to the complete execution of the work described in the plans and specifications and of minor and trifling importance, that the contractor was not bound to accept such compensation as the engineer might fix. That any material departure from such plans and specifications, resulting in a new and substantially different undertaking, could not be regarded as within the provision for alterations and additions, and that the contractor, in case of such material and substantial changes, was not limited or governed by the original contract as to his compensation for the work.[2] The departure from the original contract must have been so general as to have destroyed the connection between the work done and the contract,[3] or, as a Vermont case states the rule, "if the terms of the original contract do not appear to apply to the new work, which is beyond that originally contemplated by the parties, then the work may be regarded and treated as extra work, and as such recovered for by the contractor; but if the evident intention of the parties was to include such work within the contract, and its terms are applicable, then no extra compensation can be recovered."[4]

The question as to what changes are permissible when a general authority has been reserved to make changes was pretty fully discussed in the New York courts some years ago.[5] The court rendered the opinion that the state certainly had no right to omit entirely the construction of all or any of the buildings. The buildings contracted for were a central building, five connecting wards on each side, and the outbuildings. These were all to be built. The size and height of them was fixed and the material to be put in was determined. The gist of the court's opinion may be summed up in the language of the court. "The general character of the buildings could not be changed so that the buildings would not be the same contracted for; if it could be, then the public letting in such case would not be a useful, but an idle ceremony. Under such a reservation could a building planned for five stories be reduced to two? Could a stone building let to a stone-mason be changed to wood or brick? Could the five connecting wards be reduced to two or three or four? We are clear that authority for such extensive changes could not be found in such language. If the state could change to brick walls with sandstone trimmings, then it could change to walls made wholly of brick, and thus there would be no stone to cut, and the

[1] Wood *v.* Fort Wayne 119 U. S. 312 [1886].

[2] The County of Cook *v.* Harms, 108 Ill. 151 [1883], *citing* 115 Ill. 242 and 20 Ill. App. 74; *and see* McGran *v.* N. Lebanon R. Co., 29 Pa. St. 82.

[3] Hummer *v.* Lockwood, 3 G. Gr. 90.

[4] Boody *v.* R. & B. R. Co., 24 Vt. 660.

[5] McMaster *v.* State, 108 N. Y. 542.

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stone-cutting contract would be entirely nullified. It is difficult, probably impossible, to draw in advance a precise line between what is authorized by such a reservation, and what is not. It authorizes such changes as frequently occur in the process of constructing buildings, in matters of taste, arrangements, and details; but it does not authorize a change in the general character of the building. If it does, a contract carefully entered into could be mainly, if not entirely, frustrated. Under the contract, the contractors were required to own or purchase quarries and lease them or give control of them to the state, and thus they were required to make considerable investments for the purpose of being able to furnish the stone. Can it be supposed under such circumstances that the parties intended by the reservation in the second contract to authorize at the will of the state any change that might substantially destroy the furnishing contract? Would buildings with a few superficial feet of sandstone facings, be the buildings in reference to which the competitive bidding were invited and the contracts were let? We think not, and that the contracts were broken by change from sandstone to brick."[1]

When the right to make additions or alterations has been reserved, as to add an additional story to a building, reason and equity require that the owner should assert his right to make the changes so as to give the contractor a reasonable time to complete the work within the time specified.[2] The right to make alterations, additions, and omissions has been held not to authorize the owner to take work away from the contractor and to do it himself, but that the "omissions" should be limited to things entirely left out of the works [building].[3]

A provision giving an engineer power to direct in good faith any changes in the form or dimensions of the work is not a provision conferring authority to stop the work in an unfinished state and so arbitrarily annul the contract.[4]

In a contract for the construction of a railroad which reserved the right to alter the line or the gradients of the road without the allowance of any extra compensation, if the engineer should consider such alterations necessary or expedient, and it provided that all disputes in relation to the construction of the contract should be settled by referees, it was held that an allowance of extra compensation by the referees for alterations made, involving large increase of expense, did not transcend the authority of the referees.[5] Such a construction of a contract by referees is not re-examinable by a court.

As a general rule it is well settled that deviations and changes in the

[1] McMaster *v.* The State of New York, 108 N. Y. 542; s. c., 37 Alb. Law Jour. 295; *see also* Clark *v.* Mayor, 4 N. Y. 338, *and* Donolds *v.* State, 84 N. Y. 361.

[2] *Accord*, Lauer *v.* Brown, 30 Barb. (N. Y.) 416.

[3] Shaver *v.* Murdock, 36 Cal. 293.

[4] Clark *v.* Mayor of New York, 4 N. Y. 338 [1850]; *see also* Jones *v.* Judd, 4 N. Y. 411.

[5] Porter *v.* B. B. R. Co., 32 Maine 539 [1851].

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plans of a structure will not imply abrogation or abandonment, whether the contract provides that such deviations and changes may be made or not.[1] If a contractor intends to take exception to any alterations and additions required of him, he should take his position distinctly and unequivocally.[2]

578. Contractor's Rights are Frequently Preserved by Notices on His Part.—The question as to just what a contractor is to do when a dispute arises between him and the engineer or company, as to what work is or is not within the contract, or as to how certain work shall be classified, executed, or finished, is a most perplexing one.

The thing for a contractor to do, when asked to make changes or alterations, or to do work that he considers outside of his contract and extra work, is to quietly, but firmly, remonstrate with the engineer or officer of the company or city, and to refrain or avoid doing the work as long as possible. If the company or its engineer insists that it is included in his contract, and it is of enough importance or of sufficient magnitude to make much difference to the contractor, he should refuse to do it without somebody assumes the responsibility, after the manner required in the contract, to pay him for it as an extra. The courts advise that when the owner is guilty of a breach of his contract or demands the performance of what cannot properly be included in the contract, that the contractor refuse to proceed with the work, or if circumstances will permit, to complete what the contract certainly requires, and to then demand a final certificate, and if refused to call upon the courts to determine whether or not the work in dispute is called for by the contract.[3]

Contractors are frequently characterized as "troublesome customers," "kickers," "cranks," "sharks," and "scamps," and sundry other epithets, because they are always objecting, protesting, and complaining at what is required of them. But it is submitted that the law encourages and requires that same policy; for a contractor's right to recovery often depends upon his having given notice to the company that he considers his rights invaded or the contract requirements overstepped. Several instances have already been cited, and the books contain many more.

A contractor should look out for his own interests without regard to the epithets hurled at him or the comments bestowed, and when he feels his rights invaded he should not hesitate to give proper notice of the fact.*

There may be, as is usually the case, other stipulations by which the company or its engineer may have power to annul the contract and employ

[1] Bozarth *v.* Dudley, 14 N. J. Law 304; *see also* McGran *v.* N. Lebanon R. R. Co., 29 Pa. St. 82; *and* Mather *v.* Butler Co., 28 Iowa 253; *and* Dorsey *v.* McGee, 30 Neb. 657.

[2] Weeks *v.* Robis, 42 N. H. 316; Evans *v.* Montgomery, 50 Iowa 325; Carney *v.* Newberry, 24 Ill. 203; Sumner *v.* Parker, 36 N. H. 449.

[3] Western Union R. R. *v.* Smith, 75 Ill. 496 [1874]; O'Brien & Clark *v.* New York, 142 N. Y. 671 [1893]; Slusser, T. & Co. *v* City of B., 47 Iowa 300 [1877].

* *See* Secs. 373–375, 564–568, *supra*, where contractor is required to ask for a decision of engineer, and 735, *infra*.

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other contractors to complete the work, in which case the contractor may find himself in a precarious position; or by the terms of the contract the determination of such questions may have been left exclusively and finally to the judgment of the engineer. In the one case the contractor must choose between the loss of his pay for extra work and the loss of his contract, with perhaps what remains due on the job, and in the other case it is a choice of no pay for what he considers extra work and an expensive action at law to determine who is guilty of a breach of contract, and what really are the duties and powers of an engineer in such a case. A contractor with experience will appreciate very well that while he is required to perform only what the contract calls for, and that while the engineer's powers are limited to those created by the contract, yet it is much easier and more politic to comply with the engineer's orders as to all *minor* matters, than to question the extent of his powers. When an engineer has been clothed with power to declare a contract forfeited, if the work is not prosecuted with all possible dispatch, a contractor may not delay long to determine the duties or powers of the engineer, or to ascertain just what the contract requires without endangering the loss of his job.* Under such circumstances a contractor would not fail to seek good counsel and to place the contract and facts before a competent authority before determining what he should do.

A good illustration is afforded in a case of railroad construction, by the contract for which, the company were to furnish the iron and materials necessary to finish the work before the freezing of the ground. The company neglected to furnish the materials in time and the contractor had to complete the work in cold weather, and on frozen ground, much to his detriment and extra cost, and it was held that when the company failed to provide the materials in time, that the contractor might have abandoned the work and have refused to proceed with it further; but that if when the materials were furnished he proceeded and completed the work without objection, and without insisting on having a new contract, it should be presumed that he proceeded under the original contract, which would furnish the measure of his compensation, and that he could not recover extra pay by showing that the work was worth more on account of the state of the weather, or because the ground was frozen.[1] It seems that if the contractor had refused to do the work, or even given notice that he would complete the work, but not as a part of his contract, nor at the prices named therein, that the court would have allowed him to recover for the extra work required in consequence of the delay.[2]

579. Contractor should Make His Claim for Extras when the Addition or Alteration is Required.†—If he does perform the work required of him, or

[1] Western Union R. R. *v.* Smith, 75 Ill. 496 [1874].

[2] Slusser T. & Co. *v.* City of B., 47 Iowa 300 [1877].

* *See* Secs. 392–395, *supra*, and 591–599, *infra*.

† *See* Sec. 689, *infra*.

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does make the alterations or additions ordered, or does accept payment according to the estimate or classification rendered, he will at least demand [request] extra compensation, and if it is refused, will enter a protest or give notice of his claim for extra pay for such extra work. The acceptance of money offered in payment of work and materials under protest that it is not enough, and without giving any release or discharge, is not a final settlement, and does not preclude the contractor from suing for and recovering any balance that he may be able to show is due him.[1]

When a change in contract work is ordered amid circumstances which imply or warrant the belief that no additional expense will result from the change, it is the duty of the contractor to expressly notify the other party that he cannot make the change for the contract price.[2] If he does proceed with work which he considers extra work, without such notice, or asking terms, or making a new contract with respect thereto, it will be good evidence that he understood the work to be embraced in his original contract,[3] especially when the change was made at his request and for his benefit.[4] He will be taken to have done it under his contract, and cannot complain that the work was more difficult and expensive, or took a longer time; nor can he recover damages for delays occasioned by such changes or additions.[5] If he has neglected to enter a protest or to claim extra compensation at the time the changes were ordered or made, he cannot recover as for extra work on account of such changes.[6] The contractor cannot recover for extra labor expended or materials used in unsuccessfully trying to bring the works to a satisfactory condition, though so expended and used after a time when he would have been justified in treating the contract as performed, and leaving the work.[7]

580. Contractor may be Held to the Terms Acquiesced In or Adopted. —If the contractor has submitted to changes in the amount and location of the work, and has received and receipted for monthly payments at the prices fixed by the contract, and as payments under the contract, he will be taken to have waived the change.[8] For if he continues the work under the con-

[1] Western Union R. Co. *v.* Smith, 75 Ill. 496 [1874].

[2] Gibbons *v.* United States, 15 Ct. of Claims 174; Bowe *v.* United States, 42 Fed. Rep. 761 [1890]; Lovelock *v.* King, 1 Moody & R. 60

[3] The Western Union R. Co. *v.* Smith, 75 Ill. 496 [1874] Trustees *v.* Platt, 5 Bradw. (Ill.) 567; Waldron *v.* American Wringer Co (Mass.), 43 N. E. Rep. 81.

[4] Spencer *v.* Bd. of Commrs., 117 Ind. 573 [1888].

[5] Louisville & N. R. Co *v.* Hollerbach, 8 Wes. Rep. 364.

[6] Price *v.* Kearney C. & W. S. Co., 29 Neb. 33 [1890]: *accord*, Foy *v.* Board of Commrs. (N. C.), 15 S. E. Rep 944; McNamara *v.* Bd. of Commrs. (La.), 11 So. Rep. 278; Martine *v.* Nelson, 51 Ill. 422; Abbott *v.* Gatch, 13 Md. 314; *and see* Murphy *v.* United States, 13 Ct. of Cl. 372, which held that, notwithstanding the contractor had notified the government's agent that the cost of extra work ordered by him would be $1350, that he could recover only the actual cost ($160) and a reasonable profit (10 per cent.). *See also* Britney *v.* Bolding 28 Miss. 53; *and see* McCormick *v.* Connolly, 2 Bay (S. C.) 401; Bowe *v.* United States, 42 Fed. Rep. 761 [1890]; Slusser T. Co. *v.* City of B., 47 Iowa 300 [1877].

[7] Gubbins *v.* Lautenschlager (C. C.), 74 Fed. Rep. 160

[8] McGrann *v.* N. Lebanon R. Co., 29 Pa. St. 82; McNamara *v.* Board of Commrs.

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tract, as will be presumed in the absence of any new or subsequent agreement, its terms and prices will govern, for the parties' interpretation of a contract, as shown by their acts in respect to it, when reasonable, will govern.[1]* If a contractor has voluntarily furnished extra work and materials, knowing that the payment therefor depended upon the action of congress, he cannot recover, though the extra work has improved and embellished a government structure.[2]

The practical meaning given by the contractor and owner to a contract goes a great way sometimes to show that there was no misunderstanding or mistake between them as to the terms of the contract or specifications. If the parties to a contract have adopted a particular construction, and have acquiesced in and done work under it according to that construction, for a long time it should lead a court without hesitation to adopt that meaning as the proper one.[3]

If a contractor accepts certain rates or prices without complaint or protest he cannot afterwards deny that they were the rates of his contract.[4] If, when the inspector has rejected certain materials, the contractor procures other materials and continues with the work, he cannot subsequently complain that the rejection of materials was wrongful.[5] When a contract for making embankments failed to designate the place from which the materials were to be taken, and the parties had adopted a construction of the contract, it was held that they were concluded by it.[6] So if a contract is silent as to the time of payment, the construction that the parties put upon it by their acts may become binding upon the parties.[7]

If during the performance of a written contract the contractor and owner have put a practical construction upon it which is at variance with its literal meaning, that construction will prevail over the language of the contract.[8] It was so held when changes were made by mutual consent in the plan of a sewer which formed part of the contract, but without any agreement as to a change in the contract price, that the contract price was the measure of

(La.), 11 So. Rep. 278; *semble*, St. Louis B. & J. Co. *v.* St. Louis Brew. Ass'n (Mo.), 31 S. W. Rep. 765.

[1] Vermont St. M. E. Church *v.* Brose, 104 Ill. 206; Patterson *v.* Camden, 25 Mo. 13; Whitehead *v.* Bank of P., 2 W. & S. 172; Chicago *v.* Sheldon, 7 Wall. 50; Garrison *v.* Nute, 87 Ill. 215; St. Louis G. L. Co. *v.* City of St. L., 46 Mo. 121; Bowe *v.* United States, 42 Fed Rep. 761 [1890]; *see* Evans *v.* McConnell (Iowa), 68 N. W. Rep. 790.

[2] Merchants' Exch. Co. *v.* United States, 15 Ct. of Cl. 270.

[3] Nickerson *v.* Atchison T. & S. F. R. Co., 17 Fed. Rep. 408 [1883]; Leavitt *v.* Windsor L. & I. Co., 54 Fed. Rep. 439; McMillen *v.* Hopper (Sup.), 44 N. Y. Supp. 63.

[4] Shipman *v.* Dist. of Columbia, 119 U. S. 148, 703; Price *v.* Kearney, etc., Co. (Neb.), 45 N. W. Rep. 252 [1890].

[5] Montgomery *v.* New York (N. Y. App.), 45 N. E. Rep. 550.

[6] Boody *v.* Rutland & B. R. R. Co., 24 Vt. 660; s. c., 3 Blatch. U. S. C. C. 25; *see also* Chicago & Gt. E. R. R. Co. *v.* Vosburgh, 45 Ill. 311; Hosmer *v.* McDonald (Wis.), 49 N. W. Rep. 115 [1891].

[7] Barker *v.* Troy & Rutland R. Co., 27 Vt. 766; Crown Coal & Tow Co. *v.* Yoch Coal Min. Co., 57 Ill. App. 666.

[8] Dist. of Columbia *v.* Gallaher, 124 U. S. 505; Saunders *v.* Clark, 29 Cal. 299.

* *See* Sec. 125, *supra*.

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compensation. When the letter of the contract and specification do not agree with the working plans or model furnished, and the work has been done under the direction of the engineer, according to the plan or model or sample furnished, the practical construction which the parties have adopted, and according to which the work has been done, will prevail over the literal meaning of the contract and specifications.[1] So if the parties have attached to certain words or expressions a particular meaning in one part of a contract, it must be presumed, nothing appearing to the contrary, that the same meaning was intended wherever like words or expressions are subsequently used.[2]

If the contractor has received the monthly estimates based upon a particular construction of his contract without objection, he will be held to have acquiesced in that construction and be bound by it.[3] It was so held when the contractor had acquiesced in a certain method of measurement adopted by the engineer and upon which payments were based, and by which the contractor received pay for excavations only, and no pay for the same earth placed in embankments.[4] So when the law provides that eight hours shall constitute a legal day's work, but permits overwork by agreement for an extra compensation, if one accepts a position knowing that he will be expected to work more than the statutory time, and continues work without objection or giving notice of an intention to charge for the extra time, his consent to his employer's requirements will be presumed, and he cannot recover for the time in excess of eight hours a day during which he worked.[5]* In another case where the contractor undertook to excavate for a street to an established grade, which grade was pointed out by the city engineer by order of the city, and the depths to be excavated at different points were given in feet and inches, and the contractor, relying on the representations so made, entered into a contract and upon the work; and the grade was afterwards during the progress of the work made much lower than was represented and first established by the engineer, thereby requiring the excavation of large quantities of rock and other hard material at a cost of six times the contract price agreed upon—the court held that if after the original grade-stakes were taken up and replaced at a much lower grade the contractor was directed to excavate to that lower grade, and he had proceeded with the work without objection, he was concluded from making any claim in excess of the contract price per cubic yard; but that the contractor, because of the mistake of the engineer, had the right to stop the work at the depth indicated by the stakes as first set, and could recover the contract price for the work he had done, and was under no legal obliga.

[1] Dist of Columbia *v.* Gallagher, 124 U. S. 505 [1888].
[2] Saunders *v.* Clark, 29 Cal 299.
[3] Kidwell *v.* The B. & O. R. Co., 11 Gratt. (Va.) 676 (1854]; McGraun *v.* North Lebanon R. Co., 29 Pa. St. 82 [1857].
[4] Price *v.* Kearney C. & W. S. Co. (Neb.), 45 N. W. Rep. 252 [1890].
[5] Helphensteine *v.* Hartig (Ind. App.), 31 N. E. 845.

* *See* Sec. 144, *supra*, and Sec. 810, *infra*.

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tion to proceed further, and that if he notified the city or its representative officers of the change and its consequent obstructions, and requested that some action be taken in the premises, he should not be held as proceeding with the work under the contract, but that the removal of the rock and other material below the original grade was in the nature of extra work, which the contract did not contemplate and which the city had no right to require the plaintiffs to do, and for which the plaintiffs were entitled to a reasonable compensation.[1]

When alterations and additions are made in and to a written contract the contract will be held to exist and be binding as far as it can be followed;[2]* but if the alteration of the contract is material, and is made without the knowledge or consent of the surety, it will release him from his obligations.[3]† If the changes are material and of considerable importance, and no intention has been shown to abandon or rescind the original contract, it seems the contractor may recover for the work he has done, but at the contract prices;[4] or if the change ordered is one which must necessarily cause increased expense, no such protest, notice, or new agreement is necessary to entitle the contractor to recover.[5]

581. Owner may Waive his Rights by Remaining Silent and Not Objecting.—In the same way the *owner* may lose his claim for damages for delay in the completion of a building caused by changes in plans and other circumstances if he has known from day to day what has taken place and has made no objection to the delay.[6]‡ If by the terms of the contract, piles for a dam were to be driven to a specified depth for a fixed price, and they were driven to a much less depth by direction of the engineer—*i. e.*, the owner required and accepted a less amount of work than that specified, and without a new agreement—he is not entitled to a rebate in consequence, but the contractor may recover the full contract price.[7]

582. Work made More Onerous by Alterations or the Profit-paying Portion Omitted.—The most perplexing cases, and those that have wrought great hardships and injustice to contractors and builders, are those in which extra work has been caused by alterations and changes by which the work has been increased in quantity, or, if not made greater, it has been made more difficult, or the more profitable and easier portion of it omitted. When

[1] Slusser T. & Co. *v.* City of B., 47 Iowa 300 [1877].
[2] McKinney *v.* Springer, 3 Ind. 59.
[3] Judah *v.* Zimmerman, 22 Ind. 388.
[4] McGrann *v.* N. Lebanon R. Co., 29 Pa. St 82.
[5] Gibbons *v.* United States, 15 Ct. of Cl. 174 [1879].
[6] Anderson *v.* Meislahn, 12 Daly 150 [1883]; Meyer *v.* Berlandini, 53 Minn. 59; Bartlett *v.* Stanchfield, 148 Mass 394; Flynn *v* Des Moines, etc., R. Co., 63 Iowa 491, *and cases cit d;* Thomas *v.* Fleury, 26 N. Y. 26 [1862]; McLeod *v.* Genius, 31 Neb. 1; McFadden *v.* Odonnell, 18 Cal. 160; Gallagher *v.* Nichols, 60 N. Y. 438; Morrison *v.* Lovejoy, 6 Minn. 319.
[7] Kingsley *v.* Brooklyn, 78 N. Y. 200 *and see* Smith *v.* Corn, 23 N.Y. Supp 826.

* *See* Secs. 571–576, *supra.* † *See* Secs. 20–22 and 576, *supra.*
‡ *See* Secs. 294, 413, *supra*, and 701, 726, *infra.*

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such changes have been made the question whether or not the contractor is entitled to extra compensation is often a difficult problem. The cases are numerous, and are difficult to reconcile. The disposition of the courts may be best shown by the cases decided. Loss of profits from changes made in good faith according to the terms of the contract fall upon contractor, and the omission of the most profit-paying part of a job is no excuse for the contractor's quitting.

Under a contract for the excavation of ground for the erection thereon of an inclined plane it was provided that the work should be done "according to the directions and under the supervision of the engineer in charge of the construction of said incline." The work was to be paid for at a certain rate per cubic yard. It was held that the contractor had no right of action when the planes of the incline were changed so as to leave no earth excavation to be done, on account of the loss of possible profits therefrom, unless such excavation was directed by the engineer in charge.[1]

583. Instances where Changes have been Made.—It is well settled that mere deviations and changes of plans which reasonably might have been anticipated by the parties will not imply abrogation or abandonment when the contract expressly provides that such deviations and changes may be made.[2] Alterations so ordered are within the original contract.[3] When the contract provides that "it is understood that the owner and his architect shall have the right and power to make any alterations, additions, or omissions of work or materials herein specified or shown on the drawings, and that they may find necessary during the progress of the building," it has been held that the owner or his architect may authorize the construction of an additional stairway from the kitchen to a bedroom, the use of bronze hardware in the place of No. 1 hardware, as specified, and change the location of the cistern.[4] *

In some cases changes and alterations, on a more extensive scale, have been sustained as permissible without vitiating or destroying the contract. Thus, under a contract for the construction of a waterworks reservoir, changes by which the area of the reservoir was nearly doubled, by which the sum was reduced $248,000, the omission of an intermediate dam by which a saving of $240,000 was effected, and a net decrease of $153,000, were held not to impair or affect the rights of the parties in the absence of proof that the changes were due to corruption or bad motives.[5] Under a written contract for the regulating and grading of real property, which contained a

[1] Huckestein *v.* Nunnery Hill Incline P. Co. (Pa. Sup.), 33 Atl. Rep. 1108; *accord*, Beers *v.* N. Milwaukee Co. (Wis.), 67 N. W. Rep 936.

[2] Bozarth *v.* Dudley (N. J. Law), 27 Alb. L. J. 76 [1882], *many cases cited.*

[3] O'Reilly *v.* Kerns, 52 Pa. St. 214 [1866].

[4] Dorsey *v.* McGee (Neb.), 46 N. W. Rep. 1018 [1890], and see same case as to what changes and alterations will not release sureties.

[5] Kingsley *v.* Brooklyn, 78 N. Y. 200. The contractors were benefited in this case.

* *See* Secs. 20–22, and 576, *supra.*

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provision that the owner "reserves the right to decide, after the rock has been uncovered, whether he will have it removed or not," entitles the owner to decide that the rock shall not be removed by the present contractor, and to thereafter have it removed by another contractor.[1] *

When a contract provides that alterations may be made by the engineer in the form, dimensions, or materials of work, and that the engineer shall in all cases determine the amount or quantity of the several kinds of work and the compensation at the rates therein provided for, and, further, that he shall in all cases decide every question which may or can arise relating to the execution of the contract on the part of the contractor, and that his estimate shall be final and conclusive," and under this contract the dimensions are so changed as to reduce the amount of excavation and deprive the contractor of the easiest and most profitable part of his work, it is usually held that he cannot recover more than the contract price because of this change; that he had taken the hazard upon himself by the terms of the contract.[2] The court held that the contractor was bound by any alterations made in pursuance of the agreement, and that he could not recover more than the contract price for the work done before the alteration, even though it were more expensive and costly than the portion dispensed with by the change of the plan.[3] Such a rule might inflict great hardship upon a contractor, and would enable a company to contract for a large piece of work at a comparatively low rate, and then omit the profit-paying portion of it, and get the expensive part of it done at the cost and expense of the contractor.

Decisions to the same effect are numerous, and the law seems fairly well defined as against the recovery of the contractor for extra compensation. Thus, under a contract for excavation, at a certain price per yard, which is silent as to the depth to be excavated, a contractor cannot recover extra compensation for excavating to a greater depth than was expected, unless notice was given that the price would be increased on account of the greater depth.[4] † Under a contract to build a sea-wall whose dimensions are specified, and by the terms of which the contractor is to be paid for the work by the cubic yard, and the contract stated that the work "will contain about 216,000 tons of stone and 285,000 cubic yards of earth," and only 119,000 tons of stone and 272,500 cubic yards of earth were required, it was held that the contractor could recover only for the amount of material actually furnished.[5] When by the contract the contractor was to erect the depot buildings "after such plans and such dimensions as might be adopted

[1] Riley *v.* Black, 16 N. Y. Supp. 206 [1891].
[2] Clark *v.* Mayor of New York, 4 N. Y. 338 [1850].
[3] Clark *v.* The Mayor, *supra*.
[4] Ambler *v.* Phillips (Pa.), 19 Atl. Rep. 71; Jones *v.* Woodbury, 11 B. Monroe (Ky.) 167 [1850]; *accord*, Sullivan *v.* President, etc., 122 N. Y. 389.
[5] Hackett *v.* State (Cal.), 37 Pac. Rep. 156.

* *But see* Sec 577, *supra*.

† *See* Sec. 580, *supra*.

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by the engineer," and the buildings required were larger than had been represented by the engineer at the time the contract was signed, and their cost thereby increased above the sums stated in the estimate, it was held that the contractor could recover no extra compensation because of the changes.[1] To the same effect was another case of excavations. The contract provided that changes might be made in the size of a dock. The excavations were to be deposited inside the dock to a certain height, and the balance in certain other places. It was held that the contractor must fill up the enlarged dock to the height agreed upon, an extra price having been allowed for the addition wall, required per agreement; and that no extra compensation could be recovered for the extra materials so deposited.[2]

On the other hand, it cannot be shown in reduction of damages for stopping work or rescinding a contract, that work already done by the contractor was less expensive than that which remained to be done.[3]

584. Owner's Liability for the Cost of Extra Work Caused by Circumstances Unforeseen and Unknown.—Under a contract "to erect certain buildings, in conformity with drawings and specifications made by the architect," in a good, workmanlike, and substantial manner, to the satisfaction, and under the direction, of the architect, and the contract provided further that the contractor must excavate to a depth of not less than ten feet, it was held that labor required to excavate to a greater depth than the ten feet because of the nature of the soil, which was unknown to the parties, was extra work, for which he was entitled to additional compensation.[4]* Although the contract provides that extra work, involved by any change of plan, shall be paid for at the contract rate for work of its class at a certain price per lineal foot, if the changes made require extra work of a much more difficult character than that required by the original plan, the contractor may recover the actual increase of cost.[5] To the same effect is another case in which a contractor agreed to build some bridges according to certain plans at a certain rate of compensation, and if required to make additions to the work at the same rate, provided that no alterations should entail on the contractor expense beyond the proportion of the balance of the work, and it was held that the contractor was not required in making additions to do a class of work more costly than that contemplated by the agreement.[6]

When it is provided in the specifications, which were not annexed to the written contract, nor referred to in it, nor were themselves signed by the parties, that only the cost value, in the absence of special agreement of extra

[1] Cannon *v.* Wildman, 28 Conn. 472.
[2] Boynton *v.* Lynn Gas Light Co., 124 Mass. 197.
[3] Jones *v.* Judd, 4 N. Y. 412 [1850]. Judges were equally divided in this opinion.
[4] Anderson *v.* Meislahn (N. Y.), 12 Daly 149 [1883]; *see* Gustaveson *v.* McGay, 12 Daly (N. Y.) 428; *and* Murphy *v.* United States, 13 Ct. of Cl. 372.
[5] Wood *v.* City of Fort Wayne, 119 U. S. 312 [1886].
[6] Annapolis & B. S. L. R. Co. *v.* Ross (Md.), 11 Atl. Rep. 820 [1888].

* *See* Sec. 569, *supra*, and 678, *infra*.

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work ordered in writing, could be demanded; and the contract provided further, that "should the owner request any alterations, deviations, additions or omissions from the contract, he shall be at liberty to do so, and the same will be added to or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation,"—it was held that the contractor could recover for the reasonable value of such extra work.[1] Such a clause providing that any addition or omission from the contract shall be added or deducted by a fair valuation, but shall in no wise affect the contract, prevents a claim for extra work from being brought under the terms of the contract; but full value for such extra work may be recovered even though the requirements of the contract have not been complied with, unless the regular work has been done so negligently as to render the extra work valueless.[2] Although the contract provides that extra work is to be paid for according to the schedule of prices fixed therein, yet for extra work of a different character from that specified the contractor may recover its reasonable worth.[3]

If the limits of the work are defined, or are shown upon the plans by boundary or dividing lines, whatever is required outside or beyond such limits has usually been regarded as extra work. It was so held when a brick mason was required to take down a wall to a point lower than was indicated on the plans, and rebuild the same. The court held that he could recover for the reasonable value of such extra work.[4] Under a contract to furnish sand and pave a street, a contractor was allowed extra compensation for extra quantity of sand required to bring the street to grade and rendered necessary by the city having excavated too deep.[5]

The fact that the contract is "to furnish all materials and labor for plumbing" does not preclude a recovery by the contractor for extra work caused by changes made by the owner in the plans and specifications;[6] and when an architect is employed to prepare working drawings of a house by the owner, and the architect makes changes in the plans, and the owner directs that the work done by the working drawings shall be altered to conform to the original plan, he must pay for the extra work required to make such alterations.[7]

Where a contractor's bids are unbalanced so that his profits come from one kind of work and not from another, the company cannot deprive him of his profits by increasing the latter work and abandoning the former, if there be a departure from the plans upon which his bids were made.[8] This

[1] Demarest *v.* Haide, 52 N. Y. Super. Ct. 398 [1885].
[2] Garnsey *v.* Rhodes (Sup.), 18 N. Y. Supp. 484 [1892].
[3] Elgin *v.* Joslyn (Ill.), 26 N. E. Rep. 1090 [1890].
[4] Donlin *v.* Daegling, 80 Ill. 608 [1875].
[5] Messenger *v.* City of B., 21 N. Y. 196 [1860]; *see also* O'Dea *v.* Winona, 41 Minn. 424 [1889]; Riley *v.* Brooklyn, 56 Barb. (N. Y.) 559.
[6] Cassidy *v.* Fontham, 14 N. Y. Supp 151.
[7] Guerin *v.* Rodwell, 8 Vr. (N. J.) 71.
[8] Roettinger *v.* United States, 26 U. S. Ct. of Cl. 391 [1891].

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was a change of work, increasing the stonework and diminishing the brushwork.

When a bid for a building contract has been made and accepted solely on the plans and specifications, and the contractors have begun work, and the detailed working plans afterwards furnished varied from the original plans, involving much additional labor, and the contractors refused to continue the work at the contract price, and the owner employed others to do the work at an increased compensation, and sued the contractor for the difference, the contractor is entitled to a counter-claim for the work he has done, if there was a material variance between the original and the working plans.[1]

585. Alterations and Additions an Excuse for Delay in Completing Works.*—If a contractor agree "to execute and complete certain works, with such alterations and additions as may be required by the engineer, in the same manner as if they had been originally comprised in the works of the contract, and within the period limited for completion of the original works, unless an extension of time be allowed in writing," etc., the contractor is bound by his agreement.[2] He has been held bound to complete his contract within the time specified, or to pay the penalties imposed by the contract, even though it involves an impossibility.[3]

If, however, the contractor has not expressly and unqualifiedly agreed to complete the works, including all alteration, by a certain date, he will be excused from a complete performance within the time named if the owner has made changes which require a longer time, or which renders completion within the time impossible.[4]

In the absence of any provision to the contrary, additions or alterations or work not covered by the contract, and which requires longer time to complete, will excuse delay in completion.[5] Therefore, if after a contract is made for building a bridge by a given day, the owner of the bridge directs the contractor to make additions or changes or to do work on the bridge, not covered by the contract, which will require a longer time to complete the bridge, the time necessary to do such extra work must be added to the contract time allowed for the completion of the work.[6]

[1] Williams *v.* Boehan (Super. Ct.), 17 N. Y. Supp. 484 [1892]; *and see* Owens *v.* Butler Co., 40 Iowa 190, where it was found necessary to use coffer-dams, which was contrary to expectations.

[2] Jones *v.* St. John's College, L. R. 6 Q. B. 116; Tew *v.* The Newbold School Bd., 1 Cababe & Ellis 260 [1884].

[3] Jones *v.* St. John's College, *supra.*

[4] Westwood *v.* Secretary of India, 11 W. Rep. 261; Texas, etc., R. Co. *v.* Rust, 19 Fed. Rep. 239, 29 Amer. & Eng. Ency. Law 921-2; *and see* Thornhill *v.* Neats, 8 C. B. (N. S.) 831; Palmer *v.* Stockwell, 9 Gray (Mass.) 237; Alger *v.* Vanderpoel, 34 J. & S. 161; *but see contra*, Clement *v.* Schuylkill River E. S. R. Co., 19 Atl. Rep. 274 and 276, change of grade by ordinance.

[5] Texas & St. Louis Ry. *v.* Rust, 19 Fed. Rep 239 [1883]; Henderson Bdge. Co. *v.* O'Connor, 88 Ky. 303; Baasen *v.* Baehr, 7 Wis. 517 [1859]; Thomas *v.* Fleury, 26 N. Y. 26 [1862]; Huckstein *v.* Kelly, 152 Pa. St. 631; *and see* Sweney *v.* Davidson, 68 Iowa 386; *and* White *v.* School Dist. (Pa.), 28 Atl. Rep. 136.

[6] Texas & St L. Ry. Co. *v.* Rust, 19 Fed. Rep. 239 [1883].

* See Secs. 321–326, 573, *supra*, and 670 and 689 *infra.*

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A contract by a builder that he should and would, on or before a certain day, well and substantially erect, build, and completely finish a structure according to specifications and dimensions, also contained a covenant that in case "the building committee or owner shall direct any more work to be done than is mentioned, that he will pay the builder so much money as such work shall be worth upon a reasonable valuation," were held independent covenants that did not restrict the completion of the extra work to the day named in the contract, and that the contractor could recover for extra work, though done after the time stipulated for completion; time in relation to extra work not being regarded as essence of the agreement.[1]

When the work and materials have been increased so that more time is required for completion than the contract allows, the obligation thereafter is to finish the job within a reasonable time.[2]*

586. More Expensive Material Ordered and Furnished than the Contract Required.—Contractors must take notice of the extent of the authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act. Under a contract which, after describing the dimensions of materials and the price to be paid, provided that no departure should be made from the conditions without the written consent of the secretary of the treasury, a refusal by the engineer to receive stone which are within the description of the contract, and a demand for better and more expensive materials by him, do not entitle the contractor to recover any extra compensation. He was bound to take notice that the engineer had no power to vary the contract, and is only entitled to recover according to its terms.[3]

The mere fact that the contractor has continued to work on a sewer after it has been shortened by an authorized action of the board of public works is not a waiver of the terms of his contract with a city to construct a sewer of a certain length, nor can he be said to have accepted a modified form of his contract.[4] A shortening of the length of 176 feet in a sewer was held not a reasonable change.

587. Extra Work Occasioned by Engineer's Mistakes.†—When extra work is the result of the engineer's mistakes or errors in his lines and levels, and the contractor is required by his contract to follow the engineer's directions and instructions, as is usually the case, the company who employs the engineer should pay for it. It has been so held;[5] and it seems he is not con-

[1] Hamburg *v.* McCahan, 3 Gill (Md.), 314 [1845]

[2] Green *v.* Haines, 1 Hilt. (N. Y.) 254

[3] Hawkins *v.* United States, 96 U. S. 689 [1877]; *see also* Kinsley *v.* Charnley, 33 Ill. App. 553, *and* Merchants' Exch. Co. *v.* United States, 15 Ct. of Cl. 270.

[4] Markey *v.* Milwaukee (Wis.), 45 N. W. Rep. 28 [1890].

[5] Seymour *v.* Long Dock Co., 5 C. E Green 396.

* *See* Secs. 300–326, *supra.*

† *See* Sec. 435, *supra.*

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fined to the rate provided in his contract for similar work.[1] * If the work is to be done according to certain plans and specifications prepared by an architect named, and under his supervision and control and to his satisfaction, and a mistake is discovered in the plans and specifications by reason of which changes are necessary at an increased expense, which are made by the direction of the architect in order to enable the contractor to complete his contract, the owner will be liable for the extra cost of such changes to the contractor, although as between the owner and architect the latter would probably be liable.[2] When earthworks were to be paid for according to the contents of the embankment at a price per cubic yard, the contractor having shown the quantity of dirt hauled and placed upon the embankment, which was greatly in excess of the engineer's estimate, the city having claimed that much of the dirt slid off and sunk, and was no part of the embankment, and not having made any estimate of the amount that was so wasted, the court held that the contractor might recover the amount of earth as estimated from the borrow-pits ; that if the city engineer could form no estimate of the amount of materials so wasted that the city ought to lose it and not the contractor.[3] Labor necessary, to remove dangerous rock outside of the lines and limits of a tunnel, or to remove materials that have fallen from the roof, furnished under the express direction of the engineer, and not resulting from the carelessness or oversight of the contractor or his workmen, has been held to be extra work, notwithstanding a clause to the effect "that if in any event, or from any oversight or other cause, the contractor shall excavate any greater quantity or quantities than by his agreement he has undertaken, without the written consent, etc.," he shall not recover therefor. This clause was construed to mean that in any case, if the contractor by oversight, neglecting the direction[4] of the engineer, or without them or other like cause, makes a greater excavation than is called for by the contract, he shall bear the loss. The contractor was obliged by his contract to follow the lines, levels, and directions of the engineer. The court adopted the rule that where work was necessary to the prosecution of the undertaking it should be allowed as extra work if outside the contract.[4]

A different rule has since been adopted under a provision "that the form and area of the cross-section of the tunnel excavation at any place shall be such as the engineer may determine, and according to the lines and levels determined by the engineer, and that any excavation beyond such lines shall be filled up by the contractor at his own expense, and

[1] Mulholland *v.* Mayor, 113 N. Y. 631 [1889].

[2] Erskine *v.* Johnson (Neb.), 36 N. W. Rep. 510 [1888] ; *see also* Hurley *v* Brooklyn, 8 N. Y. Supp. 98, where a clerk and inspector made the mistake ; *and see* Genovese *v.* Third Ave. R. Co. (Sup.), 43 N. Y. Supp. 8 ; *also* Guerin *v.* Rodwell, 8 Vroom 71 ; *and* Condon *v.* Jersey City, 14 Vroom (N. J.) 452.

[3] Henderson *v.* City of Louisville (Ky.), 4 S. W. Rep. 187 [1887].

[4] Seymour *v.* The Long Dock Co., 20 N. J. Eq. 396 [1869].

* *See* Sec. 435, *supra.*

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that no payment shall be made for any excavation outside of the cross-section determined by the engineer, but all loose or shaky rock must be removed." Under this clause it was held that the contractor was not entitled to any pay for excavations beyond [outside of] the cross-sections established by the engineer, notwithstanding the fact, that by the methods of excavation adopted some rock outside the cross-section would have to be removed, and that the parties knew this when the contract was made. The contractor was allowed for excavating only to the outside of the brick lining of the tunnel.[1]

Under a contract to build a bridge according to specifications drawn up by the engineer of the employer, which, after proceeding with the works, were found to be impracticable, it was held that the contract was made on both sides upon the assumed practicability of the specifications, and that the contractor could not charge the employer with an implied warranty that the works were practicable, in order to claim the expenses incurred in attempting to build according to the specifications.[2] *

A city, it seems, is not liable for injuries or expense caused by the negligence or mistakes of its city engineer in the performance of duties imposed by law upon him.[3] †

588. Provision that Estimates are Approximate Only, and that Proprietors shall not be Responsible for Inaccuracies.

Clause: "It is expressly understood and mutually agreed by the parties hereto that the quantities of the various classes of work to be done and materials to be furnished under this agreement, which have been estimated as stated in the advertisement (attached hereto), are approximate, and only for the purpose of comparing, on a uniform basis, the bids offered for the work under this contract; and the contractor further agrees that neither the parties of the first part, nor the commissioners, or any of them, are to be held responsible that any of the said estimated quantities shall be found even approximately correct in the construction of the work; and that the said part... of the second part will make no claim for anticipated profits, or for loss of profit, because of a difference between the quantities of the various classes of work actually done, or of materials actually delivered, and the estimated quantities stated in the bids; that if any error, omission, or misstatement shall be discovered in the said quantities, the same shall not vitiate this contract or release the contractors from the execution and completion of the whole or any part of the works comprised in this contract to the satisfaction of the engineer, and in accordance with the specifications, and the plans herein mentioned, at the prices herein agreed upon and fixed therefor, or excuse them from any of the obligations or liabilities thereunder, or entitle him [them] to any damages or compensation otherwise than may be provided for in this contract, except for such extra work

[1] O'Brien *v.* Mayor, 15 N. Y Supp. 520 [1891]. 19 N. Y. Supp. 793, 139 N. Y. 543; *accord*, McEwen *v.* Nashville (Tenn.), 36 S. W. Rep. 968.

[2] Thorn *v.* City of London, L. R 1 App. Cas. 112.

[3] Sievers *v.* San Francisco (Cal.) 47 Pac. Rep. 687.

* *See* Secs. 236–247, *supra.*

† *See* Sec. 858, *infra.*

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as may be required, for the performance of which written orders must be given and received as hereinbefore specified."

589. Preliminary Estimate of Work Incorrect.—Claims for extra work are sometimes made upon the ground that the preliminary estimates of the work as to the quantities and character of the work were erroneous, largely in excess of, and of a different kind from what they turned out to be. When contractors have made such estimates the basis of their proposals for work, it would seem reasonable that the company, who have made the representations as to quantities, materials, and conditions, by or through their engineer, should be responsible for their accuracy. If the contractor is put to additional expense in consequence of erroneous estimates and representations, the company should in justice bear it.[1]

To avoid this it is customary to give, at the time the estimates are exhibited or before the bids are made,* due notice that the estimates are only approximate and according to the best judgment of the engineer, and that the would-be contractors are to go over the works and examine them and satisfy themselves as to their accuracy; and if the contract is made without fraud or mistake, the contractor must be taken to have assumed the risks of the work, and cannot recover additional compensation because the work turns out to be larger or more onerous than the engineer had determined it.[2] If he neglect to verify the estimates, but, supposing them to be correct, enters into a contract to furnish the materials and erect a structure according to plans for a gross sum, he is not entitled to any extra compensation beyond the contract price because the structure requires more materials than the estimate calls for.[3] The question is not often raised when the work is undertaken at a unit of measure according to a schedule of prices, but the contract prices hold; and a clause relating to extra work contained in the contract does not limit the work to be done to the quantities actually specified.[4] There are cases to the effect that if no notice is given that the statement of quantities taken out by the architect are approximate or are not guaranteed, and the contractor takes a contract upon such statement or estimate of the architect and it proves erroneous, he cannot claim extra pay because the quantities of materials required for the building were greater than estimated.[5]

[1] Delafield *v.* Westfield, 77 Hun (N. Y.) 124; *and see* Seymour *v.* Long Dock Co., 20 N. J. Eq. 396; Grand Rapids R. Co. *v.* Van Deusen, 29 Mich. 431; Burke *v.* New York (Sup.), 40 N. Y. Supp. 81.

[2] Cannon *v* Wildman, 28 Conn. 472.

[3] St. Paul & N. P. Ry. Co. *v.* Bradbury (Minn.), 44 N. W. Rep. 1 [1890].

[4] Sullivan *v.* S ng Sing, 122 N. Y. 389 [1890].

[5] Sharpe *v.* San Paulo R. Co , L. R. 8 Ch. App. 597; Scrivner *v.* Pask, L. R. 1 C. P. 715; Emden's Law of Building, etc., 223, *and English cases cited* The owner is not responsible for the accuracy of the estimates or bill of quantities. St. Paul R. Co. *v.* Bradbury, 42 Minn. 222; *and see* Sullivan *v.* Sing Sing, 122 N. Y. 389. Even without such a clause as precedes this section the owner has been held not responsible in England. Scrivner *v.* Pask, 18 C. B. (N. S) 785. *And see* Haydenville Min., etc., Co. *v.* Art Inst., 89 Fed. Rep. 484; Blazo *v.* Gill (Sup.), 23 N. Y. Supp.

* *See* Bids and Bidders, Sec. 151, Art. 13, *supra.*

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590. Extra Work Determined by Custom and Usage.—Questions of extra work are sometimes settled by the prevailing usage or custom.* Thus under a contract "to make up the track in good running order, well surfaced, ties evenly and firmly bedded, and 2600 good ties to be put in per mile, joints to be properly fitted, etc.," it was held that whether this required the contractor to fill up the space between the ties with earth or other proper substance was a question of fact depending upon usage in such cases, and that what was meant by the word "surfaced" must be determined from the evidence of witnesses conversant with railroad construction.[1]

If it appears that among engineers and contractors the excavation of indurate earth and cemented gravel or "hardpan" are known and recognized as entirely distinct from the excavation of common earth, and that it is customary for contractors to receive extra pay for such work, a reasonable price may be recovered, although the contract did require the contractor "to do all necessary masonry, grading, gutters, and all things else to the complete graduation and masonry" of the road, and the company agreed to pay "at the rate of sixteen cents per cubic yard for all excavations of earth done on said road under this contract," and although the meeting with hardpan was unexpected by both parties.[2]

It is not competent to show by one engaged in the business of contracting for such work how he would understand the terms if limestone rock were shown him when he made his bid. Nor can it be shown that the company represented to another who contemplated bidding on the work that the rock to be excavated was limestone.[3]*

591. Questions of Alteration, Additions, and Omissions, and their Value Left to the Judgment and Determination of the Engineer or Architect.—The third means or method suggested to prevent the practice by contractors of working the job for extras is to leave the questions of quantities, classifications, and value of extras or omissions to the engineer, and frequently to leave the question of what are or are not extras to his final determination and adjudication. Without such a stipulation, work done outside of the contract upon subsequent orders, or work rendered necessary by obstacles met or changes required, will not be under the supervision of the engineer, nor will the liability of the company to pay for such work be subject to the engineer's acceptance, approval, estimate, or certificate, as the contract may provide, with regard to work under the contract.†

Under a contract which provides that all payments shall be subject to

378; Coker *v.* Young, 2 F. & F. 98 [1860]; Williams *v.* Fitzmaurice, 3 H. & N. 844.

[1] The Western Union R. Co. *v.* Smith, 75 Ill. 497 [1874].

[2] Shepard *v.* St. Ch. W. Plank Road, 28 Mo. 378 [1859]; *but see* Wilkin *v.* Ellensburgh W. Co., 1 Wash. 286

[3] Fruin *v.* Crystal Ry. Co., 14 S. W. Rep. 557.

* *See* Chap XXI. Custom and Usage. Secs. 603–628, *infra.*

† *See* Secs. 392–396, *supra*, and Secs. 592–599, *infra.*

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the architect's approval, and that the owner may make "any alterations, deviation, additions, or omissions from the said contract," which shall not avoid the contract, but be duly allowed for in payment, (the foundations were not mentioned in the contract, and there were no specifications); it was held that, in the absence of proof that the rebuilding of the foundation was in contemplation of the parties, and a part of the work provided for by the contract, payment therefor was not subject to the architect's approval.[1]*

592. Provision that Engineer or Architect shall have Power to Determine whether Work Is or Is Not Included in the Contract.

Clause: "All and every addition, omission, alteration, and deviation, and every form of so-called extra work shall be executed in accordance with the plans and specifications referred to and made a part of this contract, in a good and workmanlike manner, according to the true intent and meaning of the said specifications and in keeping and strict conformity with the rest of the work, and to the acceptance and approval of the engineer or architect, who shall be sole judge as to all questions and disputes as to what are or are not extras, and as to the quantities, quality, character, classification, sufficiency, and value of any and all materials and work arising from, due to, or required by any alterations, deviations, additions, or omissions in the plans, specifications, or contract, or in any matters growing out of the construction and completion of the works, etc., etc.;† and if so directed by the engineer, the location of any existing works shall be changed to meet the requirements of the work or its appurtenances, and new work shall be added, when necessary, to leave all in good and complete working order. All the cost of doing any work above indicated is to be paid for as extra work, solely and only upon the valuation of the engineer, and depending upon his decision as to whether the work done is or is not included in the work required of the contractor under this contract, and his decision in regard thereto shall be final and conclusive and alike binding upon both parties."

593. Provision that Engineer or Architect shall Determine Price or Value of Extra Work.

Clause: "All additions to, deductions from, or alterations in the works shall be valued at the prices set forth in the contractor's price-bill of quantities for work of a similar character, and if no price in the quantities be applicable, then at the schedule of prices furnished by the contractor and attached to his tender, and added or deducted, as the case may be. Should the price of any item of work done not appear in the quantities or schedule, the same shall be fixed by the engineer or architect, whose decision with regard thereto shall be final and conclusive."

594. Provision that Engineer may Order Alterations, Additions, or Omissions, and that He shall Determine the Value Thereof.

Clause: "And the engineer may also alter or vary levels, or the position of any of the works contemplated, or order any further or other

[1] St. John *v.* Potter (Com. Pl.), 19 N. Y. Supp. 230.

* *See* Secs. 392-396 and 370, *supra*.

† *See* Secs. 392-396, *supra*.

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works not contemplated by the specifications or the contract, or may order any of the works contemplated thereby to be omitted, with or without the substitution of any work in lieu thereof, or may order any work or any portion of the works executed, or partially executed, to be removed, changed, or altered and, if needful, that other work shall be substituted instead thereof; and the difference of expense occasioned by such increase, diminution, or alteration so ordered or directed shall be added to or deducted from the amount of this contract, agreeably to the rates specified in the schedule of prices for regulating such extra or diminished works hereto attached; and where the rates are not contained in the schedule of prices, the engineer shall ascertain the amount of such additions or deductions, and his valuation thereof shall be final and binding upon the parties to this contract."

595. Quantity, Character, and Value of Extra Work Left to Judgment of Engineer or Architect.—When such an agreement is made by the parties to a contract, to rely upon the judgment and skill of an architect or engineer in ascertaining the character, quantity, classification, and value of extra work, it is conclusive and the parties must abide by it.[1]* When the agreement was "to refer any disputes and difficulties relative to the performance of the work under the contract, or relative to any other work done and performed, or to be done and performed by the contractor, not provided for in the contract, to engineers as arbitrators, whose decisions are made binding and conclusive upon the parties," the decision and ascertaining of the amount due the contractor was held a condition precedent to the bringing of any action for work done under the contract or as extra work.[2] Accordingly, when the contract provided that the engineer might order additions or alterations in writing, and that the value of such additions and alterations should be ascertained and added to or deducted from the contract price, as the case might be, and further that any dispute or difference as to such additions or alterations should be referred to the engineer, whose decision or valuation should be final, it was held that an action for extra work was not maintainable until the value of such extra work had been determined by the engineer.[3]

In the absence of fraud, or if the question of fraud is not submitted to

[1] Baasen *v.* Baehr, 7 Wis 516 [1859]; Goodyear *v.* The Mayor, 35 L. J. (N. S.) C. P. 12; Scammon *v.* Denio (Cal.), 14 Pac. Rep. 98 [1887]; Myers *v.* St. Andrews & Q. R. Co., 5 Allen (N. B.), 577; Dillon *v.* City of Syracuse, 9 N. Y. 98; Mills *v.* Weeks, 21 Ill. 568; Guthat *v.* Gow (Mich.), 55 N. W. Rep. 442; Ball *v.* Doud (Oreg.), 37 Pac. Rep. 70; Rens *v.* Grand Rapids (Mich.), 41 N. W. Rep. 263 [1889]; Marquette Bld'g Co. *v.* Wilson (Mich.), 67 N. W. Rep. 123; Anderson *v.* Imhoff (Neb.), 51 N. W. Rep. 854 [1892]; O'Brien *v.* Mayor, 15 N. Y. Supp. 520 [1891], (N. Y. App.) 35 N. E. Rep. 323 [1893]; Berlinquet *v.* The Queen, 13 Canada Sup. Ct. 26; Shaw *v.* First Bapt. Ch., 44 Minn. 22; Cannon *v.* Wildman, 28 Conn. 491; Westwood *v.* Secy. of State, 7 L. T. (N. S.) 736; Coker *v.* Young, 2 F. & F. 98; *see also* Rude *v.* Mitchell, 97 Mo. 365; Ohio, etc., R. Co. *v.* Crumbo, 4 Ind. App. 456.

[2] Myers *v.* St. Andrews & Q. R. Co., 5 Allen (N. B.) 577 [1862].

[3] Westwood *v.* Secretary of State, 11 W. Rep. 261; Morgan *v.* Birnie, 9 Bing. 672.

* In fact, the same law is in general applicable to the decision of engineer as regards extra work, as is set forth in Secs. 335–533, *and especially* Secs. 392–396, *supra.*

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the jury, such questions as to extra work cannot be referred to the jury.[1] * If the contract provides that such questions in regard to extra work shall be ascertained by arbitration, the contractor cannot sue for the disputed value of extras until he has offered to arbitrate the claim in the manner provided for in the contract.[2] †

If the contract provide that the engineer shall decide whether alterations made are within its terms, the contractor should get the engineer's decision before undertaking extra work, for if he does extra work, knowing that the owner believes it to be within the contract, without a protest, he cannot thereafter assert that it was extra work and recover additional compensation therefor.[3] When a contract provided that alterations directed by the engineer should "be made as directed," it was held that such alterations were within the jurisdiction of the engineer to determine and estimate.[4] The fact that such additional work was necessary to the safe construction of the work does not alter the case.[5]

Under such a clause it is the architect's judgment, and not his arbitrary will, that is made conclusive. If he acts fraudulently his decision will not conclude the party whom he attempts to wrong, and if it be shown that the architect has disregarded important, clearly established, or obvious facts, the *prima facie* presumption will be that he did so willfully.[6] ‡ The architect, as in other cases, can only exercise the right of determining the value of such extra work and material in the manner provided in the contract.[7]

When a contract provides that the engineer in charge shall determine the quantity and value of the extra work and extra materials required for the works and furnished by the contractor, but does not stipulate that his decisions and estimate shall be final and conclusive, it seems that if the engineer has made his estimate of the amount of extra work and materials and the value thereof with the knowledge of the contractor, and in pursuance of the terms of the contract, and the contractor has received the amount of such estimate as a final payment of his account without objection or protest, he is concluded from making any further demand. The ground of the action was not error or mistake on the part of the engineer, but was based upon a subsequent estimate by the state engineer authorized by the state, which was greatly in excess of the one by which the contractor had

[1] Guthat *v.* Gow (Mich.), 55 N. W. Rep. 442; *see also* Anderson *v.* Imhoff, *supra, and* Marks *v.* Northern Pac. R. Co. (C. C. A.), 76 Fed. Rep. 941.

[2] Ball *v.* Doud (Oreg.), 37 Pac. Rep. 70; Scammon *v.* Denio, 72 Cal. 393 [1887].

[3] Evans *v.* McConnell (In.), 63 N. W. Rep. 570. 68 N. W. Rep. 790.

[4] O'Reilly *v.* Kerns, 52 Pa. St. 214.

[5] Dillon *v.* City of Syracuse, 9 N. Y. 98; *but see* Board *v.* Byrne, 67 Ind. 21.

[6] The County of Cook *v.* Harms, 108 Ill. 151 [1883]; *see* Memphis Rv. *v.* Wilcox, 48 Pa. St. 161; Marks *v.* Northern Pac. R. Co. (C. C. A.), 76 Fed. Rep. 941.

[7] Cook County *v.* Harms, 108 Ill. 151 [1883]; *see* Clark *v.* United States, 6 Wallace 543 [1867].

* As regards the effect of fraud, collusion, and mistakes of engineer or architect, *see* Secs. 418–443. *supra.* † *See* Secs. 414 and 437, *supra.*

‡ *See* Secs. 335–533, *supra*, as to engineer's decisions in general.

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been paid. The court says that if an error or mistake had been alleged and shown, the transaction might have been opened to explanation and the error made a ground for opening the settlement.[1] If the language of the parties is such as to leave no doubt that they understood that they were both agreeing to abide by the decision of the engineer, a court of equity may hold the engineer's estimate conclusive even as to extra work. It was so held with regard to the clause "that in cases where fast rock, shale rock, or hard-pan may have to be excavated the additional compensation should be determined by the engineer."[2]

To give an engineer the determination of extra work, or of what is extra work, it must be specially so provided, for extra work, being outside the contract, would not otherwise be governed by its provisions and conditions.[3]* Thus a stipulation providing that "if any disputes or differences should arise with the contractors in any way relating to the contract, or if any question should arise between any of the several contractors relating to the proposed works, such dispute, difference, or question should be settled by the architect or engineer, whose decision thereon should be absolute and final," was held to apply only to disputes as to the mode of carrying on the several works and not to differences between the contractor and corporation as to their claims for extras.[4] Another case held that a stipulation in a contract for an arbitration in case of dispute as to the true value of extra work, or of work omitted, did not include disputes as to whether certain work was extra work, nor as to whether extra work at agreed prices was properly done. Such a stipulation, it was held, could oust a court of law or a court of equity of all jurisdiction over the matter falling within the stipulation.[5] A like view was taken by the court when the contract required a certificate from the engineer that the work was fully completed and the owner denied any liability for extra work.[6]

A contrary rule was held in an English case, when the contract provided that "all extras, payment for which the contractor should become entitled to under the conditions, should be fixed by the surveyor, and that the contractor should be paid on the certificate of the surveyor at the surveyor's discretion, in installments, etc., and the balance on completion of the works to the surveyor's satisfaction." The court held that this provision made the surveyor's determination as to what were extras conclusive

[1] Swift *v.* The People, 89 N. Y. 52 [1882].

[2] Mansfield & S. Ry. Co. *v.* Veeder, 17 Ohio 396.

[3] Pashby *v.* Mayor of B., 18 C. B. 2; *and see* Cook Co. *v.* Harms, 108 Ill. 151; Baum *v.* Covert, 62 Miss. 113; Boody *v.* R. & B R. Co., 24 Vt. 660; *see* Richards *v.* May, L. R 10 Q B. D. 400.

[4] Pashby *v.* Mayor of B, 18 C. B. 2; Starkey *v.* DeGraff, 22 Minn. 431 [1876]; *see also* Osborne *v.* O'Reilly, 42 N. J. Eq. 467 [1887]; *and see* Lawson *v.* Wallasey L. Board, L R. 11 Q. B. Div. 229.

[5] Weeks *v.* Little, 47 N. Y. Super. Ct. 1; Hart *v.* Lauman, 29 Barb (N. Y.) 410; Sinclair *v.* Talmadge, 35 Barb. 607; Doyle *v.* Halpin, 1 Jones & S. (N. Y.) 369.

[6] Ohio & M. Ry Co. *v* Crumbo (Ind.), 30 N. E. Rep. 434 [1892], 4 Ind. App. 456.

* *See* Sec. 395, *supra.*

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as well as the prices for such extras.[1] Under the terms of another English contract, which provides that work should be paid for according to a schedule of prices, or in the event of "any other description of work not included in the schedule at such prices as the engineer might agree to, and in case of dispute between the contractor and the company, at such prices as an arbitrator should determine, to whom disputes were to be referred," it was held that the arbitrator could determine not only the price, but also what work was "another description of work," and his decision that a large quantity of soft, swampy soil was not "excavation" within the meaning of the contract, but was within the exception as to "any other description of work," and therefore an extra item and to be paid for at a different price from that named in the schedule, was upheld and approved.[2]

596. Power to Decide Questions of Extra Work Does not Imply Power to Determine Damages for Breach of Contract.—A provision that disputes with respect to extra work, or of work omitted by direction of the owner, shall be determined by arbitrators does not include the determination of the question of damages for refusing to allow the contractor to do the work contracted for, and for letting the work to another.[3] If the contract reserve to the owner the privilege at any time during the progress of the work of making any alterations, deviations, additions, or omissions in the work or materials contracted for, without making the contract void, and provides that the true value of such changes shall be determined by arbitration, it does not give the arbitrators the determination of the question of damages for nonperformance or delay.[4] Nor does the agreement that the engineer shall determine all questions arising relative to the execution of the contract, and that his decisions shall be final and conclusive, extend to a subsequent promise on the part of the employer to pay additional compensation for work which the contractor had refused to do on the ground of misrepresentation as to the character of the work.[5]

Where a city lets a contract for the erection of a building containing a provision that in case of any dispute between the architect and the contractor as to the meaning of the plans and specifications, or as to what is extra work, the same shall be decided by the architect and his decision shall be final; but afterwards, when disputes arise, makes a supplemental contract, which, though making the architect the final interpreter of the plans and specifications, provides that in the event of a difference between him and the contractor, the contractor shall "under protest" complete the work under the architect's interpretation, leaving the contractor's rights as to such work done under protest open without impairment until after the full com-

[1] Richards *v.* May, 10 Q. B. D. 400 [1883]; *see* Galveston *v.* Devlin (Tex.), 19 S. W. Rep. 395.

[2] Kirk *v.* E. & W. India Co., 55 L. T. R. (N. S.) 245 [1886].

[3] Boyd *v.* Meighan, 48 N. J. Law 404 [1886].

[4] Cooke *v.* Odd Fellows, 1 N. Y. Supp. 498 [1888].

[5] Osborne *v.* O'Reilly, 42 N. J. Eq. 467 [1887].

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pletion of the work,—the contractor, in an action based on the supplemental contract for extra work done and materials furnished, is not bound by the architect's decision that such work and materials were required by the plans and specifications.[1]

When it is mutually agreed that the value of extra work shall be ascertained by persons mutually chosen and in no other way, but the persons have never been chosen and no valuation has ever been made, the contractor in an action upon a *quantum meruit* may give other evidence of the value of the work done.[2]

When the engineer is employed by the company and is given the direction of the work and the authority to estimate the work and determine questions pertaining to it, he is not the agent of the contractor, but the special agent of the company, and if the measurements and calculations made by the engineer or his assistants are not correct, and extra or unnecessary work and expenditure result, the loss ought not to fall on the contractor, but upon the company.[3] *

A failure to comply with a clause in a builder's contract providing that any dispute as to the true meaning of the drawings or specifications shall be decided by an architect, and as to the true value of extra work by arbitrators, is no defense to an action for services rendered under such contract where there is no allegation in the answer setting up such failure, that there was such a dispute, or that defendant ever offered or plaintiff refused to submit such matters as provided for.[4] †

Extra work done under a contract providing for extra work must be carefully done, and the fact that the said extra work is done according to the plan and under the direction of the city engineer does not relieve the contractor from due care in the performance of the work.[5]

597. Provision that Questions and Doubts with Regard to Extras shall be Submitted to Arbitration.

Clause: "Should any questions or disputes arise as to whether any work done is or is not included in the contract, or as to the value of any additional or extra work done, or any omissions made after the engineer or architect has given his final certificate in writing on completion of the contract, the same shall be referred to two arbitrators, one to be chosen by the owner or company, and the other by the contractors, and in case of disagreement, the two arbitrators shall appoint a third, and their award and decision, or that of any two of them, shall be final and conclusive, and binding upon all parties to this contract; the submission and reference to be in writing under the seal of the owner or company, and the hands and seals of the contractors, and duly witnessed,

[1] Galveston *v.* Devlin (Tex.), 19 S. W. Rep. 395 [1892].

[2] Baker *v.* Herty, 1 Cranch C. Ct. 249 [1805].

[3] Seymour *v.* Long Dock Co., 20 N. J. Eq. 397 [1869].

[4] Johnston *v.* Varian, 108 N. Y. 645 [1888].

[5] Charlock *v.* Freel, 50 Hun. 395 [1888].

* *See* Sec. 421, *supra.*

† *See* Sec. 414, *supra.*

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and the said award of the arbitrators or any two of them also to be in writing, duly signed, sealed and witnessed, and the award so made may, by any of the parties hereto, be made a rule of the supreme court of the state."

598. Provision that Disputes as to Extra Work shall be Referred.

Clause: "Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by said architect, and his decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work or of the works omitted, the same shall be valued by two competent persons, one chosen by the owner, and the other by the builder, and these two shall have power to name an umpire whose decision shall be binding on all parties." *

599. Instances of Extra Work—Interpretation of Certain Terms and Expressions.—In engineering and architectural work many ambiguities arise where the language employed by the parties is insufficient or inadequate to express definitely or fully their intention. Certain indefinite or ambiguous expressions commonly in use have been given certain constructions by our courts and form a precedent which is quite likely to be followed if they again come up for interpretation. The meaning given to such terms and clauses cannot fail to be interesting to the reader, and it is hoped that the insertion of them here may have a threefold value: First, to teach the reader to avoid the same and similar ambiguities in his own contracts; secondly, to give him the probable interpretation that they will receive; and thirdly, to assist him in the interpretation of other doubtful clauses which may occur in his experience.

600. Work Not Specifically Mentioned in Contract.—It is frequently held that a contractor is bound by his contract to do all and everything that is necessary to make his work reasonably effective for the purposes which it was intended to accomplish,[1] and this may be so even if every item and detail that are necessary to the completion are not specifically mentioned in the contract.[2]

Materials and work that are properly embraced in a structure, though not specifically mentioned in the specifications, cannot be charged for as extras when the contract is to build and complete the structure. Thus under the head "carpenter and joiner" there were specified the scantling of the joists for the floors, the rafters and ridge and wall-pieces, but the flooring was not mentioned, and it was decided that no extra charge could be made for furnishing the floor-boards; that from the whole instrument it was clear that the contractor was to supply the necessary materials for the floor.[3]

The cellar and foundations have been held a part of the erection and

[1] I., B. & W. Ry. Co. *v.* Adamson, 114 Ind. 282 [1887].

[2] Currier *v.* B. & M. R. R., 34 N. H. 498 [1857].

[3] Williams *v* Fitzmaurice, 3 H. & N. 844 [1858]; *and see* Emden's Law of Bld'g, etc., 223; *and* La Chicotte *v.* Richmond Ry. & Tel. Co. (Sup.), 44 N. Y. Supp. 75.

* As regards arbitrators and umpire, *see* Secs. 519–533, *supra*.

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construction of a building, sufficient to support a mechanic's lien;[1] and a contract for the construction of a wall at five dollars per cubic yard, which said nothing about the excavations, was held to include the excavations, and that the contractor was bound to make them without extra pay. But when the specifications called for a lining of coarse gravel in the rear of the wall and made no provision for payment, and there was no gravel near the work, and it had been agreed to substitute macadam material for the gravel, the contractor was permitted to recover extra compensation not only for the gravel lining but for the excavations for it.[2]

A contract to grade and pave a street and to lay the stone curb as specified for a fixed price per lineal foot, was held to include the digging of the trench for the curbstone after the surface of street had been brought to the proper grade.[3]

Although the only promise in a building contract is to furnish "all stock and materials mentioned in the specifications," it will include the erection of the building contemplated by the specifications, where such appears to have been its intent from provisions as to time of beginning the work, payments according to estimated value of the work and materials, and as to superintendence of architect.[4]

A contract to keep "the street bridges where crossed by street-car tracks in first-class order," has been held to mean to keep the whole bridge in repair.[5]

An agreement to quarry, burn, and deliver cement in a storehouse at a certain place, the stone to be taken from the company's quarry and in a manner so as not to endanger it, and a counter-agreement to pay a certain price per barrel for all cement delivered in such storehouse at times stated, was held to require the contractor to furnish the wood and coal to burn such cement.[6]

601. Limits of Work Not Properly Defined.—A common source of ambiguity and trouble in railroad circles is the indiscriminate use of the words "road" and "track." It is not surprising that the same annoyance has found its way into the courts on several occasions. The question came up as early as 1855, under a contract to build a railroad between certain termini at a specific price or rate per mile, according to certain specifications. A dispute arose as to whether the fixed rate was per mile of track—*i.e.*, the aggregate lengths of the main track, the side-tracks and the turnouts—or was per mile of road-bed. It was decided that the latter interpretation was the proper one, but apparently upon the ground that the contractor had received monthly payments on monthly estimates, and had made no claim

[1] Cristal *v.* Cochran (Pa.), 23 Atl. Rep. 444.
[2] Shipman *v.* Dist. of Colum., 119 U. S. 148, 703.
[3] Davis *v* Saginaw, 87 Mich 439.
[4] White *v.* McLaren (Mass.), 24 N. E. Rep 911 [1890].
[5] State *v.* Canal & C. St. Ry. (La.), 10 So. Rep 940 [1892].
[6] Freston *v.* Lawrence Cement Co. (Sup.), 30 N. Y. Supp. 144.

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for payment for such side-tracks, etc., and that such a practical construction of the contract concluded the contractor from setting up a different one.[1] The later cases have adopted the same interpretation in computing the number of miles of railroad specified as being between two points,[2] and in determining the expense that several railroads should bear "in proportion to the length of the main track, or tracks or road," it was held in the latter case that the length intended was the measured distance between the two points and not the number of miles of track.[3] Under a contract to pay a certain amount per mile for the construction of a railroad, which is to be completed by a certain date, the contractor was held entitled to payment both for a temporary line, built around a difficult part of the route, to save time, and for the permanent line, built by a more direct, but more difficult, route.[4]

A contract to construct the road-bed of a railroad between two cities named has been held to include all the road as indicated by their depot grounds, and that the contractor could not recover extra compensation for grading within the corporation limits of the villages or cities named, and that the contract was not satisfied by grading to the corporation limits.[5] Under a like construction it has been held that work upon bridge foundations of a railroad is work done under a contract "to construct and complete all the grading, earth, rock, and masonry for the road-bed of the railroad from a place named to Kennebec river; the bridge being over the Kennebec river.[6] Cattle-guards, water-tanks, stop-gaps, slides, sidings, and Y's, have been held part of the complete construction of a railroad, which a contractor is bound to supply under a contract to build and complete the road, but not the rolling stock.[7]

Earthworks at a price per cubic yard to be measured in the embankment have been held to include the filling in between the ties after the track was laid, and that it was not embraced in the contract to lay the track.[8] But under a contract to fill in a trestle under a railroad track which provides for compensation by the cubic yard of dirt, solid measure, the contractor was not allowed to recover for the space occupied by a brick culvert constructed by the company under the trestle.[9]

"Clearing land," in absence of words of limitation, has been held to mean the removing all the timber of every size, but not to include the taking out of stumps and roots.[10]

[1] Barker *v.* T. & B. R. Co., 27 Vt. 766 [1855].
[2] Sulzbach *v.* Thompson's Admrs (U. S. C. C. Pa.), 17 The Reporter 777 [1884]
[3] People *v.* Chapin (N. Y.), 12 N. E. Rep. 595 [1887].
[4] Central Trust Co. *v.* Condon (C. C. A.), 67 Fed. Rep. 84.
[5] Western Union R. Co. *v.* Smith, 75 Ill. 496 [1874]; *semble*, Mason *v.* Brooklyn C. & N. R. Co., 35 Barb. 373 [1861].
[6] Rogers *v.* Hogan, 58 Me 305 [1871].
[7] Central Trust Co. *v.* Condon (C. C. A.) 67 Fed. Rep. 84.
[8] Snell *v* Cottingham, 72 Ill. 161 [1874].
[9] E. Tennessee. V. & G. Ry. Co. *v.* Matthews (Ga.), 11 S. E. Rep. 841 [1890].
[10] Seavey *v.* Shurick (Ind.), 11 N. E. Rep. 597 [1887].

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Where, by the terms of the contract, the work done under it was to be paid for partly in stock and partly in money, it was held that payment for extra work might be recovered in money.[1] When a contractor was to be paid "the cost of labor and materials, and a certain per cent. added thereto as profit," he was held entitled to the amounts paid to subcontractors, including their customary profits, and his per cent. thereof.[2]

An interesting case came up in the construction of the Northern Pacific railroad under a contract which provided that earthworks should be measured in excavation. An embankment was partly made from two adjacent road cuts which were measured, and it was completed with earth borrowed from ditches which were not measured. The rule was that when earthworks were measured in embankment 10 per cent. should be allowed for shrinkage. The volume of the embankment was 100,000 cubic yards; that of the road cuts 60,000 cubic yards. The contractor contended that his estimate for excavation from borrow-pits should be 110 per cent. of 100,000 cubic yards, less 60,000 cubic yards, or 50,000 cubic yards. The engineer's estimate was 100,000 cubic yards, less 60,000 cubic yards measured in cuts, which was 90 per cent. of the amount which would be required to finish embankment, which was 44,444 cubic yards. The company allowed only 110 per cent. of 100,000 less 60,000, or 44,000, which is 6000 cubic yards less than the contractor's claim, and 444 cubic yards less than the engineer's estimate. The lower court sustained the estimate of the company.[3] The case is instructive as showing the importance of trifles in interpreting a contract.

602. Estimates of Quantities of Work and Materials.—A provision for an extra allowance in case "the aggregate amount of all materials encountered were increased over the preliminary estimate was held not to apply to an increase over and above the estimate of each kind of material, but to mean that the aggregate amount of all the kinds of materials should exceed the total estimate.[4]

Under a contract to erect new buildings upon land covered by houses, which does not mention them nor the use of materials in them, the contractor becomes the owner of the materials upon taking possession and removing them, and can use them whenever and wherever he chose. If the owner does not provide for the use of the materials in the old buildings in the new, or does not remove them before the contractor takes possession under his contract, he waives his right to them and they belong to the contractor.[5] The right to make alterations under a lease does not give right to materials taken out.[6] *

[1] Smith *v.* B. C. & M. R. R., 36 N. H. 459 [1858].

[2] Hamilton *v* Coogan, 28 N. Y. Supp. 21; *accord*, Ford *v.* St. L., K. & N. W. Ry. Co., 54 Iowa 728.

[3] Case not reported.

[4] Smith *v.* B. C. & M. R. Co., 36 N. H. 458.

[5] Morgan *v.* Stevens, 6 Abb. New Cases 357 [1878]; *compare* Cooper *v.* Kane, 19 Wend. 386.

[6] Agate *v.* Lowenbein, 57 N. Y. 604.

* *See* Sec. 265, *supra*.

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A stranger performing work by mistake upon another's contract to excavate earth from a street without the latter's knowledge cannot recover the cost thereof.[1] But where one contractor, upon another portion of the same sewer, excavates material and deposits the same upon that part of the sewer constructed by another contractor, and the part so covered up is afterwards found to be defective by the inspector, who requires that such part of the sewer be re-excavated and rebuilt, the contractor who placed the materials upon the sewer is liable for the damages and expenses resulting from his act.[2]

[1] Ronr *v.* Baker, 18 Oreg. 350 [1886]; *but see* McClary *v.* Mich. Cent. R. Co. (Mich.), 60 N. W. Rep. 695.
[2] Dalamater *v.* Folz, 50 Hun 528 [1888].

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CHAPTER XXI.

CUSTOM AND USAGE IN CONSTRUCTION WORK.

THEIR EFFECT UPON THE CONTRACT. ITS INTERPRETATION AND CONSTRUCTION.

603. Provision that Quantities shall be Determined by Actual Measurement without Regard to Usage.

Clause: "It is hereby further agreed and understood that the quantities of materials and work to be received and paid for, by either party to this agreement shall be measured and estimated according to their actual volume, area, or length, without regard to any customs and usages to the contrary."

604. Provision that No Extra or Customary Measurements shall be Allowed.

Clause: "It is further agreed and understood that no extra or customary measurements of any kind will be allowed in measuring the work under these specifications; but the actual length, area, solid contents, or number only shall be considered, and the length shall be measured on the center lines of the work, whether straight or curved."

605. Effect of Custom and Usage on the Law of Construction Contracts.—A distinctive feature of the common law is its versatility. Its flexibility and fickle character denies it the name it bears if employed in the sense that the term is used by scientific men. What may be the lawyer's philosophy of law, would be the scientist's theory of probability. If a certain state of facts or conditions be given a scientist, and they may be classed under any of the sciences generally understood, he will deduce a certain and known result, by the laws of mathematics and science, but the law of the land is modified by so many conditions and circumstances as to render positive deductions almost impossible. Law to a mathematician implies certainty, positive results, absolute truths, but these elements in the law of the bench or bar are nearly extinct. Make ever so clear a statement of the case to several lawyers, and a variety of opinions may be had, many directly opposed and contrary to one another.

Probably the most active agents, modifying the rigid application of the fundamental principles of the law, are those of usages or customs; usages that have been acquiesced in and practised by communities, trades, and professions, and have after a long time become the custom of the land.

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These usages and customs are the foundation of the common law. The English people have the greatest respect for precedent, for usages and customs of their forefathers, and what had been the custom of the people was made the law of the land, and so it is to this day. It is this suppleness and adaptation of the common law to the changes in life and to the altered views of the people that especially commends it to a liberty-loving race. As has been said, "it is not an indication of its inferiority, but a proof of its vitality."[1]

All branches of law may be qualified by usage and custom, some to a greater and some to a less extent, but the construction of contracts is subject to the greatest and most frequent changes. Contracts are the means by which persons assume obligations to one another; they are the medium by which the professional, manual, and commercial business of the world is carried on, and their interpretation and construction should conform to the usages and customs adopted and practised by the calling in which they are made.

606. Peculiar Effect of Custom and Usage.—The practice of engineering and architecture, having to do with such a variety of materials, employing so many different trades, and being so world-wide in its application, is essentially changed by custom and usage. It must not only conform to the usages of trades employed, but to the custom of the particular locality in which the work is undertaken. These may so modify the contract in its application to the work or subject-matter as to materially change the result and effect of the contract. They may change the requirements of the contract as to the amount, quality, and classification of work and materials, or as to the price or compensation to be paid, or the manner and means of accomplishing its ends or the time when it shall be completed.

Usages and customs are especially annoying to young and inexperienced engineers and architects, who read a contract and its accompanying specifications in the light and understanding of their school-books or of the popular meaning of the terms employed; whose understanding of the words "cord" or "perch," etc., is that number of cubic feet given by their arithmetics or described by the lady teachers of their childhood. An experienced engineer would read between the lines, "as it were," and a "cord" to him would mean several things—either a load of given weight or 100 or 128 cubic feet. Novices may marvel at interpretations given to terms of contract by trades, sometimes in plain contradiction to the usual meaning of the words employed, but the meaning adopted by the trade or business which employ them, will be the meaning given to them by the courts.

If accidents occur or injuries result from negligence or delay, the liability for such injury is often a matter of custom or usage. The liability of one party as against another for patterns, molds, or requisite appliances to

[1] Browne's Custom and Usage 17.

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prosecute or complete the work is sometimes a question of custom,[1] as is also the meaning of words, terms, and phrases, and therefore the proper performance and completion of a contract or the skillful execution of a piece of work.

It may seem strange that it can be successfully maintained that a perch in a contract means 25 cubic feet,* or that 1000 must be taken to mean 100 dozen, or 1200;[2] or that black means white,[3] or that a contract to pay for brick per 1000 means to pay for brick never laid or furnished; yet these are instances of the effect of usage on the interpretation of contracts.

All trades and businesses have trade usages and trade customs which may differ, even for different localities in the same trade, and since courts recognize them and employ them to construe the meaning of contracts, it is essential to know: (1) What constitutes a usage or custom; (2) when they may be employed to explain the meaning of contracts; (3) how may they be shown or proved; (4) usage of what place controls; (5) instances and terms defined.

607. What may Constitute a Usage.—What may constitute a usage so as to enter into and form a part of the agreement between two persons is pretty well determined. There are some essential features to its admission that have always been required. Usage is a uniform practice followed in the transaction of a business or the carrying on of a vocation or trade, or an established method or rule applied to the exercise of a calling in which the the profession, business, or trade generally acquiesce and by which they are governed.

608. Usage must be Established.—First, the practice, method, or rule or, in short, the *usage* must be established. By which is meant simply that it must have existed a sufficient length of time to have become generally known.[4] The length of time must depend upon circumstances and may differ in each particular calling. The frequency of its occurrence and the number of people affected by it, or to whose notice it is brought, will determine largely the time necessary to establish a usage.

Three weeks have been held sufficient in the insurance business in the city of New York, where a great many transactions of the same character take place every day.[5] In another case it has been held that two years was too short a time to establish a usage of a bank, it appearing that only four cases had occurred in that time.[6] In the language of the court: "To give usage the force of law, it requires an acquiescence and a notoriety from which it may be inferred that it was known to the public, and especially to

[1] Mitchell *v.* Henry, 24 Solic. Jour. 522 and 689; Barry *v.* Bennett, 7 Met. 354.
[2] Smith *v.* Wilson, 3 B. & Adol. 728 [1832].
[3] Mitchell *v.* Henry, 24 Solic. Jour. 522 and 689.
[4] Lawson on Usage 29.
[5] Wall *v.* East R. Ins. Co., 3 Dur. 264.
[6] Lawson on Usage 29-30.

* *See* Sec. 621, *infra*.

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those who did business with the bank.[1] One, three, and seven years have been held sufficient in other instances.[2]

609. Usage must be Certain and Uniform.—A usage must be certain and uniform. It must be fixed, certain, and universal. The proof of it must be undoubted. It should be definite, consistent, and not contradictory. If it is variable, indeterminate, and persons disagree as to its use, it cannot control the well-understood meaning of words. Thus, when a custom was set up that in making surveys of government lands it was a practice of the surveyors to include more land than the warrant or deed called for, and one witness testified it was customary to allow 5 per cent. in the length of lines, and another said it was usual to add four inches to the length of a chain in rough, broken, and bushy land, but that some did and some did not add to the length of a line measured with the chain thus elongated, and that in measuring old lines he had usually found them longer than the calls in the warrant, some were more than 5 per cent. and some less; and it was further testified that a few of the old surveyors would fall short of the distance called for; that there was a great variety of measurements in the early surveys, but that generally surveyors measured the distance called for, and that no general proportion of excess was known to the witness,—the court said that it was certain that almost every locator had appropriated more land than his warrants would entitle him to, but that the testimony, instead of proving any known and certain custom, proved the reverse.[3]

A usage must be continued, and that there must be no temporary suspension or interruption of the rule. A practice maintained in a public department during the administration or occupancy of a particular officer by his directions may not be regarded as an established usage. Thus the custom of a city department to charge interest on sums advanced to contractors, was held inadmissible when it appeared that the practice had been different under different comptrollers, and that the witnesses' knowledge was not later than a year before the time in question.[4]

Acts of courtesy, habits of accommodation and indulgence will not establish a usage, if they are evidently practised for that purpose. The general practice of accepting checks in payment for money, or of goods and wares from stores of employers in payment for labor, does not establish a rule to control a written contract which is silent as to the means or manner of paying. Nor does the common act of courtesy, which induces a man to call on his mechanic to rectify what is amiss in his job, establish a custom to excuse the trade from responsibility for bad work.[5] The fact that a railroad company has paid for medical attendance of injured employees in its service will hardly bind it to pay for subsequent services rendered.[6]

An arbitrary change in the methods of doing business or in the authority

[1] Lowe *v.* Lehman, 15 Ohio St. 179 [1865].
[2] Lawson on Usage 29.
[3] Lawson on Usage 35.
[4] Lawson on Usage 37; *see* Butler *v.* Charlestown, 7 Gray (Mass.) 12.
[5] Lawson on Usage 38.

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conferred upon certain officers or agents, cannot be made to the prejudice and injury of a customer, without notice.[1] The notice should be given so as to give persons sufficient time to adapt their business to the change. Thus a custom of a bank to give accommodation to a customer for which value has been given is entitled to a reasonable notice that the accommodation is discontinued.[2] The practice of other banks in a place to give notice of dishonor of commercial paper by mail will not hold with a bank which has formally abandoned the usage.[3] A usage for a company to pay for materials and supplies ordered by its engineer, to be used on a bridge being constructed under the engineer's superintendence, will render the company liable for subsequent orders, unless notice be given that the authority has been withdrawn.[4]*

610. Usage must be Generally Known.—A usage must be general, or it must be known. If not expressly brought to the notice of a party it must be so general and notorious that it may be presumed that the parties knew of it and contracted in reference to it.[4] It would not be necessary to prove that a usage is general or notorious, or how long it has existed, if it be shown that the parties knew of it and contracted with reference to it;[5] a practice might exist between two persons only, and bind them in all subsequent dealings between themselves.[6] It has been said[7] that "the proposition that a usage must be general in order to bind the parties, refers exclusively to the cases in which the knowledge of the parties and their intention to adopt the usage are inferred merely from the fact of its existence; but when their knowledge or intentions are established by other direct or circumstantial proof the contract will be governed by the usage, however local or partial, in reference to which it is proved or presumed to have been made."

As knowledge and mutual understanding with regard to a usage are difficult to prove, and since in most cases nothing has been said about it, it is generally necessary to prove the existence of a usage, and that it was so generally known and so universally in practice, that it becomes by implication a part of the contract.[8] Courts rigidly apply the rule that a usage must be general unless it can be shown that the contract was made with reference to it. Just what is understood by the term "general" often becomes an important question.

Where it appeared that a railroad company was in the custom of making monthly payments to its contractors for work done on its road, upon estimates made by the engineer at the end of each month, and that usage or

[1] Isbell *v.* Lewis (Ala.), 13 So. Rep. 335.
[2] Lawson on Usage 39.
[3] Beattie *v.* D., L. & W. Ry., 90 N. Y. 643 [1882].
[4] Dickinson *v.* Poughkeepsie, 75 N. Y. 65 [1878.]
[5] Lamb *v.* Klaus, 12 Amer. Law Reg. (N. S.) 199.
[6] Lawson on Usage 40.
[7] Insurance Co *v.* Wilson, 2 Md. 241.
[8] Steamship Co *v.* McAlpine, 69 Ga. 487 [1882].

* *See* Secs. 377 and 558, *supra.*

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custom having been adopted by the plaintiffs, it was held that this must be considered the rule of payment under the contract, established by mutual consent, and binding upon the parties.[1]

The usage of one person, or of one house, or of one mill, or of one railroad, is not sufficient to meet the rule as to generality for a community; but though a usage is confined to a city, town, or village, it may be "general" as to its use among their inhabitants in business carried on within its boundaries. A usage shown to be general in a city would not prove its generality in the country, and it has been held that a usage proved to be general in New Orleans, Cincinnati, and Louisville was not sufficient to show a general usage among merchants upon the Mississippi river and its tributaries.[2]

The fact that many persons practise a usage, or that the majority of those engaged in the business have adopted it, or that two-thirds even of the business done is transacted according to a rule,[3] is not enough; the custom must be universal, it must be the mode.[3] If a practice between two men, or two mills, or two railroads would not establish a usage between persons, mills, or railroads in general, neither would it be expected that a usage in a single town or city would establish a usage in other like cities and towns. It must be shown to be a general usage among cities and towns.[3]

611. Parties to Contract should have Knowledge of Usage.—It has been frequently held that if a usage is to be implied as a part of a contract, it must have been known to the parties, and they must have contracted with reference to the usage. The fundamental principles of contracts would seem to require this. There are invariably two requisites to a binding contract: consideration and mutual consent. Mutual consent is indispensable. The parties must have a clear and definite understanding of the obligations which they assume. The understanding of one party cannot govern; the law of contracts requires that there shall be a meeting of the minds of the parties to the contract, and if the parties do not understand alike there is no contract, theoretically. If it appear that the parties understood the contract differently, one that the structure was to be built in a certain way or of a certain material, and the other that it was to be made in a different manner or of another kind of material, or there was no mutual assent as to what was to be done or by what means, there could be no contract.[4] A local usage cannot affect the meaning of the terms of a contract unless it is known to both contracting parties.[5] Courts generally find that there was a mutual understanding, and they bring usage and customs to their assistance

[1] Boody *v.* Rut. & Burl. R. Co., 24 Vt. 660 [1853]; *accord*, Wood's Law of Railroads 1005; Merrill *v.* Ithaca, etc., R. Co., 16 Wend. (N. Y.) 586.

[2] Lawson on Usage 41.

[3] Pevey *v.* Lumber Co., 33 Minn. 45 [1884].

[4] Wilkinson *v.* Williamson, 76 Ala. 163 [1884].

[5] Chateaugay Ore & Iron Co. *v.* Blake, 12 Sup. Ct. Rep. 731; *accord* Collins *v.* Mechling, 1 Pa. Super. Ct. Rep. 594.

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to determine the intentions of the parties. A plea of "did not know" is of no avail if the usage is fully established.[1] It is not necessary to show that the custom "was in the minds of both parties" before it becomes a part of the contract, for it may be so universal in practice that it becomes so by implication.[2]

One line of cases holds that it must be shown to have been so long continued, universal, and notorious that all persons may be presumed to have had notice of it;[3] while another line holds that the usage must appear to be so well settled, so uniformly acted upon, and of so long a continuance as to raise a fair presumption that it was known to the contracting parties, and that they contracted in conformity with it.[4]

Numerous cases exist where one party has known nothing of the custom, yet it was held to control.[5] If one of the parties were ignorant of the usage, it is not binding on him; but that is for him to prove.[6] The party claiming under a usage is not required to show that the usage was known to the other party. His knowledge will be presumed at the time the contract was made.[7] There must be some proof that the contract was made with reference to the usage, or that the position of the parties was such, or their acquaintance of the business, or their knowledge of the practice, or some circumstances must exist and be shown from which it may be presumed or inferred that the parties had reference to it.[8] The parties must be acquainted with the usage or in some way be chargable with notice of it.[9]

If the usage is not general and established and universally known, it must be brought to the notice or have come to the knowledge of both parties in order to become a part of their agreement. Such are rules or regulations made by particular persons, firms, corporations, societies, and cities to govern their members or employees in the conduct of their business.[10] A witness cannot testify that a custom is so general and uniform as to create a presumption of the knowledge of it.[11]

612. Knowledge of Parties of Trade Usages and Customs.—Trade usages and customs are those that are most frequently met in engineering practice and in construction work, and these are governed by the laws of general usage. If these are established, uniform, and general, they become a part of contracts without actual knowledge by the parties. One who employs a

[1] Long *v.* Davidson (N. C.), 7 S. E. Rep. 758.

[2] Steamship Co. *v.* McAlpine, 69 Ga. 437 [1882].

[3] Wadley *v.* Davis, 63 Barb. 500 [1872].

[4] Foye *v.* Leighton, 22 N. H. 71 [1850]; Park *v.* Viernow, 16 Mo. App. 383; Rushforth *v.* Hadfield, 7 East 224.

[5] A rule for measuring brick, Long *v.* Davidson, 101 N. C. 170 [1888]; that ten hours made a day's work, Lowe *v.* Lehman, 15 Ohio St. 179 [1865]; *and see* Austrian *v.* Springer (Mich.), 54 N. W. Rep. 50; Greenwich Ins. Co. *v.* Waterman, 54 Fed. Rep. 839; De Cernea *v.* Cornell, 22 N. Y. Supp. 941.

[6] Johnson *v.* De Peyster, 50 N. Y. 666 [1872].

[7] Lyon *v.* George, 44 Md. 295 [1875].

[8] Walls *v.* Bailey, 49 N. Y. 474 [1872].

[9] Martin *v.* Maynard, 16 N. H. 165 [1844]; *accord* Gano *v.* Palo, Pinto Co. (Tex.), 8 S. W. Rep. 636.

[10] Lawson on Usage, 44–53.

[11] Ford *v.* St. Louis, K. & N. W. R. Co., 63 Mo. App. 133.

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professional man or mechanic in the business in which he is engaged is supposed to deal with him according to the rules and uniform usages established in his calling unless he stipulates to the contrary. A contract in respect to a particular trade is on the basis of the usages of that trade, which becomes a part of the agreement unless expressly stipulated to the contrary.[1]

When customs exist in reference to certain kinds of business, as, for instance, among real-estate brokers, any one having actual or presumptive knowledge of and employing them in their business without special contract will be presumed to have done so with reference to such custom.[2] If there is nothing in a contract to negative the inference that parties contracted with reference to the usage or custom which prevails in the particular trade or business to which the contract relates, then the usage may be shown in evidence for the purpose of showing with greater certainty what was intended by the words or terms used in the contract; and this, though a meaning may be given to words contradicting that which would attach to them generally.[3]

Every legal contract is to be interpreted according to the intention of the parties, and usages, if they are reasonable and well established, are deemed to form a part of the contract and to enter into the intention of the parties.[4] They are supposed to contract in reference to the usages of the particular place where they make the agreement and the trade in or to which they contract,[5] Although usages of trade cannot be set up either to contravene an established rule of law or to vary the terms of an express contract, yet all contracts made in the ordinary course of business, without particular stipulations expressed or implied, are presumed to be made in reference to any existing usage or custom relating to such trade, and a party may always resort to such usage to ascertain and fix the terms of a contract.[6] If the contract concerning a particular business is ambiguous, it will be presumed that it was made with reference to the ordinary course of business, and evidence showing such course is admissible.[7]

Knowledge will generally be presumed if the usage be well established and notorious, and "if a person close his eyes and shut his ears as to what is universally known in the community by others around about him, he will not be allowed to shelter himself under a plea of ignorance." Customs and

[1] Lawson on Usage 53. The courts of New York state have construed this rule as to notice more strictly, it would seem, than have other jurisdictions. In Sipperly *v.* Stewart, 50 Barb. 62 [1867], it was held that proof of a usage or custom of a particular locality or business is not sufficient to charge a party to a contract, where there is no proof that he ever knew or heard of such a usage or custom.

A later case has held that when the usage is with regard to a particular trade or profession, a party to be bound by it must be shown to have knowledge or notice of its existence. Hill *v.* Ins. Co., 10 Hun 26 [1877]. This, it is submitted, is not generally the accepted law.

[2] Dyer *v.* Sutherland, 75 Ill. 583 [1874].

[3] Dwyer *v.* City of Brenham, 70 Texas 80 [1888].

[4] Williams *v.* Gilman, 3 Greenl. 276.

[5] Greenl. Evdce. 292-294.

[6] Lonegran *v.* Stewart, 55 Ill. 44 [1870].

[7] Lyon *v.* Lenon, 106 Ind. 567 [1886].

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usages of trade are supposed to enter into and form a part of all contracts where the usage or custom prevails, in reference to the matter to which the contract relates.[1]

613. A Usage must be Moral.—This statement should require no comment; it should be evident that a court of justice, the office of which is to preserve the rights, peace, and morals of a community, would not tolerate the introduction by implication of immoral practices into an agreement.[2]

614. A Usage must be Reasonable, Lawful, and in Keeping with Public Policy.—Customs and usages often are, and may be, contrary to certain maxims or rules of the law, but courts are very reluctant to admit them, and when they can justify the exclusion of a usage they are likely to do so.

There can be no general definition or description of what will be regarded as unreasonable; regard may be had to legal decisions of the past to determine what are and what are not reasonable. If a usage has become established, uniform, and is generally adopted, it is fair to presume that it is reasonable. If it were unreasonable, prudent men would not continue to sacrifice their rights and interests to maintain it, and it would not be established.[3] When usages are fully established, courts feel in duty bound to regard them as reasonable, but they do nevertheless frequently declare them unreasonable when they are too absurd for recognition, contrary to public policy, or tend to violate some fixed principle of law. Of course, a man may contract with reference to foolish, absurd, and unreasonable usages, and load himself with obligations of the most oppressive and onerous character, and if he has knowledge of the obligations he is assuming, a court will not interfere.[4] Matters of inconvenience will not render a usage unreasonable, while public convenience will often render an apparent bad usage valid.

615. An Unreasonable Practice cannot Become a Usage.—A custom in other counties for a person who undertakes to survey, subdivide, and map lands to employ competent surveyors as substitutes to perform the work is too unreasonable to become incorporated into a contract without it be shown that both parties were acquainted with the custom. Such a custom was held to be unreasonable as between a court and a contractor. That it was the duty of the court to select such agents as could assist them in the discharge of their functions. That as such agents [surveyors] have necessarily to exercise judgment and discretion in the performance of the work assigned them, the duty of making such selections should not be delegated, and therefore a custom to do so was unreasonable.[5]

A custom to give bonds for the payment of work done upon public buildings, on which the law does not give a mechanic's lien, seems to have been regarded as reasonable by the court, and it seems it may be introduced

[1] Donne v. Dunham, 79 Ill. 131 [1875].
[2] Lawson on Usage 58.
[3] Lawson on Usage 68.
[4] Lawson on Usage 68, 69.
[5] Gano v. Palo Pinto Co. (Tex.), 8 S. W. Rep. 636 [1888].

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into a bid in which no reference has been made to it if proven to be a general and uniform usage among builders engaged in doing public work.[1] *

Usage and custom cannot determine the mode of executing a contract. Statutory laws require that deeds and wills and certain other instruments shall be executed in writing and with certain formalities. It cannot be doubted but that they must be followed, any usage to the contrary notwithstanding. In the absence of any statutory law, contracts may be executed in any manner that fulfills the conditions of a binding contract. Their binding force will depend upon the law of contracts and not upon customs. The fact that contracts for insurance and for the construction of works are universally made in writing and sealed and witnessed does not render it necessary to so execute them to make them valid and binding.[2]

Usage will not justify the use of words in a contrary sense from that given them by statute. Standards of numbers, weights, measures, are often determined by statute, and when so determined, evidence of a different standard will not be admitted. If other means of comparison or measure are intended it must be so specified in the agreement. Therefore when the statute declares what shall constitute "a bushel," "a quarter," "a pound," "a ton," or "a foot," or "a chain," and these words are employed, it is to be understood that statute measure is intended, and that evidence of a usage of some other measure will not be admitted.[3] A usage to allow several days of grace is held a good usage, and a promise to pay a note in sixty days is therefore construed to pay it within sixty-three days, but not if there be no statute abolishing days of grace, as in New York state.[4] A usage will be held bad if it is contrary to a rule of law. Thus an act of legislature enacting that 2,000 pounds shall make a ton cannot be controlled by a usage in a particular business making 2,240 pounds a ton.[5] Evidence of a usage or custom, though it establish a rule different from, but not in contravention of, the general law of the land has been held admissible.[6] The common-law right to support to the surface of the ground cannot be questioned because of a usage in the locality to mine coal under the land without taking precautions to prevent its settling.[7] A custom contrary to such a right is unlawful, unreasonable, and invalid.[8] A custom to pump foul water from a coal mine and to allow it to flow into natural watercourses and pollute them, is not only unreasonable but unlawful.[9]

A custom, in making surveys for location of government lands granted

[1] Park *v.* Viernow, 16 Mo. App. 383 [1885].
[2] Lawson on Usage 82.
[3] Johnson *v.* Burns (W. Va.), 20 S. E. Rep. 686; *and see* Lawson on Usage 454.
[4] Bank *v.* Fitzhugh, 1 Har. & G. 239.
[5] Godcharles *v.* Wigeman, 113 Pa. St. 431, *and see* 25 Pa. St. 114.
[6] Milroy *v.* Chicago, M. & St. P. Ry. Co. (Iowa), 67 N. W. Rep 276.
[7] Jones *v.* Wagner, 66 Pa. St. 430 [1870].
[8] Coleman *v.* Chadwick, 80 Pa. St. 81 [1875]; *accord*, Horner *v.* Watson, 79 Pa. St. 243 [1876].
[9] Pa. Coal Co. *v.* Sanderson, 94 Pa. St. 302 [1880]; *following* Sanderson *v.* Pa. C. Co., 86 Pa. St. 401; *but see* Jacob *v.* Day (Cal.), 44 Pac. Rep. 248.

* *See* Sec. 174, *supra*.

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to settlers, to include more land than the warrant actually called for is a fraud upon the government, and therefore bad.[1] Likewise a custom for surveyors in surveying pre-emption claims to receive one-half of the land for surveying, obtaining the warrants, and paying expenses, was held unreasonable.[2] A custom or usage that justifies a builder in building a house in a reckless and unworkmanlike manner when his contract requires him to build it in a workmanlike manner, is unreasonable and cannot be recognized by our courts.[3]

Proof of a custom is not permissible to enlarge the powers of officers whose authority is defined by statute.[4]

616. A Practice that Subverts Justice and is Contrary to Good Morals is not a Usage.—The usage must not tend to subvert justice nor be contrary to good morals and sound public policy. Customs or usages which would have the effect to relieve a party from the duties and obligations which the law would otherwise impose upon him are not allowed to prevail, unless the actual assent of the party is secured for their observance, or they are of so notorious a character as reasonably to lead to the conclusion that he must have known of their existence and intended to assent to them. Even then it was held they must not be unreasonable nor positively unlawful.[5]

Any practice, therefore, that strains the fiducial relations of a principal and his agent, or that brings the interests of the two in conflict, will be held bad. It is a principle of our law that a person [company] in employing an agent [engineer] to select, buy, or sell property or materials bargains for the disinterested skill, diligence, integrity, and zeal of the agent for his [its] own exclusive benefit. The agent [engineer] is expected to act with a sole regard to the interests of his employer. It is submitted that the culpable custom practiced by agents and by some engineers of accepting percentages of the price paid for materials and machinery selected or purchased by or through them could not be sustained on the plea of its being a custom for companies to pay it.[6] A custom the effect of which is to array the interests of an employee or agent against those of his employer cannot be reasonable. If such a usage were permitted, the interests of the two would be in conflict, and the agent [engineer] be tempted to promote his own interests, to the detriment of his employer's interests. The law does not permit an agent (engineer) to occupy such an essentially inconsistent relation, and therefore will not recognize such an unreasonable custom.[7]

[1] Huston *v.* McArthur, 7 Ohio 70.

[2] Lawson on Usage 74.

[3] Anderson *v.* Whitaker (Ala.), 11 So. Rep. 919; *but see* Graham *v.* Trimmer, 6 Kans. 231.

[4] Walters *v.* Senf (Mo. Sup.), 22 S. W. 511; *semble*, Butler *v.* Charlestown, 7 Gray (Mass.) 12.

[5] Duguid *v.* Edwards, 50 Barb. 288 [1867].

[6] Duguid *v.* Edwards, 50 Barb. 288 [1868]; Minnesota Ry. Co. *v.* Morgan, 52 Barb. 217.

[7] Diplock *v.* Blackburn, 3 Campbell 43 [1811]; Lawson on Usage, 479, 480; *and see* Louisville & N. R. Co. *v.* Barhouse (Ala.), 13 So. Rep. 534.

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It is a maxim of the law that an agent cannot delegate his authority where his personal skill is required, or where his authority is judicial in character or discretionary, or where trust and confidence have been reposed in him. In general all these features belong to the status of an engineer, and it has therefore been held that a usage in a city engineer's office for the assistants to attend to the making of estimates of work was irrelevant, when the written contract provided that the work should "be measured by the city engineer"; that although the making of the estimate undoubtedly required the help of assistants, yet that they must have acted under the city engineer's direct personal supervision, and he must have had personal knowledge of what was done.[1] The same decision should be reasonably expected with regard to any engineer, for usage cannot be employed to contradict the terms of a contract or to contravene a principle of law.[2]* A case apparently to the contrary is expressed in the following: "But when it is known that practically the chief engineer of a corporation never does and never can make the estimates, or even verify those made by his assistants, that such a thing is altogether impracticable, it must be concluded that the parties had reference to something which was usual, or at least possible, in such cases."[3] Although not put specifically upon the ground of usage, it is very close to it.

A usage among architects to charge 1 per cent of their own estimated cost of a structure in payment for preliminary sketches and estimates of the same was held to be unreasonable; and no such contract on the part of a customer could be implied unless he was made acquainted with such a custom and had assented to it. The decision was based upon the same principles as in preceding cases, viz., the conflict of interests of the architect and his employer, and the impossibility of making an estimate from such inadequate preliminary sketches; that such a usage, if maintained, would put every employer at the mercy of an architect's extravagance in taste and license of guessing at estimates which have nothing to measure or determine them.[4] Evidence, however, has been admitted to prove by custom that an employment of an architect to make plans and designs for a building carried with it an employment to superintend its construction, and it was held that it could be proved by contractors and builders as well as by architects.[5] But a contract to pay an architect 10 per cent commission will not admit evidence of a custom to pay a different per cent.[6] In a case where prizes are offered for the best plans, with cost, etc., of a building, and a prize is awarded to an architect, with a notice that the award

[1] Palmer *v.* Clark, 106 Mass. 373.
[2] Lawson on Usage, 465.
[3] Herrick *v.* Belknap, 27 Vt. 681.
[4] Scott *v.* Maier, 56 Mich. 554 [1885]; *and see* Gilman *v.* Stevens, 54 How. Pr. 197; *contra*, Knight *v.* Norris, 13 Minn. 473; Irving *v.* Morrison, 37 C. P. Up. Can. 242.
[5] Wilson *v.* Bauman, 80 Ill 493 [1875].
[6] Lonnegan *v.* Courtney, 75 Ill. 590.

* *See* Delegation of Duties, Secs. 499–507, *supra*.

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should not be considered as an adoption of his plans to build from, it was held that evidence was properly excluded of a usage or custom among architects that, in absence of special contract, the adoption of an architect's plans included a contract to superintend the construction of the building, or of a usage that when prizes are offered for plans that the drawings remain the property of the architect even after the prize has been paid, and if afterwards adopted as the plans to build by, that an additional price was paid for the drawings.[1] *

A custom of architects to employ engineers to estimate the quantities of a building to be erected was held valid, so as to render the employers of the builder liable to the engineer for his work.[2] This was an English case, and there is the additional fact that the duty of an English architect seems to be to draw plans only and not to estimate quantities, and that the proprietors were chargeable with notice of that fact, and that they knew the estimates must be made out by some one.[3] A contractor who furnishes men by the day on jobs may charge 25 or 50 cents per day more than he pays, where such is the custom among contractors.[4]

Under a contract to furnish granite (cut and dressed) according to the plans and specifications of the architect, and to do all the fitting and rebating necessary for a sum named, it was held that the contractor was required to furnish the necessary patterns which were incident to the performance of the work, as it was necessary to have tools and workmen; that the contractor actually had prepared the patterns; it was obvious that it was not necessary that the owner should furnish them to enable the contractor to do his work. By the legal construction of such a contract, the contractor was to furnish the patterns. A usage that the owner should pay for them would be contrary to the terms or construction of the contract, and therefore would not be valid.[5]

On an issue as to whether a hiring was for a year or by the month, it is not competent to ask a witness whether there was a custom with reference to the terms of such hirings in the vicinity.[6]

617. When usage will be Admitted to Explain Contracts—It Cannot Contradict Express Terms of Contract.—If a usage be general, established, certain, uniform, and reasonable and not opposed to well established principles of law, the parties to a contract are presumed to have contracted with reference to it pertaining to matters concerning it, unless the contract is so explicit as to preclude such a presumption. A custom cannot be per-

[1] Tilley *v.* City of Chicago, 103 U. S. 155 [1880].
[2] Moon *v.* Guardians of Poor, 3 Bing. N. C. 814.
[3] *Accord* Taylor *v.* Hall, 4 Ir. R. C. L. 467.
[4] McDonnell *v.* Ford (Mich.), 49 N. W. R. 545 [1891].
[5] Potter *v.* Smith, 103 Mass. 68; Davis *v.* Gallupe, 111 Mass. 121 [1872].
[6] Connell *v.* Averill (Sup.), 40 N. Y. Supp. 855.

* *See* Sec. 814, *infra.*

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mitted to prevail against the unqualified and unequivocal terms of a written contract.[1]

If the contract specify the mode or system of measurement by which the work is to be estimated, it cannot be varied or contradicted by evidence of a custom. The writing must necessarily have been regarded as expressing the contract and intention of the parties. Usage is admissible to interpret a contract, and to ascertain the meaning of the parties, where it can be done without violence to the terms used. As a matter of course, a custom gives the meaning of a written contract different from that which it would have been in the absence of a custom. It would have been very ineffective and anomalous sort of a usage which would be without effect in the acts and contracts of parties. It may be seen from cases given how far customs have been permitted to affect and control written contracts, without being regarded as violating the terms of the written instrument. In the case of days of grace at a bank, the written contract was to pay a sum of money sixty days after date, and yet the custom was held good by which the money was not payable until the sixty-fourth day, a custom repugnant to the general law of the subject, and to the literal meaning of the words of the contract.[2]

Extrinsic evidence is admissible to show that the parties to a written agreement have contracted upon the basis of a common usage or custom applicable to the trade or business in which the contract is made; whereby they have impliedly consented to be bound by certain usual or customary terms and conditions not mentioned in their agreement, or have accepted certain terms and conditions used in their agreement with a special meaning.[3] In contracts as to the subject-matter of which a known usage prevails, parties are bound to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify those known usages which are included as of course mutually understood; evidence therefore of such usages is receivable. The contract, in truth, is partly expressed in writing, partly implied or understood and unwritten.[4]

618. Usage can be Employed to Explain an Ambiguous Contract.—Usage of trade or business is often proved to show the actual intent and purpose of the parties when the stipulations in contracts are not clear.[5] It cannot subvert a positively unambiguous contract,[6] though it may be admitted to explain ambiguity in a contract but not to contradict the terms of an agreement.[7] The proper office of a custom or usage is to explain and ascertain the intent of the parties; it cannot be received in opposition to any prin-

[1] Mayer *v.* Lawrence, 58 Ill. App. 194.
[2] Patterson *v.* Crowther (Md. Ct. App.) [Jan. 1889].
[3] Leake on Contracts 196; Houlton *v.* Warren, 1 M. & W. 475; Spartali *v.* Benecke, 10 C. B. 222.
[4] Brown *v.* Byrne, 3 E. & B. 715; Leake's Digest of Contracts 196.
[5] Leach *v.* Beardslee, 22 Conn. 404 [1853].
[6] Bank *v.* Bissell, 72 N. Y. 615 [1878].
[7] Sweet *v.* Jenkins, 1 R. I. 147 [1840].

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ciple of general policy, and must not be inconsistent with the terms of agreement between the parties.[1] If there be no uncertainty as to the terms of the contract, usage cannot be proved to contradict or qualify its provisions. Usage is only resorted to for the purpose of ascertaining with greater certainty the intent of the parties, not to contravene their express stipulations (not to contradict).[2]

If the usage has been certain, uniform, and generally acquiesced in, in the place where the contract was made, the contract may be interpreted according to the usage, even though it has been practiced but seven years, and although one party has not had actual notice of its existence.[3] Evidence of custom is *in*admissible, under a building contract, to contravene its implied legal construction that the work shall be done and material furnished in a reasonable time.[4] The phrase, "actual stone measured in the wall," has been held to have no necessary legal signification, and that, therefore, parol evidence of its trade meaning was admissible.[5] When a contract to lay brick at a specified price per thousand, according to measurement, is modified by a subsequent agreement to pay a reasonable compensation without regard to the price originally fixed by the contract, the question whether the openings in the walls shall be included in the measurement is immaterial. The contractor is entitled to recover what his work is reasonably worth.[6] Rules established among brick-masons for measuring their work cannot be shown when they conflict with the terms of the contract. Covenants are to be construed according to the plain and obvious meaning of the terms used by a community at large, and not according to the terms used among brick-masons, or any other particular class of men who may understand them in a different sense.[7] Where a building contract in express terms calls for doors of a certain thickness, evidence of a custom among carpenters to use doors one eighth of an inch less in thickness when doors of such thickness were specified, due to the fact that the lumber from which the doors were manufactured lost that much when dressed, is inadmissible to vary the contract, there being no evidence that the custom was general in its application or that the owner of the building had knowledge of it.[8]

The true ground upon which usages and customs may be shown to assist in the construction of a contract is upon the presumption that the parties to be affected by the usage were acquainted with it or are in some way chargeable with notice of it.[9]

[1] Foye *v.* Leighton, 22 N. H. 71 [1850]; Ulmer *v.* Farnsworth (Me.), 15 Atl. Rep. 65 [1888]; Seavey *v.* Shurick (Ind.), 11 N. E. Rep. 597 [1887]; De Cernea *v.* Cornell, 20 N. Y. Supp. 895.

[2] Bradley *v.* Wheeler, 44 N. Y. 495 [1871].

[3] Lowe *v.* Lehman, 15 Ohio St. 179 [1865].

[4] Morewski *v.* Rehrig (Com. Pl. N. Y.), 23 N. Y. Supp. 880.

[5] Brenneman *v.* Bush (Tex.), 30 S. W. Rep. 699.

[6] Ills Ed. Association *v.* Strander, 78 Ills 35 [1876].

[7] Pavey *v.* Burch, 3 Mo. 314 [1834].

[8] Eaton *v.* Gladwell (Mich.), 66 N. W. Rep. 598.

[9] Martin *v.* Maynard, 16 N. H. 165

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619. There must be Ambiguity, which Question the Court must Decide.—The courts declare there must be ambiguity, and that the parties must have known of the usage and have contracted with reference to it, or that the usage must be established and not casual, uniform, and not varying, general and not personal, and so notorious as to raise a fair presumption that the parties knew of it.[1] Furthermore, they must not be unreasonable, contrary to established rules and maxims of law nor against sound public policy. This is no doubt the law generally; but as to what language will be construed as ambiguous, or how much room there must be for misunderstanding between parties, is hard to determine.

The court must determine if ambiguity exists, or if the contract is sufficiently explicit, without the admission of evidence of a custom to control it.[2]

As a general rule the judge is to interpret the meaning of the contract; but the rule is frequently departed from when ambiguity exists or the contract relates to scientific or mechanical arts. In such cases it is common and prudent to admit the opinions of experts to explain the contract. The opinions of witnesses who are familiar with such work, and in the habit of making and executing such contracts, are almost indispensable to assist the court in the proper construction of the contract.[3]

It is not competent for a witness familiar with the usage to testify as to what construction the contract bears.[4] If the contract has relation to a trade, profession, or business of a technical character, and is expressed in terms of art, or in words having a technical or peculiar sense in such trade, profession, or business, resort must be had to the testimony of experts or those acquainted with the particular art or business to which the words relate; and when such testimony is conflicting, the question of the meaning of such terms and words must be referred to the jury;[5] for while it is the province of the courts to construe contracts, yet where the meaning of the contract is obscure and depends upon facts *aliunde* in connection with the written language, the question of construction may be one of fact for the jury.[6] It is the province of the jury to decide what an oral contract is, where the evidence is conflicting as to the intent of the parties to such contract, and as to its terms and it is error to withhold such questions from the jury.[7]

It is error to exclude evidence or deny a question put to the owner as to whether he had any knowledge of the custom claimed.[8]

[1844]; Union Stock-yards Co. *v.* Westcott (Neb.), 66 N. W. Rep. 419.

[1] Sipperly *v.* Stewart, 50 Barb. 62 [1867], *and preceding cases.*

[2] Dawson *v.* Kittle, 4 Hill 107; Milroy *v.* Chicago, etc., R. Co. (Iowa), 67 N. W. Rep. 276.

[3] Reynolds *v.* Jordon, 6 Cal. 108 [1856].

[4] Collyer *v.* Collins, 17 Abb. Pr. 467.

[5] Railroad Co. *v.* Rust, 19 Fed. Rep. 239.

[6] Coquillard *v.* Hovey (Neb.), 37 N. W. Rep. 479.

[7] Patten *v.* Pancoast (N. Y.), 15 N. E. Rep. 893; Harris *v.* Kelley (Pa.), 13 Atl. Rep. 523 [1888].

[8] Walls *v.* Bailey, 49 N. Y. 464 [1872].

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When the court has determined that ambiguity exists, it may construe it according to a custom without its being proven if it is established so as to leave no doubt of its existence.[1] The court decides if the usage be sufficient to bind the parties, what length of time, at what places, and to what degree of uniformity it must have been observed to establish it;[2] it decides if the usage be reasonable, lawful, and according to public policy, and if the evidence of the usage be admissible.[3] When the court has declared such a usage reasonable, lawful, etc., and that the terms of the contract do not preclude the idea that the agreement was made with reference to the usage, it is then left to the jury to determine whether the time, places, and uniformity equal that required by law, as laid down by the judge, and also if the parties entered into the agreement with reference to the usage.[4] Generally the jury are to determine the effects of evidence of usage, given to control the construction of a contract.[5]

In order to introduce evidence of a custom and make it a part of the contract sued on, it must be pleaded.[6]

INSTANCES WHERE USAGE HAS BEEN ADMITTED TO EXPLAIN CONSTRUCTION CONTRACTS.

620. Instances in Brickwork.—Cases may be cited showing how instances have been regarded in the past, but no definite interpretation can be laid down which will certainly be followed in the future.

In a contract "to pay eight dollars per thousand for each thousand brick which may be laid," it was held that the language was sufficiently explicit to prevail, uninfluenced by any evidence of a usage or custom of the trade, and that no estimate should be made of bricks not laid.[7] A Tennessee case holds that a contract "to pay eight dollars per thousand for bricks in the wall," was not ambiguous, that the bricks should be counted, and that proof of a custom to ascertain the number by wall measurement was incompetent, but the judge continues by saying that if they could not be actually counted, having been laid, they might adopt estimates based upon measurements.[8] A contract to furnish brick at a price per thousand, "actual count of bricks in said walls," requires that the brick shall be counted numerically and not be estimated by the cubic foot;[9] while two dollars and forty cents per thousand, "wall count solid measure," was held to include the openings, as if the wall was built up solid with brick.[10] In an action for bricks sold for the

[1] Consequa *v.* Williams, 1 Peters C. C. 230 [1816].
[2] Lawson on Usage 104.
[3] *But see* Mulliner *v.* Bronson, 14 Brndw. 355 [1883].
[4] Lawson on Usage 104–105.
[5] Dawson *v.* Kittle, 4 Hill 107.
[6] Anderson *v.* Rogge (Tex.), 28 S. W. Rep 106.
[7] Kendall *v.* Russell, 5 Dana (Ky.) 501 [1837].
[8] Sweney *v.* Thomasin, 9 Lea (Tenn.) 359 [1882].
[9] Lester *v.* Pedigo (Va.), 4 S. E. Rep. 703.
[10] Long *v.* Davidson, 101 N. C. 170 [1888].

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construction of a building, where the contractor claimed that they were sold to be "measured in the wall," and the owner that they were to be counted in the wall, it was held that it might be shown what the expression "measured in the wall" meant, and that the measurement allowed 21½ bricks to a cubic foot of wall.[1]

These cases seem to be the exception rather than the rule. In an Ohio case [1865], where bricks were to be furnished and laid "by the thousand," a dispute arose as to how the bricks should be counted, and evidence was admitted of a local custom to estimate the number by wall measurement, under a uniform rule based on the average size of a brick, allowing a slight addition for extra work and wastage, deducting openings in walls, but not for openings in chimney nor jambs. Such a custom was held *not* to be unreasonable. The court said: "We are unable to see anything unreasonable in the custom. The contractor was to furnish the brick and materials, and to lay them up by the thousand. The contract contained no specifications of the dimensions, shape, angles, openings, or arches of the wall, or of the size of the brick. It does not require a mason to know that the value of the work and materials depend much upon these and such like conditions if they are to be paid for by the numerical thousand. Again, the brick are to be furnished and laid up. Where and how will you count them? At the kiln, on the ground, or in the wall? Who will lose the breakage in the transportation and handling and the waste of filling them in the wall? Some fair measurement of the wall would seem to be the more reasonable method, and we cannot say that this method was not a fair one. It slightly increased the estimated number of bricks in the wall, it is true, by making small additions for extra work, and extra waste of bricks at angles and openings, and the rule of measurement adopted fixes upon an arbitrary and uniform dimension for the average size of brick, which may vary slightly, but cannot vary much from their average size. All this seems to be reasonable."[2] An earlier case had allowed the number of bricks in a pavement to be computed by allowing a given number to the square yard, according to the usage among pavers.[3]

The same subject came up in another case, and although the custom was not established for want of a sufficient number of witnesses, its reasonableness was not questioned. It was a contract for brickwork "at ..... dollars per thousand," and was held to be by kiln count, the usage not having been sufficiently established, only one witness having testified to it.[4] A Kansas case held that parties to a contract were presumed to contract with reference to a uniform and well-settled custom or usage pertaining to matters concerning which they made a contract, and that therefore a general custom of ascertaining the number of bricks in a wall could be proved when the

[1] Welsh v. Huckestein (Pa. Sup.), 25 Atl. Rep. 138.
[2] Lowe v. Lehman, 15 Ohio St. 179 [1865].
[3] Pittsburgh v. O'Neill, 1 Pa. St. 342
[4] Martin v. Hall, 26 Mo. 386 [1858].

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contract had not prescribed a method of measuring them.[1] A contract for 100,000 brick to be counted and enumerated according to the custom of bricklayers was held to have been executed by the delivery of 40,000, which when laid in the wall made 100,000 by mason's measurement, counting the openings, etc., as being laid solid.[2] If the contract is silent as to the manner in which the number of bricks is to be determined, parol evidence will be received of a custom.[3]

621. Instances in Stonework.—When no rule has been specified in a contract for the construction of stone piers, the parties are bound by any proved custom for measuring the cubic contents of the work, but a mere local and recent usage of trade will not justify a claim for extra measurement.[4]

A custom has been proved and accepted that in measuring stonework doors and windows might be measured solid and corners twice,[5] and carved work might be measured at one and one-half times its measured length.[6]

The word "perch" in stonework is a term with many meanings. It often depends upon the usage or custom of the trade at the place where the parties reside or are doing business, unless the term and the method of ascertaining the number are expressly stipulated in the contract. When a certain price is to be paid "per perch complete," it may be shown that there is a well-known custom among stone-masons in the county by which they were entitled to compensation for not only the actual contents of the wall, but credit for all openings therein, and fifty per cent. additional for all such masonry built in a circle or curve.[7] Under a contract to build the walls of a house "for the sum of three shillings per superficial yard of work nine inches thick, and to find all materials, deducting for lights,"—the lower part of the walls to a height of eleven feet were of stone, two feet thick, the remainder of brick fourteen inches thick; evidence was admitted to prove a usage of builders at that place to reduce brickwork for the purpose of measurement to nine inches, but not to reduce the stonework unless exceeding two feet in thickness.[8]

This disposition to interpret contracts according to the usages of the trades in which they are made, is such that two different modes of measurement have been allowed where the one measurement seemed almost to have been made the basis of the price of the other. Thus where a mason contractor agreed to do the masonry of a building according to the plans and specifications for the sum of two dollars in addition to the price of the rock per perch, he was allowed mason's measurement, and to recover for the openings of doors and windows as if they were solid, and to count corners twice,

[1] Smythe *v.* Parsons (Kans.), 14 Pac. Rep. 445 [1887]. 37 Kans. 79.
[2] Brown *v.* Cole, 45 Iowa 601 [1877].
[3] Richlands, etc., Co. *v.* Hiltebeitel (Va.), 32 S. E. Rep. 806.
[4] Corcoran *v.* Chess (Pa.), 18 Atl. Rep. 876 [1890].
[5] Haynes *v.* Baptist Ch., 88 Mo. 285.
[6] Patterson *v.* Crowther, 70 Md. 124 [1889].
[7] Patterson *v.* Crowther, *supra.*
[8] Lawson on Usage, 393.

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which allowed the mason contractor 30 per cent. more a perch than the quarrymen were paid for by their measurement.[1] A similar construction was given where a builder had taken a contract to erect a building and had bought brick at seven dollars per thousand to be used therein. While the same were being delivered he sublet the masonwork by contract, by which they agreed to take the brick then being delivered at seven dollars per thousand and to have the same laid up in the wall at ten dollars per thousand, including the prices of the brick at seven dollars per thousand, the brickwork to be measured according to brick measurements in the walls. It was held that the true construction was that the subcontractor should have three dollars per thousand for his work measured in the wall, and not ten dollars per thousand, deducting seven dollars per thousand for the brick by kiln count.[2] In a contract to pay "seven dollars per thousand for making and laying brick, counting the neat brick in the building," it was held on appeal an error to have determined a rule of measurement upon the testimony of masons that the rule known and established among them for measuring their work and ascertaining the number of neat brick in a building was to ascertain the number of cubic feet in the wall, by multiplying the aggregate length of the walls of the building over all, counting corners twice, by the height of the story, and that product by the thickness of the wall, and then multiplying this cubic content thus ascertained by 22½ bricks to the cubic foot, the supreme court holding that the contract must be construed according to the plain and obvious meaning of the terms used by the community at large, and not according to their terms as used by brickmasons.[3]

To settle disputes as to how masonry shall be measured, it has been held competent to show that it was the custom of masons to measure around walls on the outside and to multiply this length by the thickness and height to ascertain the volume, instead of taking the middle or inner measurements.[4] A contract to pay two dollars and seventy-five cents per perch for the first ten feet of work, and an increase of twenty-five cents per perch for each additional ten feet, and thirty-eight cents per superficial foot for dressed ashlar set in the wall, was interpreted according to the testimony of several masons as to the usage of measuring stonework, to entitle the contractor to recover thirty-eight cents stipulated for the dressed ashlar in addition to the price provided for laying the same in the wall.[5] "Rip-rap wall at fifty cents per cubic yard" was held to mean rip-rap after it was fitted and laid into wall,[6] and not to mean the amount of stone quarried or excavated.

[1] Fitzsimmons *v.* Christian Brothers, 81 Mo. 37 [1883]; *accord*, Haynes *v.* 2d Bap. Ch., 88 Mo. 285.
[2] Miller *v.* Bolto, 79 Ill. 535 [1875].
[3] Pavey *v.* Burch, 3 Mo. 314.
[4] Ford *v.* Tirrell (Mass.), 9 Gray 401; *accord*, McCullough *v.* Ashbridge (Pa.), 26 Atl. Rep. 10, *Perches*.
[5] Shutte *v.* Hennesey, 40 Ia. 352 [1875].
[6] Wood *v.* Vt. Centfal R. Co., 24 Vt. 608 [1852].

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The interpretation of technical terms of a trade depends upon their meaning as employed by custom and long usage. Evidence of usage has been admitted to explain the disputed points in a written contract, when evidence of what was said or understood at the time the contract was entered into has been refused. Thus in a contract for masonry at a specified price per foot, "the face of the work that shows to be measured and none else," evidence was admitted to show in what sense the words were used and understood in the trade generally, but evidence of what was said before or at the time the contract was made was excluded. "Face of the work" was therefore held in accordance with the trade usage to include not only the perpendicular walls exposed, but also the copings and the rises and treads of the wings or retaining walls.[1] A contract to pay "65 cents per cubic foot for all stone when the quarried dimensions do not exceed 20 cubic feet in each stone and one cent additional for every cubic foot of those having such dimensions exceeding 20 feet," was held to be a contract to pay 65 cents for stones whose dimensions exceed 20 feet, and one cent additional for every cubic foot of the entire stone.[2] In a contract to deliver marble "furnished and ready for setting," the meaning of these words as used by marble-cutters was proved by witnesses.[3] So it may be shown that an order for marble slabs of a specified thickness, means by custom that they shall be of the thickness stated when they come from the saw, and does not require them to be of such thickness when finished.[4]

When evidence of the usage of the trade has failed to show any uniform rule of measurement by which the written contract may be construed, evidence has been admitted to show what was agreed or understood between the parties at the time it was entered into. In a written contract to furnish stone at $4.50 per perch, several standards of measurement being shown in the trade in that locality, evidence was admitted that it was verbally agreed to furnish the stone at 18 cents per cubic foot, and that the attorney who wrote the contract, of his own notion, had converted feet into perches of 25 feet each, as it enabled the court to construe an ambiguous contract in the sense intended by the parties.[5] In an express contract to do certain work "in a good and workmanlike manner," evidence has been admitted to prove that the contract was made with the expectation that such materials as was complained of were to be used in the job.[6]*

622. Instances in Plastering.—The same rules and practices have been admitted in the measurement of plastering. A very early case, [1801],[7] decided that the practice of plasterers to charge an employer for half the size

[1] Martin *v.* Thresher, 40 Vt. 461 [1868].
[2] United States *v.* Granite Co., 105 U. S. 87 [1881].
[3] Myers *v.* Tibballs (Cal.), 13 Pac. Rep. 695 [1887].
[4] Evans *v.* W. Brass Mfg. Co. (Mo.), 24 S. W. Rep. 175.
[5] Quarry Co. *v.* Clements, 38 Ohio St. 587 [1883].
[6] Graham *v.* Trimmer, 6 Kans. 231; *but see* Anderson *v.* Whitaker (Ala.), 11 So. Rep. 919.
[7] Jordan *v.* Meredith, 3 Yeates 318 [1801].

* *See* Secs. 253-258, *supra.*

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of the windows and doors at the price agreed on for work was unreasonable and bad, because it was charging for work and materials never furnished. The case has been practically overruled by more recent cases. A contrary rule has been held in New York, where it was held not to be an unlawful or unreasonable usage to charge for the full surface of the walls, without any deductions for cornices, base-boards, or openings for doors and windows, in a contract to pay a specified sum "per square yard" for plastering, when it was proved that the usage was uniform, continuous, and well settled. Such a usage was held a just compensation for the extra trouble, care, and skill required to plaster about the frames of doors and windows, and along the edges of base-boards and cornices.[1]

A Kansas case of about same date admitted evidence of such a usage to determine the amount of plastering done.[2] Under a contract to do masonwork, the contractor may introduce experts in the trade, to show that masonwork does not include "plastering and whitewashing."[3]

623. Instances in Earthworks—Excavations and Embankments.—If a contract provides a fixed price for "earth excavations," the question often arises whether the general meaning of the word could be varied by proof of usage. It has been held that "hard-pan" was included in the term; that if its meaning could be changed, the usage must have been shown to be uniform, general, and presumably known to the parties, not a local, partial, or personal usage.[4] Under a contract for excavation of earth at a fixed rate per cubic yard, if it can be shown that among contractors and engineers that the material excavated was "hard-pan," or was a material known and recognized as entirely distinct from common earth, and that it is customary for contractors to receive extra compensation for excavating such materials, the contractor may recover what it is reasonably worth to excavate it.[5] A contrary rule seems to have been held in a Massachusetts case, where the court refused to admit evidence to prove that the term "earth excavation" did not include the excavation of rock.[6] The custom must not vary the obvious meaning of the written contract. If a contract fixed a price per cubic yard for excavations, and stipulates that no extras shall be allowed, a usage to the contrary will be irrelevant.[7]

Where a contract provided that "the measurement of the quantities will usually be made in the cuts or pits from which the material has been taken," and the engineer, whose determination of the quantities was to be final and conclusive, measured the pit from which excavations had been

[1] Walls *v.* Bailey, 49 New York 464 [1872].

[2] Graham *v.* Trimmer, 6 Kans. 231 [1870].

[3] Highton *v.* Dessau (Com. Pl.), 19 N. Y. Supp. 395; Cassidy *v.* Fonthan, 14 N. Y. Supp. 151.

[4] Dickinson *v.* City of Poughkeepsie, 75 N. Y. 65 [1878]; Sherman *v.* Mayor, 1 N. Y. 316; *see also* Currier *v.* B. & M. R. R., 34 N. H. 498 [1857]; Nesbitt *v.* L., C. & C. R. Co., 2 Speers 697, *and* Morgan *v.* Birnie, 9 Bing. 672.

[5] Shephard *v.* St. Charles W. P. Rd. Co., 28 Mo. 373 [1859].

[6] Branch *v.* Town of Millbury (Mass.), 44 N. E. Rep. 1060.

[7] Phillips *v.* Starr, 26 Iowa 349.

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taken, the court held that the contract and specifications showed the measurements were not to take place in the cuts or pits in all cases, that ambiguity existed, and that the exception would have to be determined by outside testimony, by usage, or by the practice of the company in like cases. And it further held that the evidence was sufficient to warrant the conclusion that it was not customary to measure the cuts or pits when solid rock was the material, and that the contractor was therefore entitled to embankment measure.[1] In a contract for the excavation of a ditch, where nothing is said as to how the estimates shall be made, a custom or usage by which such work is usually measured may be shown to define the intention of the parties.[2]

Under a contract to excavate earth and rock, which provided that the contractor should be paid on estimates made by the surveyor, it was held not error to permit the contractor to prove the custom of surveyors to make allowances when required to excavate below the depth mentioned in the contract to reach a level, where such custom was a reasonable one, and known to both parties before entering into the contract.[3]

The words "grading, excavating, and filling" have been held ambiguous as used in a contract to make a street grade, and evidence was admitted to show their meaning.[4] If the contract be silent as to the basis of the estimates to be made, testimony of a custom is admissible,[5] but it must not contravene the terms or obvious meaning of the contract.

624. Ownership of Materials—Effect of Usage.—An agreement to excavate and remove earth, stone, etc., from premises at a price named, was held so ambiguous as to admit proof of a custom that the contractor should own the materials excavated, and that in view of such a custom, the owner should be required to pay for stone removed by the contractor that he had appropriated.[6]*

625. Instances in Timber and Lumber.—Evidence has been admitted to show what deduction shall be made for hollow and pecky logs in measurement of inch-board measure;[7] and how to measure a log for its board measure—whether by its average diameter, or by taking the diameter of the smaller end;[8] and to show what "timber 12 inches heart and up" includes.[9] A contract for shingles at a price per thousand may be satisfied by the deliv-

[1] G., H. & S. A. Ry. Co. *v.* Henry & Dilley, 65 Texas 685 [1886]; G., H. & S. A Ry. Co. *v.* Johnson, 74 Texas 256 [1889].

[2] Bradbury *v.* Butler (Colo.), 29 Pac. Rep. 463 [1892]; *citing* Hastetter *v.* Park, 137 U. S. 30; Robinson *v.* U. S., 13 Wall. 363; *and see* Wood *v.* Vt. Cent. R. Co., 24 Vt. 608 [1852].

[3] Pucci *v* Barney, 21 N. Y. Supp. 1099.

[4] Atlanta *v.* Schmeltzer (Ga.), 10 S. E. Rep. 513.

[5] Bradbury *v.* Butler, 1 Colo. App. 430.

[6] McManus *v.* Donahue, 7 Alb. L. J. 411 [1873]; *accord.* Cooper *v.* Kane, 19 Wend. 386.

[7] Destrehan *v.* Louisiana Cypress L. Co. (La.), 13 So. Rep. 230.

[8] Destrehan *v.* La. Cyp. Lumb. Co. (La.), *supra*; *see also* Heal *v.* Cooper, 8 Me. 32.

[9] McKenzie *v.* Wimberly (Ala.), 5 So Rep. 465 [1889].

* *See* Secs. 265 and 601, *supra.*

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ery of two bunches of a certain size if it be shown that by custom two such bunches are reckoned as a thousand.[1]

A contract that requires a contractor to "clean, grub, and pile brush" cannot be varied by showing that it is not usual "to grub" under such circumstances, or that the job would be better not to have the grubbing done.[2]

626. Some General Examples of Usage.—Where a contract for the construction of a sewer provides no payments shall be due "until the same shall be fully completed, and the assessments for the same duly confirmed," and it was further provided that advances might be made in conformity with the city ordinance, which allowed seventy per cent. to be paid on certificate, but required that interest should be charged on such advances from the time of making them up to the time of final payment, the court held that interest should be charged up to the time of the confirmation of the assessment, and that evidence of a usage in other departments of the city to charge interest only up to the time of the completion of the work was immaterial.[3]

Contracts are not always construed literally, as is shown in a case where specifications for a house required that "the entire walls of the building inside and out to be painted," etc., were held not to exclude evidence to show that it was not intended to paint the plastered walls inside, but only the wainscoting, frames, base-boards, and doors.[4]

Evidence offered of a local custom, that a lease of property expired at noon on the last day of the lease, was held on appeal admissible, notwithstanding the fact that the law excludes the first day of a lease and includes the last day.[5]

Specifications for a piece of black-walnut furniture are not satisfied by a counter made of whitewood, because it is proved to be a custom to use whitewood in so-called black-walnut furniture.[6]

When the price is not agreed upon the value of professional services may be proved by usage, but the usage must be general, and not simply what another engineer or surveyor would charge.[7]

627. What Usage may be Shown—Miscellaneous Examples of Usages.—It is a vexing problem to determine when evidence of usage can be introduced. Courts take different views; some that the usages and customs should not be encouraged and that proof of them should be admitted with extreme caution, while others believe it their duty to arrive at the understandings and intentions of the parties as best they may. "Lawyers and judges desire certainty, and would have every contract and business transaction in express terms and that no explanation of it should be received; but

[1] Soutier *v.* Kellman, 18 Mo. 509 [1853]; Bragg *v.* Bletz, 7 D. C. 105.
[2] Holmes *v.* Samuel, 15 Ill. 412.
[3] Fellows *v.* Mayor, 17 Hun 249.
[4] Beason *v.* Kurz, 66 Wis. 448 [1886]; *see* Ittner *v.* St. Louis Exp. 97 Mo. 562, *exterior walls of a building.*
[5] Wilcox *v.* Wood, 9 Wend. 346 [1832]
[6] Greenstein *v.* Barchard, 50 Mich. 484 [1883].
[7] Pfeil *v.* Kemper, 3 Wis. 318.

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contractors, merchants, and tradesmen, with their many affairs and duties pressing upon them, desire to write but little, and leave unwritten what is taken for granted in every transaction of the kind, and, in spite of the lamentations of the judges they are likely to continue to do so even at the risk of litigation and occasional loss."[1] These conflicting views,[2] explain the diversity in rules set forth in the cases as to the admission of evidence to explain contracts, and comprise one of the elements assisting in determining whether a contract is ambiguous. It has been held that the usage to be proved must be distinctly stated before evidence of it will be received.[3] But proof of a custom cannot be rejected because the party did not state that he intends to follow it up with evidence of knowledge.[4]

If the custom or usage be not fairly proved it should be laid wholly out of the case.[5] A custom is not established where the testimony of the witnesses who aver that the custom exists is met by an almost equal number of witnesses, with equal facilities of knowing, who testify to never having heard of such custom.[6] There is no rule of law that a usage cannot be established by a single witness,[7] but many cases have been lost by a failure to fully establish the usage.[8] It is not enough to simply show the existence of the usage; it must be shown that it is general, and that all persons dealing in the business to which it applies are presumed to have had knowledge of it and to have contracted with reference to it. This can hardly be established by one witness.[9]

Expert or skilled witnessess are not required to prove a usage. They need only have occupied such a position as to enable them to know of its existence as a fact. Therefore it is competent to prove a usage among architects by the testimony of builders;[10] and that certain excavations were "hard-pan" need not be proved by professors of geology, for it may be proved by engineers and contractors or even by laborers.[11] A person is not competent to testify as to an alleged custom of trade unless he is either engaged in such trade or it is shown that he knows what the custom is.[12] In weighing the testimony of witnesses as to a trade usage, the jury should consider the extent to which any of the witnesses may have an interest in the result of the litigation, which might color their evidence.[13]

Evidence of a custom or usage will not always be received to determine

[1] Lord Campbell, in Humphey *v.* Dale, 7 El. & Bl. 266.

[2] Lawson on Usage 20–25.

[3] Susquehanna F. Co. *v.* White & Co., 66 Md. 444 [1886]; Linsley *v.* Lovely, 26 Vt. 123 [1853].

[4] Patterson *v.* Crowther, 70 Md. 124 [1889].

[5] Linsley *v.* Lovely, 26 Vt. 123 [1853].

[6] The Harbinger, 50 Fed. Rep. 941; Brown *v.* Gill & Fisher, 50 Fed. Rep. 941.

[7] Robinson *v.* Unit d States, 13 Wall. 363 [1871].

[8] Greenwich Ins. Co. *v.* Waterman (C C. A.), 54 Fed. Rep. 839.

[9] Martin *v.* Hall, 26 Mo. 386 [1858].

[10] Wilson *v.* Brennan, 80 Ill. 493

[11] Currier *v.* B. & M. R. R., 34 N. H. 498 [1887]; *accord*, Blue *v.* Aberdeen & W. E. R. Co. (N. C.), 23 S. E. Rep. 275.

[12] Kugelman *v.* Levy, 24 N. Y. Supp. 559.

[13] Dodge *v.* Hedden, 42 Fed. Rep. 446 [1890].

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a controversy over a price agreed upon in an express contract.[1] Pay for board furnished in reliance on a custom well known to all the parties, whereby the principal contractors each month deduct the amount due by each laborer for board from his wages and pay such amount to the respective boarding-house keepers, was collected from the principal contractor, and it was held immaterial that the subcontractor was indebted to the principal contractors.[2] A contract providing for "the final inspection and acceptance or rejection of railroad ties, when being distributed on the road-bed in advance of the track," will not admit evidence of a general custom in railroad construction by which the inspection and marking of ties constituted an acceptance of them by the company.[3] Under the same rule it was held that a written contract "to pay forty-seven cents for railroad ties" could not be construed to mean to pay forty-seven cents for ties inspected and classified by the railroad company as "firsts," and half that price for those classified as "seconds." The law implies in such a contract for materials that they shall be of merchantable quality and such as will bring an average price, and that a different price cannot be imposed by showing such a usage.[4]

An agreement by stone-cutters to furnish the stone for a building according to the plans and specifications, and to do all the fitting and rebating necessary, has been held to impliedly require them to furnish the wooden patterns necessary for cutting them, as they were to furnish all necessary tools, and evidence of a usage of stone-cutters to procure such patterns and to recover the cost from the owner was properly refused. The contractors having procured and paid for them without asking the owner or architect to furnish them, they could not recover from them the price.[5]

A contract to perform a piece of work as good as some other job, or to furnish a part of a machine like one in operation, as it were by sample, cannot be modified or changed by evidence that by custom it was no part of the contractor's craft to complete it. A foundryman who undertook to furnish a customer a fly-wheel like one in operation, had not executed it by delivering a casting direct from the sand without boring the hole for the shaft.[6]

In contracts with mills and manufactories to do custom work for a price agreed upon, a practice among millers to appropriate a part of the material as culls or refuse cannot be shown. So in sawing logs at a mill, the proof of a usage for the mill to keep the slabs was denied.[7] A practice to keep the odds and ends and culls in other work, without consent of the owner, cannot be sustained.[8]

[1] Wilkinson *v.* Williamson, 76 Ga. 168 [1884].
[2] French *v.* Langdon (Wis.), 44 N. W. Rep. 1111.
[3] Smyth *v.* Ward, 46 Iowa 389.
[4] Larrowe *v.* Lewis, 44 Hun 226 [1887].
[5] Gavis *v.* Galloupe, 111 Mass. 121.
[6] Martin *v.* Maynard, 16 N. H 165.
[7] George *v.* Bartlett, 22 N H. 406; *contra*, Hewett *v.* Lumber Co., 77 Wis. 548.
[8] Wadley *v.* Davis, 63 Barb. (N. Y.), 500 [1872].

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A contract of sale of timber "at six cents per foot" was held to exclude evidence of a usage to sell "on a basis of six cents per foot." That if the parties had attempted to contract each with a different price in mind, they had failed, and that the timber should be restored to the seller, or that the purchaser must pay a reasonable [market] price for it.[1]

It may be shown that it is a well-known usage to make changes in patterns for castings for stove-work, for the reason that the first set of patterns, however good, will not produce castings that will go together and fit.[2]

To excuse delay in completing a job, evidence has been admitted to show that it was impossible to take measurements from plans and specifications for wainscoting and stairs, and that from this fact a general custom has arisen to take actual measurements therefor from the building itself, and that the parties contracted with reference thereto.[3]

Evidence of the practice of contractors and builders in guarding against accidents is competent to show whether ordinary care was exercised or there was culpable negligence.[4] It has been admitted to show the usage of builders in guarding openings in floors of buildings;[5] to show that trains were run according to an established practice of railroads,[6] and that trains were made up in accordance with an established custom.[7] It has been held not error to exclude evidence of a custom of railroad companies to put defective rails in their side-tracks;[8] nor can can it be shown that other lumber dealers piled their lumber in a manner like unto one which had fallen and injured a child.[9]

628. Custom of What Place Controls.—If both parties reside at the place where the contract is drawn, then any ambiguities it may contain will be construed by the usage of that place. When a contract is made by letter or telegram, then it will be interpreted by the usage of the writer who first used the disputed terms or expressions about which the uncertainty has arisen, because the person who first introduces the words is supposed to use them in the sense in which he understands them.

If the contract is to be performed in a certain place, and it was the evident intention to adopt the terms and usages of that place, then such language and usage will prevail. So if goods are to be bought, or work to be done, or land to be conveyed, it is presumed to be the intention to per-

[1] Wilkinson *v.* Williamson, 76 Ala. 168 [1884]; *see also* Rogers *v.* Allen, 47 N. H. 529, "measuring lumber."

[2] Machine Co. *v.* Doggett, 135 Mass. 582 [1883].

[3] Bardwell *v.* Ziegler (Wash.), 28 Pac. Rep. 360; *and see* Davis *v.* Gailoupe, 111 Mass. 121; Sawtelle *v.* Drew, 122 Mass. 228, and Sanford *v.* Rawlings, 43 Ill. 92, *distinguished.*

[4] Murphy *v.* Greeley, 146 Mass. 196 [1888], *and Massachusetts cases cited.*

[5] Murphy *v.* Greeley, *supra.*

[6] Kansas City M. & B R. Co *v.* Webb (Ala.), 11 So Rep. 888; Holmes *v.* So. Pac. Ry. Co. (Cal.), 31 Pac. Rep. 834; *but see* Louisville N. R. Co. *v.* Davis (Ala.), 12 So. Rep. 786, custom contrary to rules of company.

[7] Memphis & C. R. Co. *v.* Graham (Ala.), 10 So. Rep. 283.

[8] Lake Erie & W. R. Co. *v.* Mugg (Ind.), 31 N. E. Rep. 564.

[9] Earl *v.* Crouch (Sup.), 16 N. Y. Supp. 770; nor as to a practice in guarding fires, Pulsifer *v.* Berry, 87 Me. 405.

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form the agreement according to the usages of the place where it is to be executed; that the currency weights and measurements of the place where the goods are delivered will be the standards, that the trade usages of the place where the work is executed will control, and the laws of the country where the land is situated will determine the conveyance, so the courts have held.[1]* An agreement to get out and deliver 60,000 cubic feet of timber suitable for Quebec market was held to require the timber to be measured according to the standard of the place named. That a usage at Quebec to reject fractions of a foot in measuring cubic contents of square timber, to make up for waste in handling, was not unreasonable, and the contract was construed with reference to it.[2] Unless special provisions are made in the contract of sale, goods or materials bought in the ordinary course of business, ordered from cards or circulars of the manufacturer, designating the sizes and prices, and to be delivered to a carrier at the place of a seller, are governed by the customs and usages of the place where manufactured and sold as to standards of measurements and modes of finish.[3]

629. Certain Words and Phrases Defined.—Too much care cannot be exercised in the use of terms of a contract, and no person should undertake to draft an important contract who is not even himself familiar with the usages and customs of the trades and occupations with which he is dealing or has the counsel of some one who is informed in them.

Many words have been defined in particular instances, but whether they would receive the same interpretation will depend upon the custom and usage of the place and the circumstances attending each case.

Many terms employed in construction have been explained, which the author briefly refers to.[4]

[1] Lawson on Usage 111.
[2] Merrick *v.* McNally, 26 Mich. 374 [1873]; Lawson on Usage 110, 111.
[3] Star Glass Co. *v.* Morcy, 108 Mass. 570 [1871].
[4] "Black" means white. 24 Solicitors' J. 522 and 689.
"Bushel" is a statute bushel. 4 T. R. 314.
"Day's work" equals ten [eight] hours. 5 Hill (N. Y.) 437.
"Custom to give bonds." 16 Mo. App. 383.
"Bearings." Evidence of custom to prove whether by magnetic needle or meridian. 11 Cal. 194.
"North," meaning of. 11 Cal. 194.
"Variation of needle," Judicial notice of. Little's Cas. (Ky.) 91.
"Drawbridge." 21 Wall. 262.
"Constructive measurements." 19 Atl. Rep. 71 (Pa.)
"Measured by the city engineer." 106 Mass. 373. Custom to have assistants measure. (Sec. 616, *infra.*)
"No extras to be allowed." 26 Ia. 349.
"Weekly accounts." 30 L. J. Q. B. 9.
"Deepening a ditch." Evidence admitted as to how it might be done. 34 Conn. 43.
"Not less than" 10 feet does not mean necessarily more than 10 feet. Anderson *v.* Meislahn, 12 Daly 149.
"Per thousand bricks." 15 Ohio St. 179.
"Per foot wall." 9 Gray 401.
"Per thousand brick which may be laid." 5 Dana 501.
"Neat brick in building." 3 Mo. 314.
"Superficial yard, 9 inches thick." 6 C. B. (N. S.) 691.
"Per perch." 40 Ia. 352.
"Cord of stone," held 99 cu. ft. in wall. Robinson *v.* Grimes, 33 N. Y. Supp. 291.
"Whinstones for purposes of building." 1 Car. & Kir. 541.

* *See* Secs. 57, 58, *supra.*

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"Face of the work." 40 Vt. 460.

"To furnish cut-stone" includes patterns. 111 Mass. 121.

"Riprap per cu. yd." is to be measured after it is fitted and laid in wall. Wood *v.* Vt. Cent. R. Co., 24 Vt. 608.

"Plastering per sq. yd." 3 Yeates 318, 42 N. Y. 464, 6 Kans. 231.

Excavation "per sq. yd." means per cu. yd. Louisville *v.* Hyatt, 2 B. Mon. (Ky.) 177.

"Hard-pan." 2 Hun 615, 12 Wend. 334, 75 N. Y. 65, 46 N. Y. 444, 15 Wend. 87, 34 N. H. 498.

"Level in mining." Lawson on Usage 390.

"Lumber to be measured straight measure." 44 N. W. Rep. 788 (Mich.).

"The best lumber" specified, and was held to mean the best lumber ordinarily used for the purpose designated. McIntire *v.* Barnes, 4 Colo. 285.

"Free from knots," applied to flooring, held to mean free from all knots, both hard and soft. Rush *v.* Wagner, 12 N. Y. Supp. 2.

"An adjustable-stern dock" held not to require an automatically-adjustable dock. International Dock Co. *v.* United States, 60 Fed. Rep. 528.

"Clean, grub, and pile." 15 Ill. 412.

"One thousand feet in a raft of logs" means linear measure. 25 Pa. St. 210.

"Thousand shingles," two bunches. 18 Mo. 509.

"Cu. ft. square white oak." 26 Mich. 374.

"Inspecting R. R. ties." 46 Ia. 339.

"Measurement of tan-bark." Dwight *v.* Cutting (Sup.), 36 N. Y. Supp. 99.

"Timber" has been held to include "railroad ties." Kollock *v.* Parcher, 52 Wis. 393, and "patterns" to include "ties." Lovewell *v.* Westchester Ins. Co., 124 Mass. 418.

"Lumber scales." 50 Mich. 434.

"Miles," in a contract requiring a boat to attain a certain speed on her trial trip at sea, was held to mean "maritime miles." Rockland, Mt. D & S. S. B. Co. *v.* Fressenden (Me.), 8 Atl. Rep. 550 [1887].

"Quarter" is a statute quarter. 6 T. R. 338.

"Tons," statute tons. Lawson on Usage 454.

"Net weight." (Mass.) 31 N. E. Rep. 293.

"Net weight," manner of ascertaining the same. Thompson *v.* Bramun (Ky.), 21 S. W. Rep. 1057.

"Original line of buildings." L. R. 2 Q. B. 528 [1867].

"In good and workmanlike manner." 6 Kans. 231.

"Timber standing." Whitty *v.* Dillon, 2 F. & F. 67.

"Streets" include sidewalks, gutters, paving, etc. 76 N. Y. 174.

"Engineering purposes" has been held to have reference only to location and construction, and to permit the selection of that route for a railroad which can be built, operated, and kept in repair in the best, cheapest, and safest manner. McRoberts *v.* The Southern R. Co., 18 Minn. 108 [1871].

"Commencement of a building" held to be when the excavations were begun. Mutual B. Ins. Co. *v.* Rowand, 11 C. E. Green 389; Jacobus *v.* Mut. B. Ins. Co., 12 C. E. Green 604.

A house has been held to be "erected" when the walls are up and the materials were on the ground to finish it—Johnston *v.* Ewing, 35 Ill. 578—even though it be not plastered, nor the windows put in. McLoughlin *v.* Child, 62 Ind. 412.

Work to be done "as directed," without other explanation, was held to refer to the directions given by the owner. Lancaster *v.* Conn. 92 Mo. 460.

An "available site" for a dry-dock does not imply a site with good subsoil free from quicksand. International Dock Co. *v.* United States, 60 Fed. Rep. 528.

"Car-load." Good *v.* Chicago, etc., R. Co. (Ia.), 60 N. W. Rep 631.

"Measurement of ice in bulk." Hutchins *v.* Webster (Mass.), 43 N. E. Rep. 186.

A railroad "between two cities," whether it required the road to be built inside the city limits. The Western Union R. Co. *v.* Smith, 75 Ill. 496 [1874].

'Or" and "and" may be read "and" and "or" where it is plain that they were so intended. Bethman *v.* Harness (W. Va.), 26 S. E. Rep. 271; Dumont *v.* United States, 98 N. Y. 142.

A contract to furnish a gas-engine in place and in working order does not include its foundations. Kumberger *v.* Congress Sp. Co. (Sup.), 40 N. Y. Supp. 396.

Books, etc., for reference: Lawson on Custom and Usage, Browne's Custom and Usage.

An article, "Admissibility of Evidence of Usage to Affect a Written Contract." 12 Sol. J. Rep. 514, 536, 562.

"Evidence of Usage to Explain the Meaning of a Contract." 13 Leg. Obs. 161 [1836].

"Building Contracts." A Lecture by Mr. Dodd. 13 Leg Obs. 337. Lengthy article in Greenleaf's Evidence 292.

"Usage and Custom." 27 Amer. & Eng. Ency. Law 700.

"Implied Contracts Arising Out of the Custom and Course of Trade." 4 Amer. Law Reg. 192 and 5 Amer. Law Reg. 22.

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CHAPTER XXII.

OWNER'S LIABILITY FOR ACTS OF CONTRACTOR.

STIPULATIONS FIXING LIABILITY. RELATIONS OF OWNER TO AN INDEPENDENT CONTRACTOR AND TO HIS SERVANT DEFINED.

630. Provision that all Laws, Ordinances, etc., shall be Complied with, and that Contractor shall Protect Works.

Clause: "And it is further understood and agreed that in all the operations connected with the work herein specified, all laws, ordinances, by-laws, rules, or regulations, controlling or limiting in any way the actions of those engaged on the works, or affecting the methods of doing the work, or materials applied to it, must be respected and strictly complied with by the contractor(s), his [their] agents and servants; he [they] shall, at his [their] own cost, provide all gatekeepers, watchmen, fencing, hoardings, strutting, shoring, bridgeways, fenders, lights, signals, and defenses, and all other matters which may be necessary or may be deemed necessary by the engineer for the due protection, security of the works, and also for the security and protection and free passage of all vessels and craft navigating the river or harbor; and all enclosures for materials or works, for the protection and safety of the public, and of all buildings and property whatsoever, near to or liable to be affected by the works, and shall sufficiently light and watch the same when necessary, and shall properly light all the works, and shall afford the utmost facility for public and private transit and travel in respect of any roads, or rights of way, or rights of traffic which may be interfered with by the execution of the works."

631. Provision that Contractor shall Protect Works, Property, and Persons from Injury.

Clause: "He [they] shall take every necessary, proper, timely, and useful precaution against accident or injury to the works, or any of them, or to any property, or to any person, by the action or pressure of water, and whether the same shall arise from or be occasioned by tides, floods, springs, rain, streams, accumulations, disruptions, leakage, frost, or otherwise, and also against all other accident or injury to such works, property, or persons, whether from fire, tempests, earthquakes, or from or by any other natural or artificial cause whatsoever, and whether arising from the execution or non-execution of the works, and shall forthwith repair, make good, and defray any loss, damage, cost, charge, or expense by or in consequence of any accident, or by or in consequence of the operations, whether negligent or not, of the contractor(s), occasioned to the owner, city, or company, or to the said works or any of them, or to any person or persons injuriously affected thereby."

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632. Provision that Contractor shall Give and Serve all Notices.

Clause: "He [they] shall give all notices required by any law or statute, or as directed by the engineer, and whether notice be so required, or shall be so directed or not, shall in all cases give due and sufficient notice to all companies, such as water, gas, railway, tramway, electric lighting, hydraulic power, or other companies, and also to all state, county and city offic als or to their respective departments or other persons and authorities having charge of the water and other pipes, or of the drains, watercourses, embankments, and the highways, roads, streets, foot and carriageways, pavements, and the like, previous to, and at the completion of, any work, in order that the proper persons in respect of the matters aforesaid may be enabled to attend and see that the roads, streets, foot and carriageways, pavements, and the like, and other things incident and appertaining thereto, are secured, relaid, or reinstated in a proper and satisfactory manner; and also in order that the proper persons representing the water, gas, railway, and other companies may be enabled to attend and secure, shore up, alter the position of, remove, relay, and reinstate the pipes, mains, plugs, and other water and gas or other works belonging to the city or government or to private corporations or persons. In any and every case in which works of shoring, or other works for the protection or security of buildings, are necessary, the contractors shall, within a reasonable time before the execution of such works, serve due notices upon the occupiers of the buildings intended to be shored up or otherwise secured, and upon all other parties entitled to notice, apprising them respectively that such works are necessary, that the contractor(s) is [are] about to execute the same, and will, at a time to be specified in such notice, enter upon the premises for the purpose of executing such works."

633. Provision that Contractor shall Secure all Permits, Licenses, and shall Pay all Fees and Expenses.

Clause: "The contractors shall obtain and provide all the necessary permits, licenses, and necessary authority from the city, county, state, or federal government, and pay all the fees, compensations, and expenses incident to securing the same, which is required for the proper and lawful prosecution of the works."

634. Provision that Contractors shall be Liable for and Make Good all Damages to Works, Property, and Persons.

Clause: "And it is further expressly agreed that the contractors shall make good at their own proper cost and expense all damage of every kind which may occur by reason or in consequence of the execution of the several works comprised in this contract, whether the said damage may occur to any public or private ways, or any property, work, or thing whatsoever, whether belonging to the city or any other person, or body, or to the state, that may be damaged, removed, disturbed, or injured, and the contractors shall indemnify, save harmless, and keep indemnified the city and its officers from and against the same, and from and against all actions, suits, claims, demands, penalties, or liabilities, and all charges and costs, or expenses whatsoever, by reason or on account thereof, whether arising therefrom directly or indirectly; and when required by the engineer the contractors shall deliver at his office certificates in writing from the proper authorities, or otherwise give

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evidence to the satisfaction of the engineer, that all public and private ways, and all property, works, or things that may have been disturbed or injured by the said works have been properly made good, and all expenses and demands in respect thereof paid by the contractors before the last two payments under this contract shall be due or made, as hereinafter provided, to the contractors."

635. Provision that Contractors shall Indemnify Owners for all Claims, Costs, and Expense from any Infringement of Patent-rights.

Clause: "The contractors shall indemnify the owner, company, or city against all actions, and all claims and demands, and all costs, charges, and expenses, and all damages which may be brought, made, or claimed against, or incurred by the owner, company, or city for or on account of any infringement or alleged infringement of any patent rights by reason of the user of the plant, machinery, and things supplied, or processes employed by the contractors upon the works or any part thereof."

636. Provision that Contractor shall Indemnify Owner and Save Him Harmless from all Suits and Damages, and that Owner may Compromise Suits.

Clause: "In case of any action or suit or proceeding being brought or taken against the owner, company, or city, or the said engineer or officer in charge, or any of their or his officers or servants, in respect of any penalties, damage, or defects or any loss, damage, or injury by reason thereof, or consequent upon the execution or non execution of any work contracted for, or of any patented processes, tools, or materials, the contractor shall fully indemnify them, and each of them, and shall forthwith pay to him [it, or them] all costs, charges, damages, and expenses which he or they shall or may have been put to or have incurred in reference thereto; and the said owner, company, or city, or its solicitor, may, if they or either of them shall see fit, and in their absolute discretion, defend or compromise any such action, suit, or other proceeding, or any claim in respect of any such damage as aforesaid, on such terms as they shall see fit, and the contractor shall thereupon forthwith pay the sum or sums so paid; but if the contractor forbid such compromise, or if no such compromise is effected, then he shall be made a party to such action, suit, or proceedings, and shall in every case pay to him [it, or them], such sum or sums as shall fully indemnify him [it, or them], and the owner, company, or city, or engineer, may deduct the amount of all such damage and costs thereof, including the taxed costs of the said owner, company, or city out of any money due or owing, or may become due to the said contractor on the contract for this work, or any other contract which he may have with the owner, company, or city. And it is further understood and agreed by and between the parties hereto that the special enumeration of certain duties and liabilities shall not in any way relieve the said contractor from the general and the whole liability arising from the execution of the work or any neglect to use proper measures to prosecute and protect the work."

637. Provision that Contractor shall take Every Precaution to Avoid Injuries, and will Save City from all Cost, Damage, or Expense.

Clause: "And the said part... of the second part [contractor(s)] agree(s) during the performance of the work, to take all necessary precautions and

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to place proper guards for the prevention of accidents; and to put and keep at night suitable and sufficient lights, and that he [they] will indemnify and save harmless the said owner, company or city from all suits or actions, of every name and description, brought against the said owner, company, or city for or on account of any injuries or damages received or sustained by any person or persons by or from the said contractor, his servants or agents, in the construction of said work, or by or in consequence of any negligence in the performance of the work or in guarding the same, or any improper materials used in its construction, or by or on account of any act or omission of the said contractor or his agents and servants; and the said contractor further agrees that so much of the money due or owing to him, or that may become due under and by virtue of this agreement as the said engineer shall consider necessary, may be retained by the said city until all such suits or claims for damages, as aforesaid, shall have been settled, and evidence to that effect furnished to the satisfaction of the said engineer."

638. Owner cannot Escape Liability for Certain Acts by Making Contractor Assume the Liability.—The adoption of such clauses in a contract does not absolve or protect the owner or company from liability for injuries that ordinarily result from the work itself, or from the means or methods authorized by the owner. The liability assumed by a contractor are usually those which can be avoided by the skillful, careful, and prompt performance of the contract, or that can be avoided by the foresight, experience, and knowledge which a contractor or builder is supposed to possess. It could hardly be expected that a contractor would be required to assume liabilities which are a necessary result of the carrying out of the contract. A person or corporation cannot escape liability for a criminal, unlawful, surreptitious, or injurious act by employing some one else to do it for him. His liability directly to the injured party remains, though he may recover or recoup the damages he may have to pay from the contractor who assumed them. The contractor's assumption of risks or the agreement to pay all damages, injuries, or costs arising does not relieve the owner, company, or city from its liability to the person who is injured,[1] and the latter can bring his action against the person or party who is responsible and liable, irrespective of the relation existing between that person and others.

The owner is primary liable for the acts of his servant, and as will be seen from succeeding sections, the question as to whether a builder is really an independent contractor or a servant is in some cases one of doubt. This is one good reason why the stipulations are used, for they are a safeguard, should the builder be declared a servant of the owner or city.

If the contractor has agreed to assume all the risks incident to the work, and to indemnify the owner and save him harmless from all damages, actions, and costs, without doubt he is liable on his contract, and the bonds he has given

[1] Storrs v. Utica (N. Y.), 17 N. Y. 104; Mechem on Agency, § 747

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for the performance of the contract will be holden for such sums as the company has to pay in consequence of damages accruing from or arising out of the work or the contract. If an owner who has paid a judgment against him for personal injuries caused by an obstruction left in a street by a contractor, sues on the contractor's bond for indemnity, he may show, by evidence *aliunde*, the record in the action by the person injured, that the presence of the obstruction was the subject-matter relied on for a recovery in that action.[1]

Provisions making the contractor liable for injuries caused by his negligence, and allowing the company to withhold payments under the contract on account of them, do not affect the relation of the company to third parties and inure to their benefit,[2]* nor does the fact that the owner or city has required a bond of indemnity from the contractor tend to fix the liability on the owner or city,[3] nor does a city become liable for the negligence of a contractor making a public improvement merely because the contract did not provide that the contractor should use care to prevent such conditions as that complained of.[4]

In an action against a city for damages resulting from the construction of a viaduct, it has been held that the contractors who built it should not be admitted as defendants, though they agreed to indemnify the city for damages caused by carelessness in the work, since the question in such action is as to the liability of the city by reason of its acts, and not as to which of the wrongdoers, as between themselves, is primarily liable.[5]

A contractor, building a sewer in the streets of a city, who has undertaken to save the city harmless from all suits arising from negligence in guarding the same has been held liable to a person injured in consequence of such neglect, though the work was done under the direction of the city engineer.[6]

A water company which is laying water-pipes in a city which has agreed to protect all persons against damages by reason of their excavations, and to be responsible for all damages which might occur by reason of the neglect of their employees on the premises, was held liable for injury accruing to a person passing over a street and occasioned by the negligence of a subcontractor whom they had employed. The duty and responsibility assumed by the water company cannot be shifted by a contract.[7] When a contractor,

[1] City of New York *v.* Brady (Sup.), 30 N. Y. Supp. 1121.

[2] Tibbetts *v.* Knox & L. R. Co., 62 Me. 437; St. Paul Water Co. *v.* Ware, 16 Wall 566; Blake *v.* Ferris, 5 N. Y. 48.

[3] Fink *v.* St. Louis, 71 Mo. 52 [1879]; Green *v.* Portland, 32 Me. 431; Murphy *v.* Chicago, 29 Ill. 279.

[4] White *v.* City of New York (Sup.), 44 N. Y. Supp. 454 [1897].

[5] Sauer *v.* City of New York (Sup.), 41 N. Y. Supp. 957.

[6] Charlock *v.* Freel, 50 Hun 395 [1888]; *and see* Baumeister *v.* Markham (Ky.), 39 S. W. Rep. 844 [1897]; *but see* French *v.* Vix (N. Y. App.), 37 N. E. Rep. 612.

[7] Water Co. *v.* Ware, 16 Wall. 566 [1872]; *accord*, McManus *v* The C. Gas Lt. Co., 40 Barb. 380 [1863].

* *See* Sec. 17, *supra*, and Secs. 752–768, *infra*.

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in constructing a sewer, injured the pipes of a gas company laid in the street, and, when sued for such injury, justified the trespass under his contract with the village, plaintiff may avail himself of a provision of such contract binding the contractor to repair all damages done to substructures in its execution.[1]

However, a stipulation by which the contractors assume liability for any damages that may be done to the property or person of any neighbor or passer-by is for the protection of the owner, to save him from claims enforceable against him, and does not give a neighbor a right of action against the contractors for the acts of an independent subcontractor, where the owner would not have been liable had such acts been done by the contractors themselves.[2] Such a stipulation does not make the contractors insurers against injury to the property of a neighbor who had no knowledge of the contract, for whom the owner did not act as agent, in whose property he had no insurable interest, and for which insurance he paid no consideration.[3]

Such stipulations to indemnify the owner, company, or city from losses, damages, and costs are contracts of insurance, and an extended discussion of them would take the reader into the broad field of insurance law, which the size of this book will not permit. There is no object in doing that, for the subject of insurance in all its branches has been carefully digested and excellent books are to be had of the dealers, containing both American and English law.

The law in this country as to whether the contractor can or cannot be sued is not uniform, owing to the codes of the different states. The practice, as well as the parties to the action, cannot be given in a book of the narrow limits of this volume. If the author succeeds in giving his readers a general idea of who may be sued, or who is liable, without conveying wrong impressions to the laymen, he will feel that the object of the book has been accomplished. Attorneys at law are referred to works on insurance [marine insurance] and to works on actions, pleading, and practice.

The questions of law arising in construction work, under these stipulations, are chiefly those which come, or are the result of, laches in the enforcement of the stipulation, or that arise from a loosely-drafted clause, or when it is entirely omitted, when the question is, Who is ultimately responsible, the company or the contractor, or both of them?

639. Owner's Liability for the Unskillful, Careless, Negligent, and Lawless Acts or Works of His Contractor.*—The liability of the owner for injuries and damages resulting from work performed under a construction contract arises in several ways, which the authorities have taken up under the following heads: (1) When the act which has caused the injury was

[1] Glens Falls Gas Light Co. *v.* Van Vranken (Sup.), 42 N. Y. Supp. 339.

[2] French *v.* Vix (Com. Pl.), 21 N. Y. Supp. 1016.

* *See* Sec. 275, *supra:* Trespass.

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committed by the owner himself; (2) when the act in itself is harmless and lawful and the injury has resulted not from negligence or wrongful acts, but from the work being performed in the manner required by the contract; (3) when there are certain duties and obligations incumbent on the owner, which he owes to the public, or to adjoining property-holders, which he cannot escape by delegating to others, and the performance of which duties is rendered imperative by the work; (4) when the owner or contractor is in possession of fixed property which is so managed, wrought, or dealt with, that injury results to another; (5) when the owner undertakes that due care has been exercised in the erection of a structure or the like, and that it is reasonably fit for the purposes for which it was intended, and it turns out that it was negligently constructed, by reason of which injuries were sustained, liability will attach notwithstanding the fact that the owner employed competent contractors to erect the structure; (6) when the injury has been caused by an agent or servant of the owner, through whom the act or neglect has been committed.[1]

640. Act Committed by the Owner or Principal.—This condition should require no comment or discussion. Every man or corporation must be made and held responsible for his own acts. The protection of personal rights requires it. It is equally true where the owner has undertaken to perform a part of the work, and injury results from his own negligence.[2]

640a. When Injury Results from Carrying Out the Terms of the Contract.—If damages result from the performance of the work in the manner required in the contract, and not from any negligence or wrongdoing of the contractors, the contractors are the agents of the owner, and he is therefore liable for such damages.[3]

If the work is harmless and lawful when properly conducted and performed, and the company merely prescibes the end, or results to be attained, it cannot be charged with liability for injuries resulting from the means employed.[4] The enterprise undertaken must be a lawful one; if it amounts to a nuisance, or if the injury arises not from its negligent or unskillful construction, but from the fact that it was constructed at all, then liability attaches whether the erection be made under the supervision and control of the company, or it be let out by contract to others.[5] An owner or company is liable when the performance of the act authorized necessarily or naturally produces the injury in the ordinary mode of doing the act or work, or it employs a contractor to do an unlawful act or one amounting to a nuisance.[6] The falling of a brick from an upper story of an incomplete

[1] See Evans on Agency 590.

[2] Gilbert *v.* Beach, 5 Bosw. 445.

[3] 2 Dillon's Municipal Corpn., §§ 977, 978; Addison on Torts 86.

[4] Wabash, St. L. & P. Ry. Co. *v.* Parver, (Ind.) 12 N. E. Rep. 296 [1887]; Roemer *v.* Striker, 21 N. Y. Supp. 1090.

[5] Boswell *v.* Laird, 8 Cal. 469 [1858]; Cooley on Torts 128; Wilson *v.* Peto, 6 Moore 49.

[6] Pierce on Law of R. R. 288 [1881]; Carlson *v* Stocking (Wis.), 65 N. W. Rep. 58; Ellis *v.* Sheffield Gas Co., 2 El. & Bl. 767.

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building not being the natural result of any act which independent contractors erecting the building were engaged to perform, the owner cannot be held for injuries resulting therefrom.[1]

641. Owner is Liable if the Natural Result of the Act will be a Nuisance.—If the work as authorized will necessarily produce the injuries complained of, or if the act itself will be a nuisance to others, then the employer or company may be held for the damages resulting from the acts so authorized.[2] It is not essential that the injury shall be a necessary consequence to the work. If the natural result of it when done in the ordinary mode is a nuisance, the one who authorizes it to be done is liable;[3] or if the nuisance necessarily occurs in the ordinary mode of doing the work, the company or owner is liable; but if it is from the negligence of the contractor or his servants, then he alone should be responsible.[4] For injuries that result entirely from the wrongful or negligent acts of the contractor or his workmen the employer is not liable, but if injury is occasioned directly by the acts authorized by the company, it, too, is equally liable.[5] If both are negligent or have failed to conform to ordinances or building regulations, then each is liable for the damages that result. One superintending the construction of a building, as agent of the contractor, has been held equally liable with his principal for an injury to a third person, resulting from a failure to erect proper scaffolding to prevent the fall of brick, or from the negligent construction of the wall;[6] and where two different persons are engaged as independent contractors in the erection of a building, the one at masonry work and the other at iron work, each, and the owner, too, is required to comply with an ordinance requiring "any owner or contractor who shall build or cause to be built" any building abutting on the public sidewalk to erect a roof passageway over the sidewalk.[7] *

It may be doubted if it must amount to a nuisance strictly. If the natural or probable consequences of the work are mischievous and are liable to injure others in the enjoyment of their rights unless preventive measures are exercised by the owner, then he will be liable for injuries caused by his neglect to adopt preventive measures.[8] It has been so held when the support of a building has been undermined by the owner of adjoining premises[9] or

[1] Smith *v.* Milwaukee B. & T. Exch. (Wis.) 64 N. W. Rep. 1041.

[2] McCafferty *v.* S. D. & P. M. R. Co., 61 N. Y. 178 [1874]; Readie *v.* The London, etc., R. Co., 4 Exch. 244.

[3] *Cases cited in* Cuff *v.* N. & N. Y. R. Co., 35 N. J. L. 17 [1869.]

[4] Chicago *v.* Robbins, 2 Blackf. 428; Clark *v* Fry, 8 Ohio St. 358.

[5] Robbins *v.* Chicago, 4 Wallace 679. *Either* or *both* may be liable.

[6] Mayer *v.* Thompson-Hutchinson Bldg. Co. (Ala.), 16 So. Rep. 620.

[7] Smith *v.* Milwaukee Builders and Traders' Exchange (Wis.), 64 N. W. Rep. 1041.

[8] Bower *v.* Peate, 1 Q. B. Div. 321 [1876]; Gorham *v.* Gross, 125 Mass. 233; Augus *v.* Dalton, L. R. 4 Q. B. D. 162; Homan *v.* Stanley, 66 Pa. St. 464; Chicago *v.* Robbins, 4 Wall. (U. S.) 657; Scammon *v.* Chicago, 25 Ill. 424; *cases in* 29 Amer. & Eng. Ency. Law 947.

[9] Evans on Principal and Agent 593. English *cases cited.*

* *See* Sec. 244, *supra.*

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when reasonable care or skill were not exercised in the use of a party wall.[1] Such injuries or conditions are in the *nature* of nuisances, if not so according to the strict interpretation of the word.[2]

Therefore, where an owner employed a contractor to shore up a neighbor's wall, to prevent it from falling into an excavation which the owner was making on an abutting lot, and the contractor's employees, without permission from the neighbor, entered his premises and put beams through the wall (the only way in which it could be shored up), whereby his property was injured, and it was claimed that the work was negligently or improperly done; it was held that the work was necessarily injurious to plaintiff, and defendant was not relieved from liability by the fact that it was done by an independent contractor.[3]

Where one is making improvements upon his own premises, or without lawful right, trespasses upon or injures his neighbor's property by casting material thereon, he is liable absolutely for the damage, irrespective of any question of care or negligence, and a license from the municipal authorities cannot affect the question of responsibility.[4] If a neighbor sustains damage by the dropping of mortar and bricks during the erection of a wall next to his premises, the owner is not liable for such damage if it was not a necessary result of the building of the wall, but was caused by the negligence of the contractor, or of the contractor's servants.[5] The owner is not liable when an independent contractor negligently uses a coal-hole or obstructs the sidewalk, nor is he obliged to see that the street is not obstructed if it be not necessary to obstruct it in performing the contract.[6] The owner of a building, while putting on a gravel roof, was held not negligent in failing to clear the sidewalk every hour of gravel which falls on it.[7]

If a person not in the actual possession of land, the title to which is in another, without the latter's consent enters thereon and excavates so as to injure the adjoining building of the owner, he is liable therefor, and it makes no difference that the person who actually committed the injury is an independent contractor, where the work is done with his knowledge and consent, and for his use and benefit.[8]

The nonperformance by the owner of a duty imposed by an ordinance requiring the erection of a roofed passageway over the sidewalk after the

[1] Hughes *v.* Percival, 8 App. Cas. 443; Bowers *v.* Peat, L. R. 1 Q. B. D. 321.

[2] *Per* Court, in Quarman *v.* Burnett, 6 M. & W. 499.

[3] Ketchum *v.* Cohn (Com. Pl.), 22 N. Y. Supp. 181.

[4] Mairs *v.* Manhattan R. E. Ass'n, 89 N. Y. 498 [1882].

[5] Pye *v.* Faxon (Mass.), 31 N. E. Rep. 640; Larson *v.* Met. St. R. Co., 110 Mo. 234; Engle *v.* Eureka Club (N. Y. App.), 32 N. E. Rep. 1052; Smith *v.* Milwaukee B. & F. Ex. (Wis.), 64 N. W. Rep. 1041; Reedie *v.* Lond. N. W. R. Co., 4 Exch. 244.

[6] Malthie *v.* Balting (Super. N. Y.), 26 N. Y. Supp. 903; *s. c.* Patterson *v.* Austin (Tex.), 39 S. W. Rep. 976; Baumeister *v.* Markham (Ky.), 39 S. W. Rep. 844.

[7] O'Reilly *v.* Long Island R. Co. (Sup.), 44 N. Y. Supp. 264 [1897].

[8] Crenshaw *v.* Ullman (Mo. Sup.) 20 S. W. Rep. 1077.

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completion of the first story of a building cannot be excused by a plea that an independent contractor has agreed to perform the duty.[1]

642. A Man must Maintain His Property in a Reasonably Safe and Proper Manner—The Owner of Real Estate is Responsible for the Safe Condition of His Land.—It is sometimes stated that the owner of real estate is responsible for the negligent acts of persons employed in making erections upon it for his benefit, even when the relation of master and servant does not exist between such owner and the person employed.[2] This statement regarding the ground of liability should be received with considerable caution, for the rule, if applied strictly, would become the exception. It is well settled that an owner of real estate may contract for any work which is lawful and not in itself a nuisance, and is harmless if properly and carefully carried out, or which is not of such a character as to impose a duty upon him to protect the public or his neighbors, and if he does not reserve or assume control of it so as to make the contractor his servant, he will not be liable for injuries resulting either from the work or from the prosecution of the work during its progress. Thus it has been held that the owner is not liable for the failure of a dam built upon his property,[3] for injuries resulting from excavations,[4] or from the operation of a steam shovel by which the horse of a passer-by was frightened, or from fires negligently set under a contract to clear land.[5]

Two interesting cases which are seemingly contrary are directly in point on this question. The facts are very much alike, each being a case of failure of a dam and destruction of property resulting. In one case it was held that the owner of real estate was responsible for erections negligently carried on upon his property,[6] and in the other the court held that the mere fact that improvements were erected upon the land was no just reason why liability should attach to the owner during the process of erection any more than if the enterprise were executed elsewhere.[7]

643. After Acceptance the Owner is Responsible for the Safety of Works.—If work is done by a contractor not in its way a nuisance, but which becomes so by reason of the manner in which the contractor has performed it, the owner or company becomes responsible at once if he [it] accepts the

[1] As to what acts in building operations amount to nuisances, *see* 29 Amer. & Eng. Ency. Law 946, 947, *and see* Haman *v.* Stanly, 66 Pa. St. 464; *also* Lloyd's Law of Building, §§ 76–78. Some of the most ordinary nuisances in building operations are the following. Obstruction of streets, ways, and streams; interruption of public travel and traffic, as by structures, excavations, building materials; undermining land or the foundations of other structures; trespass upon, over, or beneath private property; accumulating and keeping dangerous or offensive materials, or unsightly and noisy things, to the annoyance of others, such as water, snow, sewage, offal, factory products, and steam exhausts or whistles. Cooley on Torts, Smith *v.* Milwaukee B. & T. Ex. (Wis.), 64 N. W. Rep. 1041; *and see* Jager *v.* Adams, 123 Mass. 62.

[2] Mayor of New York *v.* Bailey, 2 Denio 433 [1845], *citing many cases.*

[3] Boswell *v.* Laird, 8 Cal. 469 [1857]; *and see* Barton *v.* McDonald, 81 Cal. 267; *but see* Mayor *v.* Bailey, 2 Denio 433 [1845].

[4] Aston *v.* Nolan, 63 Cal. 269.

[5] 14 Amer. & Eng. Ency. Law 831, 832.

[6] Mayor *v.* Bailey, 2 Denio 433.

[7] Boswell *v.* Laird, 8 Cal. 469 [1857].

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work in that condition.[1] "Before acceptance the owner must see to it that the work, as to strength and durability, and as to all other particulars necessary to the safety of the property and persons of third parties, is subjected to proper tests, and that it is sufficient. By acceptance and subsequent use the owners assume to the world the responsibility of its sufficiency."[2]

Acceptance of important works, as has been shown in other parts of this work, is an act which should be attended with appropriate formality and preparation. A searching inspection of the work itself, and careful review of all the circumstances and events connected with it, will frequently reveal many things that would otherwise be overlooked. Tests, actual use, or service, under the control and superintendence of the contractor, are advised. After the owner has accepted a work or a structure he is liable for subsequent injuries caused by the natural results of the work, he having assumed the responsibility of its sufficiency. From the act of acceptance by the owner the liability of the contractor ceases.[3] The owner is responsible after acceptance, even though the accident is due to the negligent performance of the contractor.[4] A formal acceptance, it seems, is not necessary; it is enough if the owner or city has assumed control of the structure.[5] The owner must have possession and control, or there is no such ratification of the contractor's work as will render him liable therefor.[6]

The law casts a duty upon an owner of property to see that operations upon his land are conducted with reasonable care and skill, and an owner cannot get rid of this responsibility by delegating the performance of work to a contractor. The owner cannot remove the lateral support which his land has afforded his neighbor's land without taking precautions to prevent injury to his neighbor's land.[7] If the adjoining property be occupied with a building, the owner or builder is in duty bound to notify his neighbor of the operations he is about to undertake before commencing,[8] and he must exercise due and ordinary care in carrying on the work,[9] or he will be liable for injuries resulting.[10] It has been held that a person must use

[1] Vogel *v.* Mayor, etc., 92 N. Y. 10 [1883]; Smith *v.* Milne, 1 Dowl. 290.

[2] Field, J., in Boswell *v.* Laird, 8 Cal. 469; *but see* Ryder *v.* Kinsey (Minn.), 64 N. W. Rep. 94.

[3] Boswell *v.* Laird, 8 Cal. 469 [1857], 14 Amer. & Eng. Ency Law 837.

[4] Khron *v* Brock (Mass.), 11 N. E. Rep. 748 [1887]; *contra*, Ryder *v.* Kinsey (Minn.), *supra*.

[5] First P. C. of E. *v.* Smith (Pa.), 30 Atl. Rep. 279, a sewer; *semble*, Klix *v* Nieman (Wis.), 22 N. W. Rep. 223, *note*; Khron *v.* Brock, 11 N. E. Rep. 748 [1887]

[6] Atlanta & F. R. Co. *v* Kimberly (Ga.), 13 S. E. Rep. 277 [1891].

[7] Quincy *v.* Jones, 76 Ill. 231; Thurston *v* Hancock, 12 Mass. 220; Wyatt *v.* Harrison, 3 B. & Ad. 871; Partridge *v.* Scott, 3 M & W. 220.

[8] Brown *v.* Werner, 40 Md. 15; Massy *v.* Goyder, 4 C. & P. 161; Wyley Canal Co. *v.* Bradley, 7 East 368.

[9] Charles *v.* Rankin, 22 Mo. 566; B. & O. R. Co. *v.* Renney, 42 Md. 117; Jeffries *v.* Williams, 5 Ex. 792

[10] *See* Peyton *v.* Mayor, 9 B & C. 725; *and see* Emden's Law of Building, chap. xviii, *and* Lloyd's Law of Building § 80; Smith *v* Darby, L. R. 7 Q. B 716; Horner *v* Watson, 79 Pa. St. 242; Hilton *v* Granville, 5 Q. B 701; Fisher *v.* Beard, 32 Iowa 346; Bononi *v.* Blackhause, El., Bl. & El. 622.

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ordinary and reasonable care and means to prevent an injury to his property by negligent construction, and he can only recover such damage as could not by such care and means be avoided.[1] So when an owner's house was separated from an adjoining house by a party wall and he employed a builder to pull down his house and build it on a plan which involved the tying together of the new house and the party wall so that if one house fell the other would be damaged, in the course of rebuilding the builder's workmen, in fixing a staircase negligently, and without consent of the owner, cut into a party wall on the other side, in consequence of which the house fell and damaged all the houses, the owner was held liable for the damage, unless he proved that the act could not have been reasonably anticipated by workmen of ordinary skill who were neither dishonest nor insane.[2] A landlord, who undertakes to make repairs which affects the support and foundations of a building, is bound to use the greatest degree of care, not mere ordinary care, because he is bound to use ordinary care towards persons to whom he owes no duty; and if by his alterations he endangers the safety of his tenants or guests, he does it at his peril, and cannot shield himself from responsibility after a catastrophe has happened by saying, "I used ordinary care and employed skillful mechanics, but in spite of all, for some unknown reason, the building fell."[3] Ordinary care is that degree of care which a reasonably prudent and cautious person would take to avoid injury under like circumstances.[4]

An owner cannot maintain the right to blast rock with gunpowder on his own lot even if he uses care and skill in so doing. He should know that by such act, which was intrinsically dangerous, the damage would be a necessary, probable, or natural consequence.[5]

644. Duties Imposed by Law Upon the Owner to Exercise Due Care and Foresight—Must Employ Competent Parties.—The first duty of an owner is to employ competent and skillful persons to undertake the work. If unskillful and improper persons are knowingly employed by the owner or company to perform their work, they may be required to answer their reckless choice and make good their blunder.[6]* It is not enough, in em-

[1] City of Dallas *v.* Cooper (Tex. Civ. App.), 34 S. W. Rep. 321.

[2] Hughes *v* Percival (Eng.), 8 App. Cas. 443 [1883]; Gorham *v.* Gross, 125 Mass. 232; *but see* Connors *v.* Hennessy, 112 Mass. 96.

[3] Judd & Co. *v.* Cushing, 50 Hun 181 [1888]; Jefferson *v.* Jameson & M. Co. (Ill.), 46 N. E. Rep. 272; McHenry *v.* Marr, 39 Md 510; Stott *v.* Churchill (Com. Pl.), 36 N. Y. Supp. 476; *and see* Campbell *v.* Portland Sugar Co., 62 Me. 552; Toole *v.* Beckitt, 57 Me. 544.

[4] Chicago City Ry. Co. *v.* Dinsmore (Ill. Sup.), 44 N. E. Rep. 887.

[5] Colton *v.* Onderdonk (Cal.), 22 Rep'tr 106 [1886]; Addison on Torts, 9; Transportation Co. *v.* Chicago, 99 U. S. 635; Losee *v.* Buchanan, 51 N. Y. 479; *explaining* Hay *v.* Cohoes Co., 2 N. Y. 159; Pixley *v.* Clark, 35 N. Y. 520; Heeg *v.* Licht, 80 N. Y. 579; Tiffin *v.* McCormick, 34 Ohio St. 644; Sutton *v.* Clark, 6 Taunt. 44; Joliet *v.* Harnood, 86 Ill. 110; Farrand *v.* Marshall, 19 Barb. 381; Rylands *v.* Fletcher, L. R. 3 H. of L. 106; Wilson *v.* New Bedford, 108 Mass. 261–266; Cahill *v.* Eastman, 18 Minn. 324; Norwalk Gas Co. *v.* Norwalk (Conn.), 28 Atl. Rep. 32.

[6] 14 Amer. & Eng. Ency. Law 836; Cuff *v.* N. & N. Y. R. Co., 35 N. J. L. 17 [1869]; Boswell *v.* Laird, 8 Cal. 469 [1858].

* *See* Sec 246, *supra.*

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ploying an independent contractor, not to knowingly employ an incompetent one; but one must exercise due and reasonable care to select a competent and skillful person.[1] If the work be lawful and be entrusted to competent and skillful engineers and contractors, no liability will attach to the projectors before it is accepted.[2] *

The owner, however, does not guarantee to the workman that the contractor engaged by him is skillful or careful; it is for them individually to inquire into the contractor's character and ability.[3] If a person has been injured, through the contractor's negligence, in doing the work he was employed to do, the habits of the contractor may be shown to prove that he was a person not to be trusted with such work, and the owner may be required to show that he had used proper care and diligence in ascertaining the contractor's character and capacity.[4]

If the company employ a contractor to do a thing the performance of which would render it liable, it cannot hope to escape by delegating the act to a third party. If the company authorized the very act to be done which has caused the mischief, it will be compelled to shoulder the consequences. But if the act which is the subject of complaint has arisen indirectly in the course of the work as a result of the contractor's mistakes, omissions, negligence, or methods that he has himself adopted, then the company is not responsible, because it has never authorized these acts to be done.[5]

A duty is imposed by law upon everybody to avoid acts in their nature dangerous to others. If the negligence of the contractor complained of be an act imminently dangerous to life, then the contractor is liable; and this is so notwithstanding the fact that the party injured was not a party to the contract. The builder of a structure for a company is liable for defects in his work when the defects are such as to render the building dangerous and the injury is a natural and probable consequence of its use,[6] even though such defects are due to negligence of subcontractors.[7]

If the owner of land contracts with a skillful party to erect a building thereon, and for that purpose surrenders the premises for the use of the contractor, he is not, *during the erection of the building*, answerable in damages for an accident which occurs to a passer-by.[8] If a corporation that is building a structure composed in part of brickwork and in part of woodwork has exercised due and reasonable care in selecting a mason supposed

[1] Norwalk Gaslight Co. *v.* Norwalk (Conn.), 28 Atl Rep 32.

[2] Cuff *v* N. & N. Y. R. Co., 35 N. J. L. 17 [1869]; Boswell *v.* Laird, 8 Cal. 469 [1858].

[3] Hunt *v.* Penn. R. Co, 51 Pa. St. 445; Schiu *v.* Pabst Brew. Co. (Minn.), 66 N. W. Rep. 8.

[4] Berg *v.* Parsons (Sup.), 35 N. Y. Supp. 780, *also* 31 N. Y. Supp. 1091.

[5] Hale *v* Ry. Co., 6 H. & N. 497; *accord*, Ryder *v.* Kinsey (Minn.), 64 N. W. Rep. 94; Ryan *v.* Fowler, 24 N. Y. 410; Homan *v.* Stanley, 66 Pa. St. 464.

[6] Devlin *v.* Smith, 89 N. Y. 477 [1882].

[7] Bast *v.* Leonard, 15 Minn. 304.

[8] Scammon *v.* City of Chicago, 25 Ill. 424 [1861].

* *See* Insufficient Plans, Secs. 243–248, *supra*.

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to be an expert in the business, it is not responsible for the fall of the masonry upon the carpenter, whereby he was killed, even though the mason's work was defective. The carpenter and mason are co-laborers of a common master, and co-operating in their respective departments of labor to a common end, viz., the erection and completion of the building.[1]

If the owner has not knowledge or even constructive notice of the danger, he cannot be held liable for injuries sustained by a laborer by a floor giving away, caused by overloading with stone and brick by the mason contractor who was building the walls. In this case plans and specifications had been approved by the building department, and mason's and carpenter's work had been contracted for with the owners, to be done according to plans and specifications, by contractors well known, experienced, and competent. An inspector of the building department had examined the work every day as it progressed, and had approved of it up to the day of the accident, but on that day he warned the employees of the mason contractor not to overload the beams.[2]

Negligence has been defined as the failure to exercise that degree of caution which a man of ordinary intelligence would exercise under the circumstances of a particular case.[3] Of corporations it is required that they exercise the same degree of care and prudence that a cautious individual person would exercise if the whole risk or loss were his own;[4] such a measure of prudence as a discreet person would employ.[5] The degree of care necessary has been held to be in proportion to the extent of the injury that would be likely to result if it should prove insufficient or fail.[6]

645. Duties of Cities and the State to Maintain their Streets, Ways, and Public Improvements in a Safe Condition.—It has been frequently held that cities owe to the public the duty of keeping its streets in a safe condition for travel.[7] If it authorizes excavations and obstructions it will be liable for injuries received from neglect to take proper precautions to prevent accidents. It must keep proper lights and guards at night, whether it has or has not contracted for such precautions with the persons executing the work.[8]

[1] Keith *v.* Walker Iron & Coal Co. (Ga.), 7 S. E. Rep. 166 [1888]; *but see* Giles *v.* Diamond State Iron Co. (Del.), 8 Atl. Rep. 368 and 11 Atl. Rep. 189, where the walls fell from being improperly designed; *see* 7 S. E. Rep 166, *note.*

[2] McEmandy *v.* Kyle, 14 Daly 268 [1887]; *and see* Olsen *v.* Meyer (Neb.), 64 N. W. Rep 954, where owner had employed an architect.

An inspector has been held a mere fellow-servant of the men at work upon a structure. Stourbridge *v.* Brooklyn City R. Co. (Sup.), 41 N. Y. Supp. 128.

A surveyor is the fellow-servant of the conductor of a train upon which he may be riding. Ross *v.* N. Y. C. & H. R. R., 5 Hun 488 [1875].

[3] Gravelle *v.* M. & St. L. Ry. Co, 10 Fed. Rep. 711 [1882].

[4] Denver *v.* Rhodes (Colo.), 13 Pac. Rep. 729 [1887].

[5] Mayor of New York *v.* Bailey, 2 Denio 433 [1845].

[6] Mayor *v.* Bailey, 2 Denio 433 [1845].

No additional liability is incurred by a city's taking a bond to indemnify it against any loss or damage resulting from a failure of a contractor to perform his duty. Erie *v.* Caulkins, 82 Pa. St. 247.

[7] Storrs *v.* Utica, 17 N. Y. 104; Cuff *v.* N. & N. Y. R. Co, 35 N. J. L 17 [1869]; *see cases collected,* 14 Amer. & Eng. Ency. Law 842, *note.*

[8] Storrs *v.* Utica, 17 N. Y. 104 [1858];

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The arguments upon which this liability is put are that the accident is a result of the work itself and not of its unskillful performance; that a ditch could not be dug in a public street and be left unguarded at night without imminent danger of such casualities; that the author of the mischief was the one who caused the excavations to be made, whether it did it by its own laborers or let it out by contract. The city first determines that the excavations shall be made, and then selects a contractor to do it. Can it escape responsibility for putting a public street in a dangerous condition by interposing a contract which it itself has made for the very thing which creates the danger?[1] The law in all cases does not, it seems, make the same rule for counties; thus it has been held that where independent contractors, while putting down a stone curb for a county, left a trench and a pile of dirt unguarded and unlighted during the night, the county was not liable to a person who fell into the trench and was injured, in the absence of interference with and control of the work by the county.[2] Although the city is responsible for such injuries, that does not necessarily relieve the contractor of liability for *his* negligence or the wrongful acts of *his* servants.[3]

While it is the imperative duty of cities to keep their streets safe for travel as regards pitfalls, it seems that the duty does not extend to protecting residences from accidents due to the negligence of contractors.[4] Thus where a contractor was to furnish the materials and do the work of regulating and leveling the road, and injury was occasioned by negligent blasting of rocks by a subcontractor in the execution of the work, it was held that the city was not liable for damages caused by rocks being thrown into a house.[5] Nor does it require a city to provide water for fire purposes when there is a contract by which a water company agreed to keep the city supplied with a certain quantity of water to protect its inhabitants from loss by fire. Such a contract does not create between the city and the company the relation of principal and agent, so as to relieve the company of liability to a citizen for loss by reason of its failure to keep such supply.[6] If, however, the state has by statute empowered the city to elect water commissioners for a fixed term, and for such subsequent terms as the city might determine, to prescribe the duties and compensation of the commissioners, and to regulate the mode and causes of their removal from office, and under such statute the city owns the waterworks, receives rents for water, and controls the use and distribution of the water, the city *is* liable for

see Baumeister *v.* Markham (Ky.), 39 S. W. Rep. 844, which held contractor liable.

[1] Storrs *v.* City of Utica, 17 N. Y. 104; Stafford *v.* City of Oskaloose, 64 Iowa 251 [1885]; Welsh *v.* St. Louis, 73 Mo. 71 [1880].

[2] Eby *v.* Lebanon County (Pa.), 31 Atl. Rep. 332.

[3] Storrs *v.* City of Utica, 17 N. Y. 104.

[4] Kelly *v.* Mayor, 11 N. Y. 432.

[5] Pack *v.* The Mayor, etc., 8 N. Y. 222; Kelly *v.* The Mayor, etc., 11 N. Y. 432.

[6] Paducah Lumber Co. *v.* Paducah Water Supply Co. (Ky.), 13 S. W. Rep. 249.

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damages resulting from an unsafe highway caused by a stream of water thrown from a city hydrant across the highway by employees of the water commissioners. The water commissioners and their employees were held the servants of the city, and the city responsible for their acts.[1]

The same duty is required of common carriers, such as railroad companies, to keep their depots and platforms free from defects occasioned by carelessness of contractors to whom construction has been let. They must provide a safe means of access to and from the cars for the public, which duty is independent of the means by which the obstructions or defects are occasioned. It is a duty imposed by law.[2] Their obligations to the public as a common carrier requires this. The law imposes certain obligations and liabilities upon a company in which it vests a franchise with exclusive privileges, of which it cannot relieve itself so long as it enjoys those privileges. It cannot escape responsibility by delegating a portion of its business to others, nor parcel out its business to agents, and be a common carrier without assuming the liabilities of a common carrier.[3]

If a town be directed by statute to build works of a certain size and according to plans approved by a board of harbor and land commissioners, and it is done, through the selectmen and a committee of citizens of a town, in a negligent manner, the town will be liable for personal injuries caused by the negligence of its agents in constructing the work.[4]

646. City, Company, or Owner Cannot Escape Liability by Delegating Duties to a Contractor.—"No one can lawfully delegate to another the authority to do an unlawful act, nor can one upon whom the law imposes the performance of a duty relieve himself from the responsibility for its nonperformance by committing its performance to a substitute. Thus if the thing to be done is in itself unlawful, or if it is in itself a nuisance, or if it cannot be done without doing damage, he who causes it to be done by another, be the latter servant, agent, or independent contractor, is as much liable for injuries which may happen to third persons from the act done as though he had done the act in person."[5]

"It is, therefore, the duty of every person or company who does by its own act, or causes to be done by another, an act which from its nature is liable, unless precautions are taken, to do injury to others, to see to it that these precautions are taken, and he cannot escape this duty by turning the whole performance over to a contractor."[6] "Of the same nature is the

[1] Aldrich *v.* Tripp, 11 R. I. 141 [1877].

[2] Cuff *v.* N. & N. Y. R. Co, 35 N. J. L. 17 [1869].

[3] Speed *v.* O. & P. R Co., 71 Mo. 303 [1879]

[4] Paul *v.* Forbes, 148 Mass. 495, 628; *semble*, Lebanon *v.* McCoy (Ind. App.), 36 N. E. Rep. 547.

[5] Meechen on Agency, 747, *and cases cited;* Mairs *v.* Manhat R. Est. Assn., 89 N. Y. 498 [1882]; Bailey *v.* Troy & Boston R. Co., 57 Vt. 252; Gorham *v.* Gross, 125 Mass. 232; Eaton *v.* Railroad Co., 59 Me. 520; Caswell *v.* Cross, 120 Mass. 545; Water Co. *v.* Ware, 16 Wall. (U. S.) 566.

[6] Meechen on Agency, § 747; Wilson *v.* White, 71 Ga. 506; Gray *v.* Pullen, 5 B. & S. 970; Bower *v.* Peate, L. R. 1 Q. B. Div. 341; Turry *v.* Ashton, 1 Q. B. Div. 314; Gorham *v.* Gross, 125 Mass. 232

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duty which the law imposes upon every person, who for his own purposes brings on his lands and collects or keeps there anything likely to do mischief if it escapes, to confine it at his peril. If he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape." [1] This distinction has been stated in a recent case as follows: "If the work to be done is committed to a contractor to be done in his own way, and is one from which, if properly done, no injurious consequences to third persons can arise, then the contractor is liable for the negligent performance of the work. If, however, the work is one that will result in injury to others unless preventive measures are adopted, the employer cannot relieve himself from liability by employing a contractor to do what it was his duty to do, to prevent such injurious consequences. In the latter case, the duty to so conduct one's own business as not to injure another is continuously with the employer." [2]

"It would be monstrous if a party, who caused another to do a thing which will necessarily in its progress become dangerous and inconvenient, were exempt from liability for the act, merely by interposing a contract between him and the person immediately causing the act to be done." [3]

The rule that a railroad company cannot delegate to a contractor its charter right to construct the road, so as to exempt it from liability, does not extend to the use of the ordinary means employed for its construction, but to the use of such extraordinary powers as the corporation itself could not exercise without first having complied with the conditions of its charter.[4] A provision in the charter of a street railroad company that it should be liable for the negligence or misconduct of its agents and servants in constructing the road, does not apply to the negligence of an independant contractor.[4]

647. Provision that Engineer shall have Supervision and Direction of Work, and that He may Require Dismissal of Incompetent and Disorderly Workmen.

Clause: "And it is further mutually agreed and understood that the work shall be under the supervision and direction [but not control] of the engineer and according to his instructions in all matters pertaining to the result or results required by this contract, but not as to the means and manner by which such results are to be accomplished; that the said engineer shall have power to require the contractor to discharge any men considered by the engineer to be incompetent, disorderly, or disposed to create discontent or mischief on the works; that

Colegrove *v.* Smith (Cal.), 33 Pac. Rep. 115; Sturges *v.* Theological Society, 130 Mass. 414.

[1] Gorham *v.* Gross, 125 Mass. 232; Fletcher *v.* Rylands, L. R. 1 Exch. 265; Shipley *v.* Fifty Associates, 106 Mass. 194.

[2] Powers, J., in Bailey *v.* Troy & Boston R. Co., 57 Vt. 252

[3] Lowell *v.* Railroad Co., 23 Pick. 31; *and see* Water Co. *v.* Ware, 16 Wallace, 566; Florsheim *v.* Dullaghan, 58 Ill. App. 593.

[4] Sanford *v.* Pawtucket St. Ry. Co. (R I.), 35 Atl. Rep. 67.

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the work shall be performed and completed to the entire satisfaction of the engineer and to his approval and acceptance."

648. Provision that Contractor shall Employ and Keep Competent Foremen and Mechanics, and that the Engineer may Dismiss Objectionable Employees and Workmen.

Clause: "The contractor shall give all necessary personal superintendence during the execution of the said works, and shall constantly employ on each part thereof at least one good, careful, and competent foreman, skilled in the trades and callings required by this specification, to manage and direct in the absence of the contractor, and such foreman shall, on behalf of the contractor, receive and have charge of such several drawings, writings, papers, specifications, and documents as may be delivered to or for the use or guidance of the contractor, and such foreman shall also, on behalf of the contractors, receive, execute, and obey all such instructions and directions as may be given by either the engineer, or assistant engineer, or authorized person, and shall not be changed without the consent of the engineer; but he may, nevertheless, be objected to and his dismissal required by the engineer, if and when he shall see fit to do so; and thereupon the contractor shall forthwith cease to employ him upon the work, and shall employ another good and competent foreman in his stead, and so from time to time, and as often as occasion shall require. In like manner the contractor shall employ, in and about the execution of the said works, or any of them, only such clerks, foremen, superintendents, agents, and workmen as are careful, competent, and skilled in their various trades and callings; and the engineer shall be at full liberty to object to or require the dismissal of any person employed by the contractor in or about the execution of such works who shall, in the opinion of the engineer, misconduct himself, or be incompetent for, or negligent in, the due and proper performance of his duties or any of them; and such person or persons shall not be employed again thereon without the consent in writing of the engineer; and should the contractor continue to employ, or should he again employ about such works, without such consent, such overseer, mechanic, or workman, the contractor shall pay and forfeit to the said corporation the sum of twenty dollars lawful money for each day during which such overseer, mechanic, or workman shall be employed on the works after such order as aforesaid, as and for liquidated damages in respect thereof; and all sums so forfeited may be deducted from the amount which the contractor may be entitled to receive from the said company."

649. Provision that only Skillful, Competent Men shall be Employed, and that the Engineer May Order the Dismissal of Incompetent and Disorderly Men.

Clause: "And the said part... of the second part further agree... to employ only competent, skillful men to do the work; and that whenever the engineer shall inform said part... of the second part, in writing, that any man on the work is, in his opinion, incompetent, or unfaithful, or disorderly, such man shall be discharged from the work, and shall not again be employed upon it."

650. Provision that Engineer or Architect may Require Dismissal of Workmen.

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Clause: "The engineer or architect for the time being shall have power to require the builder immediately to dismiss any workman, watchman, or other servant of the builder who shall in the opinion of the engineer or architect misconduct himself, or shall in his opinion be incompetent, and the builder shall forthwith comply with such requirements."

651. Object of Contract Work to Avoid Liability Consequent to its Performance.—These are stipulations which often prove expensive and that are a cause of great mischief and endless litigation. If not carefully drafted they may endanger the chief objects and purposes of the contract system of doing work, its effect being to retain the control of the work, and therefore to assume the risks, dangers, and damages attending its execution. The primary object of having work done by contract is to avoid these very things, and to shift the responsibility upon parties who are in better position to undertake hazardous jobs and to avoid accidents common to their execution. Contractors who are working for themselves are likely to use more care, and take greater pains to protect themselves and their own interests, than would agents of corportions, who have little or nothing at stake, and this fact alone is sufficient reason for companies to adopt the system of contract work, rather than trust to the probable indifference of servants. Contractors are usually better able to undertake the work. Men who reside in a cummunity and who have personal acquaintance with workmen, and know each man's individual habits, character, and disposition, or who from their experience with men on contract work are able to judge of their fitness and value, are better qualified to assume the risks, dangers, and liability of their employment than any other class of persons. They know whom to employ and who may prove able and trustworthy servants. A contractor's acquaintance with the conditions and resources of his locality enable him better to estimate the probable cost of work. He knows the cost of materials and labor; his experience affords him some knowledge of difficulties and hardships to be encountered in a proposed undertaking. He has experienced floods and sunken foundations in the same stream or in the same vicinity, and knows what to expect. He may have two jobs, one of which will assist the other, by reason of which he may be able to execute both cheaper and better than the company or any one else not being in the same position.

For these reasons contractors are willing to undertake engineering work and its attendant risks, and companies and owners are fortunate in securing them to assume duties and undertake work the performance of which is hazardous and burdensome.

652. Contract should Make the Contractor an Independent Contractor and Not a Servant.—To avoid the risks and dangers of the work, the relation of the party undertaking the work to the company must be that of an independent contractor and not that of a servant. If work be put into the

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hands of an independent contractor, and it is not in itself a nuisance or unlawful, and if the work be of such a character that if properly performed no injurious consequence will arise, and if the law does not impose a duty upon the company or principal or take necessary precautions to protect the rights of others who may be injured by the work, the company or principal escapes the liability arising from any injury or damage caused by the negligent or improper performance of the work.[1] When these conditions exist, the owner's or company's liability is to be determined by the fact whether the party doing the work is an independent contractor or is an agent and servant of the owner or company, which must be ascertained from the facts of each case.[2] Nice shades exist, and many cases are hard to reconcile, but all seem to recognize this general rule.

Except in the three instances mentioned, the rule is invariable that the master alone is responsible for the acts of the servant. In some cases it is difficult to say whose servant a person is that does the injury, but when that is decided the liability is placed.[3] It is absolutely essential in order to establish a liability against a party for the negligence of others, that the relation of master and servant should exist,[4] and the liability by virtue of the relation of master and servant must cease where the relation itself ceases to exist.[5]

The responsibility grows out of, is measured by, begins and ends with, the *control* of the parties doing the injury. If it is the owner's duty to *control* them in what they do, he is responsible for their neglect; but where workmen do not stand in such relation to the party sought to be charged as to make it a duty to control them, they are not his servants; except in some cases, where by subsequently adopting and sanctioning these acts he renders himself legally a participator in them. That party is undoubtedly liable who stands in the relationship of master to the wrong-doer—he who had selected him as servant, from the knowledge or belief in his care and skill, who could remove him for misconduct, and whose orders he was bound to receive and obey, should be responsible.[6]

The owner's liability for injuries resulting from the improper and negligent performance of the work depends upon the relation that the party executing the work or causing the injury bears to the owner. If the relation be that of contractor and contractee, the company is not liable; if it be that of master and servant, he (or it) is liable. A contractor therefore is

[1] Wood's Law of Railroads 1008, *and many cases;* Clark *v.* Fry, 8 Ohio St. 358; Connors *v.* Hennessy, 112 Mass. 96; Carmen *v* Steubenville, etc., R. Co., 14 Ohio 399; Dygert *v.* Schenck, 23 Wend. (N. Y.) 446; Callahan *v.* Burlington, etc., R. Co., 23 Iowa 562; Searle *v.* Laverick, L. R. 9 Q. B. 122; Gilbert *v* Halpin, 3 Jr. Jur. (N. S.) 306; Murrie *v.* Currie, L. R. 6 C. P. 24.

[2] 40 Alb. L. Jour. 228.

[3] Cuff *v.* N. & N. Y. R. Co., 35 N. J. L. 17 [1869].

[4] King *v.* N. Y. Central R. Co., 66 N. Y. 181–184.

[5] Cuff *v.* N. & N. Y. R. 35 N. J. Law 17.

[6] Allen *v.* Willard, 57 Pa. St. 374 [1868]; Cuff *v* N. & N. Y. R., 35 N. J. L. 17 [1869].

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not liable for injury to one of his employees caused by the negligence of a subcontractor, where the contractor had no control over the subcontractor.[1]

653. What Makes the Relation of Master and Servant.—The questions as to what creates the relations of master and servant, and what conditions are necessary to establish the relation of independent contractor, are questions extremely difficult to determine. There is irreconcilable conflict in the decisions, and no general rule can be laid down. Each case must be decided upon its own peculiar facts.[2] They must not be such acts as he cannot delegate. As said before, when the work is in itself harmless and lawful if carefully conducted, and no duty is imposed to prevent injury, the general principle is recognized everywhere that liability for damages occasioned by the act of another exists only when they stand in the relation of master and servant.[3]

A company or proprietor is not chargeable with the negligent acts of another in doing work upon his lands unless he stands in the character of employer to the one guilty of negligence, or unless the work as authorized by him would necessarily produce the injuries, or that they are occasioned by the omission of some duty incumbent on him.[4] It is not enough to show employment merely, it must be shown in addition that the employment created the relation of master and servant.[5]

The circumstance that a person possibly may not be capable of paying damages is not one which can legally be taken into consideration in order to determine the legal liability for a wrong. The law can only afford redress against the individual who commits it;[6] nor does the fact that after the act of the subcontractor the contractor made declarations showing his belief to be, that he was liable, make him liable; nor the fact that he was to have secured permits make him liable.[7] Though the contractor's remuneration is measured by the day's and hour's work of himself and his men, he is liable for injury caused by their negligence.[8]

654. The Owner or Employer Cannot have the Direction and Control of an Independent Contractor, His Servants, nor the Work He is Doing.—It is the intention and aim in construction contracts to create and maintain the relation of independent contractors and to prevent the person engaged to do the work from becoming a servant. To understandingly attempt this it is first necessary to ascertain what is the relation of an independent contractor and how it differs from a servant. The general test of the relation between the owner and the contractor is whether the former controls the

[1] Wittenberg *v.* Friederichs (Sup.), 40 N. Y. S. 895.

[2] Speed *v.* Atl. & Pac. R. Co., 71 Mo. 303.

[3] Speed *v.* Atl & Pac. R. Co., 71 Mo. 303; Painter *v.* Mayor, 46 Pa. St. 213 [1863]: Hale *v.* Johnson, 80 Ill. 185; Barry *v.* St. Louis, 17 Mo. 121 [1852]; Cooley on Torts 547; Pierce on Railroads 286.

[4] McCafferty *v.* S. D. & P. M. R. Co., 61 N. Y. 178 [1874].

[5] Hexamer *v.* Webb, 101 N. Y. 377 [1886].

[6] Painter *v.* Mayor, 46 Pa. St. 213; *and see* Udell *v.* Atherton, 7 H. & N. 195.

[7] City of Buffalo *v.* Clement, 19 N. Y. Supp. 846.

[8] Geer *v.* Darrow, 61 Conn. 230.

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separate individual acts of the latter; whether the one has the direction, when and where, and in what manner the other shall act; whether or not the owner or employer retains the supervision, direction, and control of the contractor or the work, and the means to be employed to accomplish it.[1] To hold the owner liable for the acts of an employee, justice demands that the former should direct and control the acts of the latter, and that is the test which determines whether the relation is that of master and servant. If an employer retains the power to select, direct, and discharge, he is responsible as a master; but if he surrender the hiring, direction, and control of the workmen, he is relieved of the responsibility for their acts.[2] When the power of directing and controlling the work is parted with by the employer or company, and given to the contractor, the relation of master and servant does not subsist, but only that of contractor and contractee.[3] So long as the employer or company has no control over the workmen, or cannot interfere with the manner of doing the work, nor discharge one workmen or employ another, then he [it] cannot be held liable.[4]

In order to be chargeable for the acts of another, the person sought to be charged must at least have the right to direct such person's conduct and to prescribe the mode and manner of doing the work.[5] As Mr. Meechem in his excellent book on Agency has said, "The employers' liability for the acts of his agent within the scope of his authority depends upon the fact that the relation of principal and agent exists. It is the principal's will that is to be exercised; his purpose that is to be accomplished; his are the benefits and advantages which ensue. He selects his own agent, puts him in motion, and has the right to direct and control his actions. It is therefore just and proper that he should be responsible for what the agent does while so employed."[6] "Where, however, the principal has not this control,

[1] Fulton Co. St. R. Co. *v.* McConnell (Ga.), 13 S. E. Rep. 828 [1891]; Atlanta & F. R. Co. *v.* Kimberly (Ga.), 13 S. E. Rep. 277 [1891]; Wabash, St. L. & P. Ry. Co. *v.* Parver (Ind.), 12 N. E. Rep. 296 [1887]; Lowell *v.* Boston & L. R. Co., 23 Pick. (Mass.) 24; Water Co. *v.* Ware, 16 Wall. (U. S.) 566; Mohr *v.* McKenzie, 60 Ill. App. 575; Schwartz *v.* Gilmore, 45 Ill. 455; Allen *v.* Hayward, 7 Q. B. 975; Painter *v.* Pittsburgh, 46 Pa. St. 213; St. Paul *v.* Seitz, 3 Minn. 297; Cincinnati *v.* Stone, 5 Ohio St. 38; Blake *v.* Thirst, 2 H. & C. 20; Sadler *v.* Henlock, 41 El. & Bl. 570; Scammon *v.* Chicago, 25 Ill. 424, *cases in* 14 Amer. & Eng. Ency. Law 830, 831 and 833; Leavitt *v.* Bangor & A. R. Co. (Me.), 36 Atl. Rep. 998 [1897]. *collection of cases in* Blackstone's (Students' Ed.); Evans's Principal and Agent, *note* 1, *p.* 581; Humpton *v.* Unterkircher (Iowa), 66 N. W. Rep. 776; Cooley on Torts 548; *many cases in* Pierce on Law of Railroads 286, 287; *and in* Dillon's Munic. Corps., § 974, p. 1193; Shearman & Redfield on Negligence, § 73; Schouler Dom. Rel. 644; *and see* Collensworth *v.* New Whatcom (Wash.), 47 Pac. Rep. 439, which held a city which had retained control of the employee was liable for his negligence, notwithstanding that the law required the city to do the work by contract.

[2] Pierce on Railroads 286; Storrs *v.* Utica, 17 N. Y. 104; St. Louis, etc., Ry. Co. *v.* Yonley (Ark.), 13 S. W. Rep. 333; Wallace *v.* So. Cotton Oil (Tex.), 40 S. W. Rep. 399; Carlson *v.* Stocking (Wis.), 65 N. W. Rep. 58; Sanford *v.* Pawtucket St. Ry. Co. (R. I.), 35 Atl. Rep. 67.

[3] Conners *v.* Hennessy, 112 Mass. 96 [1873]; Mumby *v.* Bowden, 25 Fla. 454; Morgan *v.* Smith (Mass.), 35 N. E. Rep. 101; Campbell *v.* Lumsford, 83 Ala. 512.

[4] Storrs *v.* Utica, 17 N. Y. 104

[5] Wood on Master and Servant 281; Rome & D. R. Co. *v.* Chasteen (Ala.), 7 So. Rep. 94.

[6] Andrews, J., in King *v.* New York,

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a different rule prevails. Neither reason nor justice requires that he should be held responsible for the manner of doing an act when he has no power or right to direct or control that manner. The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskillful or careless person to execute his orders should be responsible for any injury resulting from the want of skill or the want of care of the person employed; but neither the principal of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned."[1] If therefore the principal, using due care in the selection of the person, enters into a contract with a person exercising an independent employment, by virtue of which the latter undertakes to accomplish a given result, being at liberty to select and employ his own means and methods, and the principal retains no right or power to control or direct the manner in which the work shall be done, such a contract does not create the relation of principal and agent or master and servant, and the person contracting for the work is not liable for the negligence of the contractor, or of his servants or agents, in the performance of the work.[2] Whether or not the owner has by his contract retained any control over the work is a question for the court, and cannot be left to the jury, as the interpretation of contracts, oral or written, is for the court.[3]

655. The Relation of Independent Contractor is not Determined by the Term of Service nor by the Wages.—"The independent contractor is usually paid, in common parlance, by the job, but the fact that he is paid by, or has charged by the day, does not necessarily destroy the independent character of his employment."[4] So when a carpenter was employed under a continuing contract to make all repairs and alterations upon works, he to furnish tools and the company the materials, at $2.50 per day for his own services and 25 cents profit on each man employed by him, the carpenter to hire, pay, superintend, and discharge the men employed by him, the company to direct how the work was to be done, it was held that a man hired by the carpenter was an employee of the carpenter, and not of the company.[5]

etc., R. R. Co., 66 N. Y. 181; *see also* McCafferty *v.* Spuyten Duyvil, etc., R. R Co., 61 N. Y. 178; Clark *v.* Fry, 8 Ohio St. 358; Gahagan *v.* Aerometer Co. (Minn.), 69 N. W. Rep. 914.

[1] Justice Rolfe in Hobbit *v.* London, etc., Ry. Co., 4 Exch. 255.

[2] McCarty *v.* Second Parish, 74 Me. 318; Harrison *v.* Collins, 86 Penn. St. 156; Linton *v.* Smith, 8 Gray (Mass.) 147; Bennett *v.* Truebody, 66 Cal. 509; Bailey *v.* Troy & Boston R. R. Co., 57 Vt. 252; McCafferty *v.* Spuyten Duyvil, etc., R. R. Co., 61 N. Y. 178; Hexamer *v.* Webb, 101 N. Y. 377; Hass *v.* Philadelphia, etc., Steamship Co., 88 Penn. St. 269; Boswell *v.* Laird, 8 Cal. 469; Hilliard *v.* Richardson, 3 Gray (Mass.) 349; City of St. Paul *v.* Seitz, 3 Minn. 297; Clark *v.* Fry, 8 Ohio St. 358; Cuff *v.* Newark, etc., R. R. Co., 35 N. J. L. 17; Ryan *v.* Curran, 64 Ind. 345; Myer *v.* Hobbs, 57 Ala. 175.

[3] Brannock *v.* Elmore, 114 Mo. 55.

[4] Harrison *v.* Collins, 86 Pa. St. 153; Forsyth *v.* Hooper, 11 Allen (Mass.) 419; Corbin *v.* American Mills, 27 Conn. 274; Geer *v.* Darrow, 61 Conn. 230; Dane *v.* Cochrane Chem. Co. (Mass.), 41 N. E. Rep. 678; Hexamer *v.* Webb, 101 N. Y. 377 [1886]; Rourke *v.* W. M. Colliery Co., 1 C. P. D. 556.

[5] Dane *v.* Cochrane Chem. Co. (Mass.), 41 N. E. Rep. 678.

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When a person is employed to construct a building with materials to be furnished by the owner, and according to certain plans, the person to receive in payment day wages for himself and the other men engaged on the work, who were to be hired and paid by him, the court will hold him an independent contractor, for he occupies the relation of master to such employees, for whose negligence the owner is not liable, the work contracted for being lawful.[1] If the contract be parol, and there is evidence that one performing work for another represented the will of that other, not only as to the result of the employment, but also as to the means by which that result was to be accomplished, the question whether he was an independent contractor, or an agent for whose acts the employer was responsible, should be submitted to the jury.[2]

The fact that the employee is paid by the job does not make him an independent contractor if he is at all times subject to the control of the employer and works in the manner the employer directs and employs such men as he indicates.[3]

656. Contract Clause should Give Control of Men and Manner of Doing Work to Contractor. — In drafting an engineering contract great care must be taken to leave the mode and manner of performing the work, the hours or days that the work shall be carried on, the means by which it is to be executed, and the persons by whom it shall be done, to the contractor. If by the terms of the contract the owner or employer retains the power to select and discharge the workmen, and can *control* them in the discharge of their duties, can hold them responsible and direct them as to the mode and manner in which they perform their duties, they may justly be regarded as agents and servants of the owner or company, and he (it) is responsible for their misconduct and negligence.[4] The responsibility is equal and similar to that which exists in the ordinary case of principal and agent.[5]

657. Relation of Contractor to Owner where Workmen are Furnished by Contractor.—The fact that the workmen are furnished by a contractor, upon the requisition of an officer of a department of public works of a city, and are paid by a contractor, does not alter the case; if the contractor does not have the control of the men, and the direction of the mode and manner or means by which the work is to be accomplished, then they are not his his servants, but those of the city.[6] Therefore, a person employed by the

[1] Emmerson *v.* Fay (Va.) 25 S. E. Rep. 886.

[2] Barge *v.* Bousfield (Minn.), 68 N. W. Rep. 45.

[3] Sadler *v.* Henlock, 4 El. & Bl. 570; *accord*, Frink *v.* Missouri Fur. Co., 10 Mo. App. 61; Corbin *v.* American Mills, 27 Conn. 274; *and see* Geer *v.* Darrow, 61 Conn. 230.

[4] Bibbs' Admr. *v.* Norfolk & W. R. Co., 14 S. E. Rep. 176; Butler *v.* Townsend, 126 N. Y. 105.

[5] Story on Agency [7th ed.], p. 567; Cincinnati *v.* Stone, 5 Ohio St. 38; *see* Clark *v.* Vermont & C. R. 28 Vt. 103; Pawlet *v.* Rutland & Wash. R. 88 Vt. 297; *and* Blackwell *v.* Wiswall, 24 Barb. 355; Ladd *v.* Chotard, 1 Ala. 366; Felton *v.* Deall, 22 Vt. 170; Rapson *v.* Cubitt, 9 M. & W. 710; Winterbottom *v* Wright, 10 M. & W. 109-111; *other cases collected*, 29 Am. & Eng. Ency. Law 947 *note* 6.

[6] Beatty *v.* Thileman, 8 N.Y. Supp. 645.

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agent of the owner of a street railway, at a stipulated sum per month, to run a car and furnish a driver, the car and the road being controlled and the work directed by the agent, is not an independent contractor, and the owner is liable for the negligence of such employer's servants.[1] And when a subcontractor for the brickwork of a building, on account of lack of work for his employees, put some of them to work on an excavation not included in his contract, under an agreement with the contractor that the subcontractor should pay their wages, which should be repaid him by the contractor, the laborers worked under the direction of the contractor. When the excavation was completed the subcontractor paid the laborers and was repaid by the contractor, and it was held that the laborers, while working on the excavation, were not the subcontractor's servants, so as to render him liable for their negligence.[2]

An agreement by a contractor to furnish men to prosecute work he has undertaken, for which he is to be paid the cost of their labor increased by fifteen per cent., creates no privity between the owner and the laborers.[3] When one undertakes to complete a job that had been abandoned by another contractor, and is to receive the cost of the labor and materials furnished and ten per cent. additional, he will be held to be an independent contractor and not a servant.[4] Under such a contract it has been held that the contractor could recover what he had paid subcontractors for portions of the work, including their customary profits as the cost of the work, and in addition his own per cent. profit agreed upon.[5]

These cases should be distinguished from those cases where one furnishes a servant with personal property which he furnishes for hire. There is a principle in law that where a person hires the personal property of another who furnishes a servant to manage the same, though the hirer acquires the right to superintend and direct the conduct of the servant, the latter continues to be the servant of the owner of the property, who is responsible for any negligence of the servant in the performance of his service for the hirer, even where the hirer only is interested in such service.[6] Such cases are those where one hires a horse and carriage with a driver; but cases might arise where it would be difficult to draw the line, though one may distinguish between a livery rig and a hod and shovel of a common laborer. The question might be asked if the furnishing of a plow or scraper with team attached would come within the former or latter rule. It has been held that the fact that the employer furnishes the tools, materials, or appliances with which the work was to be done by the contractor does not

[1] Jensen *v.* Barbour (Mont.), 39 Pac. Rep 906.

[2] Cotter *v.* Lindgren (Cal.), 39 Pac. Rep. 950.

[3] United States *v.* Driscoll, 96 U. S. 421 [1877]; *other cases*, 14 Am. & Eng. Ency. Law 749; *but see* Beatty *v.* Thileman, 8 N. Y. Supp. 645.

[4] New Orleans, etc., *v.* Reese, 61 Miss. 581.

[5] Hamilton *v.* Coogan (Com. Pl.), 28 N. Y. Supp. 21; *and see* Ford *v.* St. Louis, etc., R. Co., 54 Iowa 723.

[6] N. O., B. R. & M. R. R. Co. *v.* Norwood, 62 Miss. 565 [1885].

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render him liable for negligence in their use by the contractor or his servants.[1]

If, however, he negligently furnishes defective appliances, he would be liable for an injury happening on that account.[2]

658. Relation of Master and Servant is Established if Control of Contractor is Reserved.—"The simple test is," says Mr. Wood, in his book on master and servant, "Who has the general control over the work? If the person employed reserves this power to himself, his relation to his employer is independent, and he is a contractor; but if it be reserved to the employer or his agent [engineer], the relation is master and servant."[3]

The relation of master and servant does not cease so long as the employer reserves any control or right of control over the method and manner of doing the work or the agencies by which it is effected.[4]

Whether an owner or company retains such control over work to be done and the manner of doing it as to render himself responsible for injuries occasioned by the negligence of a contractor and his employees in the performance of the work depends upon the construction given to the contract.[5] It is a question to be decided in each case largely if not entirely from the terms of the contract.

It has, therefore, been held that a deposition by the engineer of a company that the duties of the contractors were to build the road so that it would be accepted by the engineer-in-chief, that the owner controlled the work only indirectly and as manager of his superior, that the details were left to the contractors, and that the results of the work were what the railway company was after, was not admissible as evidence; that as the contract stated the relative duties of the contractors and of the engineer, and the relation of the latter to the former, the evidence of the engineer was a mere opinion as to the legal effect of the contract, and, therefore, incompetent.[6]

659. Contractor may be a Servant, though Called a Contractor.—What the party is called or what term is applicable to him makes no difference; the duties and obligations required by the contract, and the power of direction and control given or reserved therein, determines the true relations of the parties and who shall bear the responsibility.[7] The intention of the

[1] Riley *v.* State Line Steamship Co., 29 La. Ann. 79.

[2] Mechem on Agency, § 748.

[3] Wood's Master and Servant, 614; *see also* Kelly *v.* Cohoes Knitting Co., 32 N. Y. Supp. 459; McCann *v.* Waltham (Mass.), 40 N. E. Rep. 20.

[4] Wood's Master and Servant 281; Painter *v.* Mayor, 46 Pa. St. 213; *and cases cited and reviewed.*

[5] Lineman *v.* Rollins, 137 Mass. 123 [1884], *and cases cited.*

Owner's liability for materials ordered by contractor as owner's agent discussed in Steele *v.* McBurney (Iowa), 65 N. W. Rep. 332.

[6] Gulf, C. & S. F. Ry. Co. *v.* Shearer (Tex. Civ. App.), 21 S. W. Rep. 133; *but see* Carlson *v.* Stocking (Wis.), 65 N. W. Rep. 58, which held it was a question for the jury to decide.

[7] *Semble* Norwalk Gas Lt. Co. *v.* Norwalk (Conn.), 28 Atl. Rep. 32.

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parties has no weight in determining the relation to one another or their liability to an injured party; the whole question must be decided by the test who has the immediate direction, control, and management of the person or things causing the injury. The contract is the instrument by which the control is to be retained or surrendered, and the limit of the control and the extent of the reservations are determined by it.

The character and difficulty of engineering works renders it desirable, if not necessary, for the company to retain a general direction and supervision of the work. And this the courts have permitted to a greater extent, it is believed, than in any other business.

660. The Owner or Employer May Direct as to the Ultimate Object or Result of the Undertaking.—The exceptions to the rule as laid down are best expressed in words often quoted, and which are particularly true of engineering works, which are, "That the true test is to ascertain whether the service is rendered in the course of an independent employment, in which the contractor represents the will of his employer only as to the *result* of his work, and not as to the *means* by which it is accomplished.[1]

The employment, says Mr. Meechem in his work on Agency, "is regarded as independent where the person renders service in the course of an occupation and performs the will of his employer only as to the *result* of his work, and not as the means by which it is to be accomplished."[2]

If the employee or contractor is engaged to accomplish a particular object, and the mode and manner in which it is to be done and the means to be employed in its accomplishment are left to his skill and judgment, then the owner or employer are not liable for injuries due to the acts or negligence of the contractor, or of his agents and servants. The contract may provide for a *result* to be attained, without the right to interfere in the *conduct* of work. An employee bound only to produce or have a certain result brought about, even though a result of labor, and who is free to dispose of his own time and personal efforts according to his own pleasures, without responsibility to his employer, is an independent contractor and not a servant.[3]

661. The Right of Selection is an Important Element in Determining the Relation of the Parties.—Some courts have put great stress upon the hiring and paying of the workmen. One says, the right of selection is the basis of the responsibility of a master or principal for the acts of his agent. No one can be held responsible as principal who has not the right to chose

[1] Shearman & Redfield on Negligence, § 76; Harding *v.* Boston (Mass.), 39 N. E. Rep. 411; Storrs *v.* Utica, 17 N. Y. 104; Wabash, St. L. & P. Ry. Co. *v.* Farver (Ind.), 12 N. E. Rep. 296 [1887]; Cunningham *v* International R. Co., 51 Texas 503 [1879].

[2] Meechem on Agency, § 747; *citing* Harrison *v.* Collins, 86 Pa. St. 153; Peck *v.* Mayor, 8 New York 222; Barry *v.* St. Louis, 17 Mo. 121.

[3] Vane *v.* Newcombe, 132 U. S. 220, *telegraph line contractor; also see* Aiken *v.* Wasson, 24 N. Y. 482, *contractor not a servant;* Wakefield *v.* Fargo, 90 N. Y. 213, *general manager not a laborer or servant;* Gurney *v.* Atl. & Gt. W. Ry., 58 N. Y. 358, *counselor-at-law not an employee,* 32 Wis. 541, *employee of contractor, and* 45 Ind. 96.

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the agent from whom the injury flows.[1] Something more than the mere right of selection is essential to the relation of master and servant. That right must be accompanied with the power of subsequent control in the execution of the work contracted for, and if that power is wanting the relation to which it is essential does not exist.[2]

In the words of another court, "The party employing has the selecting of the party employed, and it is reasonable that he who has made the choice of an unskillful or carless person should be responsible for an injury resulting from the want of skill or want of care of the person employed. However, neither the principle of the rule nor the rule itself can be applied where the person sought to be charged does not stand in the relation of master or principal to the party whose negligent act has occasioned the injury."[3]

662. The Fact that the Contractor Carries on an Independent Employment may be an Important Element in Determining His Relationship.—Other circumstances may afford a strong presumption that an employee is a servant: the fact that he always serves the same person, and that he has no independent occupation.[4] A large number of cases are decided on the ground that if the employee exercises a distinct and independent employment, he and the persons whom he employs under him are not servants of the employer, but are servants of an independent contractor.[5] The distinction made in many cases is, that if the employee carries on an independent employment and acts in pursuance of a contract with the employer by which he has agreed to do the work on certain specified terms, in a particular manner and for a specified price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer, and given to the contractor, *but* if the work is done under a general employment, and it is to be performed for a reasonable compensation or for a stipulated price, the employer will be liable if he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient. This distinction is recognized in many cases.[6]

These circumstances as evidence of independent employment to go before the jury are important when no written contract has been entered into, and it is difficult to show what was the understanding between the parties. Mechanics are called in to make improvements or repairs, and what

[1] Kelly *v.* Mayor of New York, 1 Kernan 436; *but see* Boswell *v.* Laird, 8 Cal. 469 [1858].

[2] Boswell *v.* Laird, 8 Cal. 469 [1857], *a long case reviewing the law up to that time.*

[3] Jewett, J., in Pack *v.* Mayor of New York, 8 N. Y. 222.

[4] Shearman & Redfield on Negligence, §§ 76–78; Dressil *v.* Kingston, 32 Hun 533.

[5] Story on Agency, § 454.

[6] Forsyth *v* Hooper, 11 Allen 419; Linton *v.* Smith, 8 Gray 147; Hillard *v.* Richardson, 3 Gray 349; Brackett *v.* Lubke, 4 Allen 138; Conners *v.* Hennesey, 112 Mass. 96 [1873]; Morgan *v.* Smith (Mass.), 35 N. E. Rep. 101.

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was or was not the nature of the understanding is very difficult to determine. As a general rule, where a person is employed to perform a certain kind of work, in the nature of improvements or repairs to a building by the owner thereof, which requires the exercise of skill and judgment as a mechanic, the execution of which is left entirely to his discretion, with no restrictions as to its exercise, and no limitations as to the authority conferred in respect to the same, and no provision is especially made as to the time in which the work is to be done, or as to the payment for the services rendered, and the compensation is dependent upon the value thereof, such person does not occupy the relation of a servant under the control of the master, but he is an independent contractor, and the owner is not liable for his acts or the acts of his workmen.[1] The fact that the owner furnishes the tools, machinery, and the building in which the work is carried on, does not make him the master, when the contractor employs, pays, and has sole control over the workmen.[2]

663. The Mode, Method, and Manner of Doing the Work may be Prescribed in the Specifications and Plans.—A company or employer may direct work with regard to the minutest detail if the directions are prescribed and incorporated into the plans, specifications, and contract, and agreed to by the contractor.[3] This is upon the theory that the contractor accepts, approves, and adopts the methods and plans proposed by the company or owner as his own. By the agreement he undertakes on his own responsibility and by his own methods and means to perform and complete the work as required by the contract, plans, and specifications.[4]

It has therefore been held that one who contracts to do a specific piece of work, furnishing his own assistants and executing the work entire in accord with his own ideas, or in accordance with an accepted plan, without being subject to the orders of the owner in respect to the details of the work, is clearly a contractor and not a servant, and a person injured by his negligence in the performance of the work would have no right of action against the party for whose benefit the work is done.[5] An owner is not liable for damages resulting to a third person from boards intended to be used in repair and alterations of his house when they have been deposited in the highway in front of his land by the contractor's teamster if the contractor was to do the work under a written contract according to a plan and

[1] Painter *v.* Pittsburgh 46 Pa. St. 213, 3 Am. L. Reg. (N. S.) 350 [1864], *foot note and collection of cases.*

[2] Reier *v.* Detroit St. & Sp. Wks. (Mich.), 67 N. W. Rep. 120.

[3] *Semble*, Smith *v.* Milwaukee Builders' and Traders' Exch. (Wis.), 64 N. W. Rep. 1041; Hunt *v.* Railroad Co., 51 Pa. St. 475.

[4] Smith *v* Milwaukee B. & T. Exch. (Wis.), 64 N. W. Rep. 1041; Pack *v.* Mayor, 8 N. Y. 222; St. Louis, etc., R. Co. *v.* Willis, 33 Kan. 330.

[5] Hale *v.* Johnson, 80 Ill. 185 [1875]; *citing also* Scammon *v.* City of Chicago, 25 Ill. 424; 2 Hilliard on Torts 537, § 11; Wharton on Neg'ce, § 181, *and cases cited:* Shearman & Redfield on Neg'ce, § 77; Harris *v* McNamara (Ala.), 12 So. Rep. 103; Morgan *v.* Smith (Mass.), 35 N. E. Rep. 101.

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specification annexed and to furnish his own materials.[1] Upon the owner or company the law imposes a duty to see that the plans, specifications, and contract are appropriate, suitable, sufficient, and meet the necessities of the case, and that the work be entrusted to men capable and with proper skill, means, and knowledge to perform the work.[2] Authority to insist generally that work shall be done according to the terms of the contract, but reserves no right to direct as to the manner of performance, does not render the company liable to a third person for injuries caused by negligence in the execution of he work.[3]

In order to establish the company's liability for acts of the contractor, the control or direction reserved must be such as can be changed or modified as the company or employer may chose to declare from time to time. He or it must have retained power to give instructions as the period and condition of the work demand, whether contrary or in keeping with earlier orders, specifications, and plans. And the control reserved must be both general and special, and not only be in regard to *what* work shall be done, but also *how* it shall be done.[4] A contract which requires a company's depot business to be done under the control of the superintendent and to his satisfaction, and if not so done, reserving the power to revoke the contract, together with the fact that the employee performed no service for any one else, made the employee a servant, and that he was not an independent contractor.[5] The company employed the help, but put them under the control of the contractor; but the company could at any time remove them and substitute others. The fact that all business was to be performed under the supervision of the company's superintendent, who had express authority to direct the manner in which it should be done, was strong evidence of service. This reservation of the control or direction as to the manner of doing the work is fatal to the relation of independent contractor. In this case there was also the selection and hiring of the the workmen, and further than that, there was an element of duty which every common-carrier owes to the public to protect it from injuries. The same rule exists between principal contractors, and subcontractors; if the former reserves no right to direct the work, and he *has not* in fact *given* any directions, then he is not responsible for the acts of his subcontractor.[6]

664. What Control or Direction, if Any at All, may be Reserved to the Owner.—The authorities all recognize the rules laid down in the preceding sections, viz.: that the owner must not retain present *control* of the mode, manner, or means of doing the work, though he may beforehand specify in writing or designate by plans how the work shall be done, and he may direct the *results* of the work.

[1] Hilliard *v.* Richardson, 3 Gray (Mass.) 349 [1855].
[2] Connors *v.* Hennesey, 112 Mass. 96 [1873].
[3] Slater *v.* Mersereau, 64 N. Y. 138 [1876].
[4] 40 Alb. L. J. 223.
[5] Speed *v.* A. & P. R. Co., 71 Mo. 303.
[6] Buffalo *v.* Clement, 19 N. Y. Supp. 846; *accord*, Slater *v.* Mersereau, 64 N. Y. 138 [1876].

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The conflict in the decisions arises from the interpretation of the rules, and is due to the personal judgment of different courts as to what is a sufficient control of the work and the operatives. Some courts hold that the owner shall have surrendered the *entire* control over the work, the contractor, and employees, holding the owner responsible when the contractor has not the full nor immediate control of the negligent party;[1] that to escape liability the owner must entirely abstain from control, and that if he personally interfere with the work and assume control of it, or of some part of it, and through such interference, whether as a direct result or as a consequence thereof, injury results to a servant, he is responsible.[2]

It has been held that when a city ordinance gave its consent to the construction of a work by a private corporation, and reserved the right, in case it became necessary in the progress of the work to remove a sewer, to supervise and control the work of removal and reconstruction, that it was the duty of the city officers to exercise such supervision and control, and that the fact they did not exercise any control or supervision was no defense in an action for damages resulting from negligent construction by the contrator. It was held that the duty was imposed by the charter and recognized in the ordinance.[3] Other cases maintain that the control reserved must be both general and special, and not only as to *what* work shall be done, but also as to *how* it shall be done.[4] Then there are cases that have held that where the contractor is independent and a properly competent person, the employer's *right* to control any part of his work is immaterial; that it is only the employer's actual interference or assumption of control that makes him liable for injuries caused by the contractor's negligence.[5] Where a railroad company employed a contractor to lay its track under a a contract, by which, if strictly carried out, the party would be an independent contractor, but afterwards the parties abandon the contract, and the railroad company, by its officers and servants, takes charge of and supervises the work, gives directions as to how the roadbed shall be constructed, and assumes general management and control of the enterprise, the railroad company cannot relieve itself from liability for injuries caused by negligent or improper construction.[6] In fact, it seems that any interference, assumption of control, or direction on the part of the owner of work being done

[1] Schwartz *v.* Gilmore, 45 Ill. 455 [1867]; *immediate control*, Morgan *v* Smith (Mass.), 35 N. E. Rep. 101.

[2] Faren *v.* Sellers, 37 Alb. L. Jour. 321 [1887]; Thompson's Negligence 213, No. 40; Wood's Master and Servant 837; Cooley's Torts 548; Hefferman *v.* Beckard, 1 Rob. 437; Wharton's Negligence, §§ 186, 205; Bower *v.* Peate, 1 Q. B. D. 321; Gilbert *v.* Beach, 16 N. Y 608; Hughes *v.* Percival, L. R. 8 App. Cas. 444.

[3] Frink *v.* St. Louis, 71 Mo. 52 [1879].

[4] 40 Alb. L. Jour. 223; *see* Hughes *v.* Railroad Company, 15 Amer. & Eng. R. Cas. 101, *and notes; see also* Lesher *v.* Navigation Co., 56 Am. Dec. 495; Bailey *v.* Mayor, etc., 38 Am. Dec. 669; Hilliard *v.* Richardson, 63 Am. Dec. 743, *and notes.*

[5] Norwalk Gaslight Co. *v.* Norwalk (Conn.), 28 Atl. Rep. 32; *and see* Buffalo *v.* Clement, 19 N. Y. Supp. 846; Eby *v* Lebanon Co. (Pa.), 31 Atl. Rep. 332, *in absence of interference with work; and see* Allen *v.* Hayward, L. R. 7 C. B. 975.

[6] Savannah & W. R. Co. *v.* Phillips (Ga.), 17 S. E. Rep. 82.

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by contractors under a special agreement giving the latter the control of the work *may* render the owner personally liable for injuries caused to third persons by the negligent conduct of the contractors in doing the work so directed.[1] If the contractor is without doubt an independent contractor, and the owner has not by the contract retained the right to direct the work and control the contractor, yet if the owner takes it upon himself to direct and the contractor yields to his direction and control, then the owner is liable for the injury that results.[2]

The best advice that one can give an owner is to keep a close mouth when on or about works, and to close it entirely to his contractor. A stereotyped answer to all questions or a convenient reply to all inquiries pertaining to the work, which refers all questions to the contract and specifications or architect, would best evade responsibility for damages, extra work, delay, and many other kindred accounts which an owner is frequently called upon to settle.

665. Instances in Which the Contractor has been Held a Servant of the Owner or Company.—The effect of reservations as made in construction contracts by the stipulations commonly employed will be understood best by giving the interpretations put upon them in the decisions rendered.

The owner or employer has been held a master, and the employee a servant, when the former retained a general or special or supervisory control of the work. Such control over the mode, manner, method or means of doing, performing, or conducting the work has been held to be reserved when the contract stipulation employed required:

that the contractor shall perform his work under the supervision and direction of the architect, who was declared to be the superintendent of the owner, reserving also the right to change the plan of the work;[3]

that the engineer shall have superintendence of the improvement, and that any person employed on the work disobeying the city engineer shall be discharged;[4]

that all of said work shall be done carefully and under the direction and subject to the approval of the owner;[5]

that the work shall be under the supervision of the engineer and subject to his orders;[6]

that the contractor shall rebuild a wharf and replace parts in such a manner as the company through the engineer shall require, and shall sub-

[1] Hefferman *v.* Benkard, 1 Robt. (N. Y.) 432 [1863]; *and see* Hughes *v.* Percival L. R. 8 App. Cas. 444; Bower *v.* Peate, L. R. 1 Q. B. D. 321.

[2] *Semble*, Gilbert *v.* Beach, 16 N. Y. 607 [1858].

[3] Schwartz *v.* Gilmore, 45 Ill. 455 [1867]; *accord*, Camp *v.* Church Wardens, 7 La. Ann. 322.

[4] Cooper *v.* Seattle (Wash.), 47 Pac. Rep. 887.

[5] Linneman *v.* Rollins, 137 Mass 123. Work to be "subject to the acceptance of engineer," has been held to mean that "the work should be done to his satisfaction," Pollock *v.* Penna. I. W. Co., 34 N. Y. Supp. 129.

[6] Chicago *v.* Joney, 60 Ill. 383 [1871], in this case the city also reserved the right to dismiss the contractor's workmen.

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mit to the supervision and direction of the company's engineer, and do the work to his satisfaction;[1]

that the work shall be carried out according to the directions of the supervising architect, whose decisions on all points I agree to accept as final;[2]

that the work shall be done as the engineer may direct, any employee refusing to obey his orders to be discharged by the contractor.[3]

The mere fact that the owner's engineer had no authority over the contractors except to see that the work was done according to contract does not establish that the contractors were independent.[4]

Frequently it will be found that these cases which held the contractor a servant, when the control reserved by the contract was remote or had reference to the design, plan, materials and general results of the contractor's undertaking, depended upon other circumstances and rules of law, and that it was not the contract stipulations alone that determined the question. In an Illinois case before mentioned, where the parties who contracted with a city to do work under the supervision of its engineer and subject to his orders were held servants for whose negligence the city was liable, it appears from the contract that the city retained a supervisory control over the work. It had power to dismiss any persons employed by the contractors on the work, and the dismissals by the representatives of the city were final and conclusive in every case that might arise under the contract. The court declared that here was dependency and serviency in the contractors, and for their negligence the city was responsible.[5] By the contract the entire work was to be under the immediate direction and superintendence of the city through its board of public works, and the contractor, being under the direction and control of his employer, the employer was held liable for his negligence. There was another element in this case, viz: It was shown that the work was done at the point where the accident occurred at the very time and in the manner in which it was directed by the city.[6] This work was the deepening of the Illinois and Michigan Canal, and was negligently done so as to leave a reef of rocks on which the claimants boat struck and sank. The city was directing merely as to the results, and that was the extent of their superintendence, and it is submitted that if this case is sustained it should not be upon the ground of master and servant, but because it was either the duty of the city to make the canal safe for boats or that it was a natural consequence of the way it was authorized to be done. The fact that the benefit of the work accrued to the city cannot shift the liability from where it properly belongs.

[1] The N. O., Mobile & C. R. Co. *v.* Hanning, 15 Wallace 649 [1872]; *semble*, Chicago *v.* Dermody, 61 Ill. 431 [1871]; *and see* Carman *v.* Steubinville, etc., R. Co., 4 Ohio St. 399; Lerandat *v.* Saisse, L. R. 1 C. P. 152; Lake Sup. Iron Co. *v.* Erickson, 39 Mich. 492; Philadelphia, etc., R. Co. *v.* Phila. Tow Bt. Co., 23 How (U. S.) 209.

[2] Faren *v.* Sellers (La.), 37 Alb. Law Jour. 321 [1887].

[3] Larson *v.* Met. St. Ry. Co. (Mo.), 19 S. W. Rep. 416.

[4] Taylor B. & H. Ry. Co. *v.* Warner (Tex.), 32 S. W. Rep. 868.

[5] Chicago *v.* Joney, 60 Ill. 383.

[6] City of Chicago *v.* Joney, 60 Ill. 383 [1871], *and cases cited.*

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Another case in which a city was held liable for injuries caused by the abandonment and neglect of a job of grading on one of its streets was a contract which required the work to be done under the supervision and to the approval of an engineer appointed by the street commissioners, and the contract reserved power to complete the work at the expense of the contractor if at any time the work should not progress according to the terms of the contract. The work was not completed per contract, but was abandoned, and the court held, three judges dissenting, that the city was liable to an adjoining property owner for damages from water diverted upon his premises, as it permitted these excavations to remain, when it had power and right to take charge of and complete the work and thus protect the adjoining property from injury; that when work was done under contract not in its nature a nuisance, but which becomes so by reason of the manner in which the contractor has performed it, the one who directed the work to be done becomes at once responsible for the nuisance, if he accepts the work in that condition. The liability in this case can hardly be traced to the contract reservation, but to the principle that the injury was an ordinary result of the city's negligence. When the contractor abandoned his contract, the city was under obligations to remedy defects in the street.

It may be difficult to distinguish between damages to residents upon a street by water and damages by blasting. However, if a city contracts for work that in its progress will divert and cast water upon the land of another it should be held liable for it.[1]

666. Instances in Which General Supervision and Direction have been Held Not to Create the Relation of Master and Servant.—The greater and better tendency of later decision is to be more liberal in the application of the rule and to permit the owner to reserve a general supervision and direction of work and yet uphold the relation of independent contractor. The difficulties attending operations, the impossibility of foreseeing obstacles and to provide for the thousands of changed conditions that may arise, and the great necessity of remedying evils promptly, that no delays shall occur, render it almost necessary that a general supervision should be retained over the progress of work, that the ultimate object and result of the work may be accomplished. Many courts have appreciated this and have given such reservations a liberal construction, and it is believed that the general tendency is to follow those decisions. A liberal construction of such stipulations will best carry out the evident intention of the parties to the contract, and place the liability on the shoulders of the one who has expressly assumed it. Clauses as a rule are incorporated to protect the company and save it harmless from any damages arising from the contractor's or his servant's acts. No hardships are created and no liability bestowed, but those that were anticipated and assumed.

[1] Vogel *v.* New York, 92 N. Y. 10 [1883].

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It is well settled that the owner may determine what work shall be done and how it shall be done, if in the beginning he incorporates that determination in the contract, specifications, and plans; and it is now pretty generally settled that he can also retain a general direction and control as to what shall be done or as to what results shall be reached.[1]

It therefore follows that changes may be made as to the size, quantity, or amount of work to be done, and that the owner or his engineer may superintend and direct what shall be done without being liable for negligence in the manner of doing the work, though it was directed to be done by him.[2] A reasonable construction of a contract to do work in a substantial and workmanlike manner and in accordance with the plans, specifications, and *instructions* furnished by the company does not give the company the power to direct the mode of accomplishing the work, but leaves that to the skill and judgment of the builder. The word instructions should be held to refer to such questions as the kind of structure, the planning of the building, its design, materials, combinations, and not to give the company the control of the manner of doing the work so as to render them liable for negligence in its performance.[3]

In further support of this doctrine we find cases that have held the relations of the parties not changed by a clause in the contract by which the contractor engages to conform the work to such further directions as may be given by the city engineers or street commissioners, and to do it to their satisfaction. The court held that this agreement only entitled these officers to direct the results of the work and not the manner of performing it; that it gave the city the power to direct as to the results of the work, but without control over the contractor or his workmen as to the manner of performing it, which control alone furnished a ground for holding the owner liable for the acts of an employee.[4]

The fact that the engineer had power to interpose in certain cases is not conclusive as to the contractors' status. So long as the contractors fulfill their stipulations neither the owner or company or their engineers have any control over them. The engineer may stand in the relation of an umpire between the owner and the contractors in certain contingencies. If no act has been done by the contractors which authorizes an interference either by the owner or the engineer, then the contractors must be considered as in possession of the work.[5] So under a contract with a city to build a

[1] Hunt *v.* Pa. R. Co., 51 Pa. St. 475; St. Louis, etc., R Co. *v.* Willis, 38 Kans. 330; Edmunson *v.* Pittsburgh, etc., R. Co., 111 Pa. St. 316; *many cases cited*, 14 Amer. & Eng. Ency. Law 837–838.

[2] Cuff *v.* N. & N Y. R. Co., 35 N. J L. 17 [1869]; Steel *v.* S. E Railway Co . 16 C. B. 550; Cary *v.* Chicago, 60 Ill. App. 341; Brown *v.* Accrington Cotton Co., 3 H. & C. 511, 519; Pack *v.* Mayor of N. Y. City, 4 Seld. 222; Kelly *v.* Mayor, 1 Kernan 432.

[3] Hunt *v.* The Penna. R. Co., 51 Pa. St. 475 [1866]; Slater *v.* Merserean, 64 N. Y. 138 [1876]; *but see* Farren *v.* Sellers (La.), 37 Alb. L. Jour. 321.

[4] Pack *v.* Mayor, 8 N. Y. 222 [1853] Kelly *v.* Mayor, 11 N. Y. 432 [1854].

[5] Stone *v.* Cheshire R. Co., 19 N. H. 427 [1849].

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sewer for a sum to be paid on completion, the work to be done to the satisfaction of the engineer in charge, the contractor to indemnify the city against all loss, damages, costs, and expenses arising from the nature of the work or from the manner of its execution, the city was held not liable for damages from blasting, as the workmen were not servants of the city.[1]

In another case a railroad company contracted under seal to build a portion of the line, and by the contract reserved to itself the power of dismissing any of the workmen of the contractors; the workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing along the highway underneath by allowing a stone to fall upon him. After elaborate argument it was decided in an action against the company by the administratrix of the deceased that it was not liable, and that the terms of a contract did not make any difference.[2]

When a person lets out work to another to be done by him, such person to furnish the labor, and the owner reserves no control over the work or the workmen, the relation of contractor and contractee exists, and not that of master and servant, and the contractee is not liable for the negligence and improper execution of the work by the contractor.[3] The element essential to the discharge of the contractee from responsibility is that he shall *not* reserve control of the work. This does not mean that he may not reserve a certain power to direct as to the things to be done, provided the methods and instruments of doing the thing are left under the exclusive control of the contractor. "The simple test is," says Mr. Wood, "who has the general *control* over the work."[4]

667. Interpretation of Certain Contract Clauses.—The courts have held that the relation of independent contractor was not inconsistent with such control and direction as is given by a contract which provides:

that the work shall be done subject to the supervision or approval of the engineer;[5]

or that the owner or employer shall have the right to inspect the work,[6]

or to employ an agent to superintend the work and see that the contract is complied with;[7]

[1] Herrington *v.* Lansingburg, 36 Hun 598 [1885]; *and see* Tibbetts *v.* Knox & L. R. Co., 62 Me. 437.

[2] Story on Agency [7th ed.] 565; Reedie *v.* Lond. & N. W. Ry. Co., 4 Wels., Hurl. & Gord. 244; *see* Buffalo *v.* Holloway, 3 Seld. 493; Hickock *v.* Plattsburgh, 16 N. Y. 161; Kelly *v.* New York, 1 Kernan 432; Storrs *v.* Utica, 17 N. Y. 107; Blake *v.* Ferris, 1 Seld. 48; Pack *v.* Mayor of N. Y., 4 Seld. 222; Steel *v.* The S. E. Ry. Co., 16 C. B. 550; Cuthbertson *v.* Parsons, 12 C. B. 304.

[3] Wood's Master and Servant 593.

[4] Farren *v.* Setlers (La.), 37 Alb. Law Jour. 321 [1887]

[5] Alabama Mid. Ry. Co. *v.* Martin (Ala.), 14 So. Rep. 401; *accord*, Fitzpatrick *v* Chicago, etc., R. Co., 31 Ill. App. 649; Steel *v.* South Eastern R. Co., 16 C. B. 550; *contra*, Hart *v.* Ryan, 6 N. Y. Supp. 921 [1889]; *and see* Larson *v.* Met. St. R. Co., 110 Mo. 234; Campbell *v.* Lunsford, 83 Ala. 512; Edmundson *v.* Railroad Co., 111 Pa. St. 316; Hughes *v.* Railroad Co., 39 Ohio St. 461; Eaton *v.* Railroad Co., 59 Me. 520; Schular *v.* Railroad Co., 38 Barb. 653; Callahan *v.* Railroad Co., 23 Iowa 562.

[6] Bibb's, Admr., *v.* Norfolk & W. R. Co., 87 Va. 711; Smith *v.* Milwaukee B. & T. Exch. (Wis.), 64 N. W. Rep 1041.

[7] Creushaw *v.* Ullman (Mo.), 20 S. W. Rep. 1077.

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that the employer, engineer, or architect may supervise the work generally;[1]

that the work shall be done according to the directions and to the perfect satisfaction of the superintendent;[2]

that the engineer shall have power to direct changes in the time and manner of conducting the work,[3] or in the plan of doing the work;[4]

that the engineer may give further directions, which relate only to the results of the work and not to the manner of its performance;[5]

that the work shall be under the supervision of an architect, who, in the event the work being delayed, was authorized to employ another builder, and without whose consent the builder could not sublet any of the work;[6]

that the work shall be performed under the supervision of the engineer, at whose directions objectionable employees should be discharged,[7] or simply that the engineer may require the discharge of incompetent workmen;[8]

that "The work is to be executed under the supervision of the engineer, officer in charge or his agent. * * * No material of any description will be placed in the works without his knowledge and instructions at the time. * * * The contractor must keep upon the works at all times responsible agents, who shall have full authority to carry out the instructions of the agent of the United States; * * * and all material, supervision, and labor furnished by the contractor will be subject to the approval of the engineer or officer in charge;"[9]

that a city may suspend or annul the contract, and oblige the contractor to discharge workmen who disobey city officers;[10]

that the company shall have the right to control the contractor or to terminate the contract if the work be not done to the satisfaction of the company;[11]

[1] *Many cases collected*, 14 Amer. & Eng. Ency. Law 837–8; Eaton *v.* European & N. A. R. Co., 59 Me. 520; Barry *v.* St. Louis, 17 Mo. 121; *but see* N. O., M. & C. R. Co. *v.* Hanning, 15 Wall. 649.

[2] Chambers *v* Ohio L. J. & T. Co., 1 Dist. (Ohio) 329; *accord*, Forsyth *v.* Hooper, 11 Allen (Mass.) 419; Allen *v.* Willard, 57 Pa. St. 374; Kelly *v.* Mayor, 11 N. Y. 432.

[3] Erie *v.* Caulkins, 85 Pa. St. 247; *and cases collected*, 14 Amer. & Eng. Ency. Law 841.

[4] Pack *v.* Mayor, 8 N. Y. 222.

[5] Pack *v.* New York, 8 N. Y. 222; Kelly *v.* New York, 11 N. Y. 432; Gourdier *v.* Cormack, 2 E D. Smith 254; Schular *v.* Hudson R. R. Co., 38 Barb. 653; Callahan *v.* B. & M R. Co, 23 Iowa 562.

Where the employment is under a contract for the execution of a certain job or work, and the choice and direction of the servants still remain with the contractor, such reservations do not make the relation one of master and servant. Pierce on Railroads [1881].

[6] Robinson *v.* Webb, 11 Bush. 464 [1875].

[7] McKinley *v.* C. S. T. & C. Ry. Co., 40 Mo. App. 449 [1890]; Eaton *v.* E. & N. A. Ry. Co., 59 Me. 520 [1871]; Harris *v.* McNamara (Ala.), 12 So. Rep. 103.

[8] Cuff *v.* Newark & N. Y. R. Co., 6 Vroom 17, 35 N. J. Law 17; Robinson *v.* Webb, 11 Bush. 464; Reedie *v* Lond. & N. W. R. Co., 4 Exch. 244; Hobbitt *v.* Lond. & N. W. R. Co., 4 Exch. 254.

[9] Callan *v.* Bull (Cal.), 45 Pac. Rep. 1017.

"Under direction of architect" has been held a power to direct, given to architect for the protection of the owner, and as applying to the fitness of the materials and the manner in which the work was done. Slater *v* Merserean, 64 N. Y. 138 [1876].

[10] Blumb *v.* City of Kansas, 84 Mo 112.

[11] Pack *v.* Mayor, 4 Seld. 222; Schular *v.* H. R. R. Co., 38 Barb. 655 [1862]; Wray

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that the company or owner shall have the right to direct how the work should be performed, and by the specifications provided that the ground be cleared of all perishable materials, which were to be removed or burned as the engineer might direct; and the company was held not liable notwithstanding that the engineer, in the progress of the work, ordered an employee of the subcontractor to set fire to and burn the rubbish from which the fire escaped, it being shown that the fire escaped not from the burning simply, but by reason of the negligent manner in which it was done;[1]

that the engineer shall have power to direct changes in the time and manner of conducting the work;[2]

that the engineer or architect may criticise the method of erection and the workmanship, if he has not the power to direct the methods of the contractor in the erection;[3]

that the architect may direct that certain things be done by the contractor, where he has not exercised any control of the manner of doing the work or his choice of workmen;[4]

that the contractor shall be liable to the owner for all negligent acts, and that the owner may retain from moneys due the contractor a sum sufficient to meet all damages suffered from injuries done;[5]

that the work and materials may be inspected by the city officers to see that the specifications are fulfilled; that certain kinds of work should be done by workmen approved by the engineer; that no tunneling should be allowed except by his permission; that if in excavation any obstruction were met, which said engineer thought should be avoided, the work should be measured and the excavation filled in; that the work should be prosecuted at as many points as said engineer should from time to time determine; that plank foundations should be laid when the engineer thought them needed; that all work should be done according to the plan and direction of the engineer; that certain rock should be excavated with as little blasting as possible, under immediate supervision of the engineer; that laborers and tools objected to by the engineer should be removed; and that the contractor should be responsible for damages to neighboring property, and at his own expense shore up, protect, and restore all improvements disturbed or injured;[6]

that the contractor shall employ competent foremen and workmen and experienced mechanics, and shall immediately discharge, whenever required to do so by the engineer, any men considered by the engineer to be incompe-

v. Evans, 80 Pa. St. 102 [1875]; Blumb *v.* City of Kansas, *supra*.

[1] Callahan *v.* B. & M. R. R Co., 23 Iowa 562 [1867]; *see also* Eaton *v.* E. & N. A. Ry. Co., 59 Me. 520 [1871]; *but see* St. Johns & H. R. Co. *v.* Shalley (Fla.), 14 So. Rep. 890.

[2] Erie *v.* Caulkins, 85 Pa. St. 247.

[3] Bibb's Adm'r *v.* Norfolk W. R. R. Co. (Va.), 14 S. E. Rep. 176 [1892], *many cases cited, a long case reviewing many cases;* Morgan *v.* Smith (Mass.), 35 N. E. Rep. 101.

[4] Morgan *v.* Smith, *supra*.

[5] Tibbetts *v.* Knox & L. R. Co., 62 Me. 437.

[6] Norwalk Gaslight Co. *v.* Norwalk (Conn.), 28 Atl. Rep. 32.

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tent or disorderly, or disposed to foment discontent or mischief on the work;[1]

or that the contractor shall employ and pay the laborers and do the work subject to the approval of the company's engineer; increase the force of laborers whenever required by said engineer, and discharge any laborer who might be offensive to the company;

or that in case of failure to complete the work within the time stipulated the company might employ laborers and complete it at his expense; that the contractor should remove or burn up all trees, logs, and other perishable materials along the line of the road, and be responsible for damages as between himself and the company; and that the company's assistant engineer shall personally direct the execution of the work.[2]

668. Advice in Regard to Reserving Control of Work and of Contractor. —Without going into further detail it should be clear that certain of these stipulations are undesirable features of a construction contract, if indeed not perilous to the interests and success of a project. Accidents do and will occur, and misfortunes do not always come singly, and prudent managers and owners will prefer the safe side. It is foolhardy to assume risks and losses that can be avoided by a little foresight and precaution, and the contract is the place to provide that no liability shall attach to the employer for the misdoings and neglect of servants over whom he has little or no control. It must be evident that the stipulations as usually written and employed are perilous to the interests of the company, and should be drafted with extreme care, unless it is the express intention of the company to retain the control of the work and to be responsible for the omissions, negligence, and blunders of the contractor and his employees, etc.[3]

[1] Cun v. Newark & N. Y. R Co., 35 N. J. Law 17 [1870]; State v. Williams, 1 Vroom. 102; Reedie v. Railway Co., 4 Exch. 244; Hobbett v. London, etc., R. Co., 4 Exch. 254.

[2] Rogers v. Florence R. Co. (S. Car.), 9 S. E. Rep. 1059 [1889], s. c. 40 Alb. L. Jour. 233.

[3] Of the clauses given Secs. 647 to 650, the first one is usually to be preferred.

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CHAPTER XXIII.

NONPERFORMANCE OF CONTRACT. IMPOSSIBILITY OF PERFORMANCE.

COMPLETION PREVENTED BY CIRCUMSTANCES BEYOND THE CONTROL OF EITHER PARTY. CASUALTIES AND DESTRUCTION OF WORKS BEFORE COMPLETION. WORK MORE ARDUOUS OR ONEROUS THAN WAS EXPECTED.

669. Performance of Contract Impossible—Construction Contracts Whose Performance is Impossible.—Contracts are impossible and their performance will be excused either when (1) the nature of the obligation is such that it cannot by any means be accomplished, or (2) when some event has supervened which has rendered the performance of the contract either legally or physically impossible.[1] The authorities agree that a contract created *by law* which is absolutely and palpably impossible will not be enforced, but performance will be excused. A person is not required to contend with Providence or in his private capacity to contend with the public enemy.[2]

There is little if any direct authority for the statement that an agreement impossible in itself is void. "The ground of such a dictum is probably that the nature of such an agreement shows in itself that there was no serious intention of contracting and therefore no real agreement."[3] When the performance of an agreement becomes impossible by law the agreement becomes void.[4] Contracts contrary to law are without binding effect and therefore void.* An agreement is not void merely because its performance is physically impossible, nor does it become void because the performance has become impossible in fact, without fault of either party, unless, by the intention expressed or implied from the terms of their agreement, the performance was conditioned on the possibility continuing.[5] If the act undertaken is notoriously physically impossible, and was known to be so at the time the contract was entered into, it will not be a binding contract,

[1] 10 Amer. & Eng. Ency. Law 176.
[2] State *v.* Clark, 73 N. C. 255; Norcross *v* Clark, 53 Me. 163; Mosley *v.* Baker, 2 Sneed (Tenn.) 362.
[3] Pollock on Contracts [4th ed] 352.
[4] Pollock on Contracts [4th ed.] 351.
[5] Pollock on Contracts [4th ed.] 352; Paradine *v.* Jane, Aleyn 26. So held when in drilling a well the auger broke off and became "stuck" in the well. Barrett *v.* Austin (Cal.), 31 Pac. Rep. 3 [1892]; *and see*, Brinkerhoff *v* Elliott, 43 Mo. App. 185; School Trustees *v.* Bennett, 3 Dutch 515; Bube *v.* Johnson, 19 Wend. 500.

* *See* Chap. III, Secs. 71-88, *supra.*

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unless the contractor has taken upon himself to warrant that it was possible.[1] A party may, by absolute contract, bind himself to perform things which subsequently become impossibilities, or to pay damage for their nonperformance, and such construction is to be put upon an unqualified undertaking when the event which causes the impossibility might have been foreseen and guarded against, or when the impossibility arises from the act or default of the promisor; but when the event is of such a character that it cannot reasonably be supposed to have been in contemplation of the contracting parties, they will not be held bound by general words, which, though large enough to include, were not used with reference to, the possibility of the particular contingency which afterwards happens.[2]

A thing is not to be deemed impossible simply because it never yet has been done.[3] Cases arise in which a man has undertaken to do that which turns out to be impossible, yet he may be bound by his agreement. Many things have become possible that were supposed to be utterly impossible, and this not only in the well-known instances of mechanical invention and the application of scientific discovery, but in the realm of pure mathematics. Sylvester has solved certain algebraic and geometrical problems long thought insoluble, and Peaucellier a form of the problem of link motion. A contract to make a flying-machine, with the warrant that it shall fly, may be a good contract;[4] so too, one to draw or lift water more than 34 feet by a suction-pump. It is submitted that the undertaking must be one that is within the serious contemplation of a reasonable man. Whether an agreement to construct a perpetual-motion machine or to fly to the moon would be recognized as a binding contract may well be doubted.[5] We have read lately of contracts to make rain in the Western States, and presume that the wonderful (?) Keely motor of Philadelphia has furnished some instances of the impossible; but of decisions in these cases by the courts the author has no knowledge.[6]

In such cases the question is not so much whether the thing is absolutely impossible as it is one of intention of the parties. The thing stipulated for may be so absurd that the paties cannot be supposed to have contracted for it, or if they did, that they were not possessed of ordinary intelligence and capacity to contract. If the contractor by his own contract assumes a duty or charge he is bound to make it good, notwithstanding any accident by inevitable necessity, for he might have provided against such misfortunes by his contract.[7]

[1] Addison on Contracts [8th ed.] 1196.

[2] Chicago, M. & St. P. Ry. Co. *v.* Hoyt, 18 Sup. Ct. Rep. 779

[3] Duncan *v.* Gibson, 45 Mo. 352; The Harriman, 9 Wallace 161; Walker *v.* Tucker, 70 Ill. 527; McDonald *v.* Gardiner, 56 Wis. 35.

[4] Paddock *v.* Robinson, 63 Ill. 99; Haviland *v.* Halstead, 34 N. Y. 643.

[5] *See* Pollock on Contracts 350–4; Walker *v.* Tucker, 70 Ill. 527; Gilmer *v.* Tucker, 42 Ala. 9; Metcalf on Contracts 211.

[6] *See in point*, Bube *v.* Johnson, 19 Wend. 500.

[7] Davis *v.* Smith, 15 Mo. 467; Brinkerhoff *v.* Elliott, 43 Mo. App. 185; School Dist. *v.* Dauchy, 25 Conn. 530; Jameson *v.* McDaniel, 25 Miss. 83; Bacon *v.* Cobb. 45

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If a condition precedent is not known to be impossible when the contract is made, and it afterwards becomes so, the other party cannot be placed in default while even for this cause it remains unperformed.[1]

If the subject-matter of the contract has been destroyed and the performance of the contract has been rendered impossible thereby, the contract may in some cases be avoided.[2] *

670. Impossibility of Performance Caused by Act of Owner.†—The case of impossibility of performance caused by an act of one of the parties to the contract involves quite different considerations, because a party must be responsible for the consequences of his own act. "It is a clear principle of law that if by any act of one of the parties the performance of a contract is rendered impossible, then the other side may, if they choose, rescind the contract;[3] and it appears to be sufficient, if the contract cannot be performed in the manner stipulated, though it can be performed in some other manner not very different."[4] A promise is excused if the performance of it is rendered impossible by an act of the owner. Thus, where a contract is made for work to be completed by a fixed day under penalties of so much per day for delay, the contractor is excused the penalties for delays caused by the default or interference of the employer.[5] ‡

Where the owner and his agents prevented the contractor from completing the work within the time fixed by the contract, by ordering extra work and neglecting to supply necessary drawings in time, and his architect or agent continued to supervise it after that time, and it was completed as soon as the owner's interruptions and required alterations allowed, it is no ground for resisting a recovery that the work was not finished by the time specified in the contract.[6] If the contractor is prevented from performing his contract, or any part thereof, by default or refusal of the owner, the performance is to that extent excused. The contractor may recover any loss incurred thereby, or if the breach goes to the essence of the contract [is important], the contractor may rescind the contract and recover for what he has furnished

Ill. 47; Bunn *v.* Prather, 21 Ill. 217; Barrett *v.* Austin, *supra.*

[1] Howell *v.* Knickerbocker L. Ins. Co., 44 N. Y. 276; Mizell *v.* Burnett, 4 Jones (N. C.) 279; *see* 19 Am. Law Reg. (N. S.) 548; White *v.* Mann, 26 Me. 361, *and* English cases in Lloyd's Law of Building 47, *note.*

[2] Strickland *v.* Turner, 7 Exch. 217; Clifford *v* Watts, L. R 5 C. P. 586, where clay to be dug gave out; Taylor *v.* Caldwell, 3 B. & S 833; *and* Livingston Co. *v.* Graves, 32 Mo. 479, where a bridge that was to be kept in repair was destroyed by fire; *but see* Brecknock Co. *v.* Pritchard, 6 T. R. 750

[3] *Many cases*, 29 Amer. & Eng. Ency. Law 903.

[4] Panama Tel. Co. *v.* India Rubber Tel. Works, L. R. 10 Ch. 532; Planche *v* Colburn, 8 Bing 14; Leake's Digest of Contracts, p. 708 [1878].

[5] Holme *v.* Guppy, 3 M. & W. 387; Haughery *v.* Thiberge, 24 La. Am. 442; McAndrews *v.* Tippett, 39 N. J. Law 105; Thornhill *v.* Neats, 8 C. B. (N. S.) 831; Russell *v.* Bandiera, 13 C. B. (N. S.) 149; Pollock on Contracts [4th ed.] 381; Standard Gas Lt. Co. *v.* Wood, 61 Fed. Rep. 74; Ketchum *v.* Zeilsdorf, 26 Wis. 514.

[6] Thomas *v.* Fleury, 26 N. Y. 26 [1862]; White *v.* Braddock School Dist., 159 Pa. St. 201.

* *See* Sec. 676, *infra.* † *See* Sec. 326, *supra.* ‡ *See* Secs. 321–6, and 585, *supra.*

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or done.[1] The owner who keeps a contractor from fulfilling his part of a contract must pay or settle the damages that the contractor suffers.[2] One cannot maintain a suit against a contractor for not doing what he has put out of the contractor's power to do.[3]

If the owner has interrupted the performance of the contract and rendered it impossible, it will excuse performance on the part of the contractor.[4] The owner cannot thereafter take advantage of the nonperformance by the contractor and thereby avoid liability.[5] If the owner has been the cause of nonperformance, the contractor is discharged from the liability.[6] If a contractor has undertaken to produce the certificate of the owner's engineer that work has been done according to the contract or to the engineer's satisfaction before he will demand any pay, and the production of the certificate is prevented by the owner, it will excuse his failure to produce it, and he may recover his pay without it.[7] *

671. Provision by Which Contractor Assumes Risks and Dangers of Destruction of Works.

Clause: "It is further declared and agreed that from the commencement of the work to its completion and final acceptance by the engineer, the structure, building, or works shall be under the contractor's care and charge, who hereby agrees and undertakes to rebuild, repair, restore, and make good all injuries, damages, re-erections, and repairs occasioned or rendered necessary by accidental causes, or by flood, storm, tempest, lightning, fire, earthquakes, or trespassers, or other means, artificial or natural, to all or any portion of the works during construction or before the final acceptance and occupation of the works by the owner, company, or city, or its engineer; and to hold the employer harmless from any claims for injuries to persons or to structures or from any damage to property happening from any neglect, default, want of proper care, or misconduct on the part of the contractor, or of any one in his employ, during the execution of the work."

This clause is frequently met in English contracts, but from what follows it will be seen that the law requires all that the first part of the clause provides for, and the second part, making the contractor responsible for injuries to others and their estates, is covered in clauses given in Secs. 630–637.

The clause is recommended in all contracts which are *not* clearly entire, and it is an extra safeguard in any contract where partial payments are made, or where the works are large and complicated or numerous.

[1] Pollock on Contracts [4th ed.] 380; *many cases in* 29 Amer. & Eng. Ency. Law 903

[2] Wallman *v.* Society of C., 45 N. Y. 485; Blood *v.* Enos, 12 Vt. 625; St. Louis *v.* McDonald, 10 Mo. 609.

[3] Gibson *v.* Dunman, 1 Hill (S. C.) 289; Coal Co. *v.* O'Hern, 8 Md. 197; Stewart *v.* Keteltas, 36 N. Y. 388; McKee *v.* Miller, 4 Blackf. 222.

[4] People *v.* Ins. Co., 91 N. Y. 174; Leopold *v.* Salkey, 89 Ill. 412; Ohio R. R. *v.* Yohe, 51 Ind. 181; Walker *v.* Fitts, 24 Pick 191.

[5] 10 Amer. & Eng. Ency. Law 183.

[6] 10 Amer. & Eng. Ency. Law 184.

[7] Guidet *v.* Mayor, 36 Super. Ct. 557, 562; *see other cases.**

* *See* Secs. 418–444, *supra.*

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672. Provision that Contractor shall Insure Works against Loss by Fire, Floods, Tempest, etc.

Clause: "And the builder further agrees that he shall and will forthwith insure and keep insured the buildings and works herein provided for during the progress of such work, and until the same shall be completed and delivered to the owner, from loss or damage by fire, lightning, etc., in such insurance company or companies as the said owner shall approve."

673. Provision that Contractor shall Insure the Works.

Clause: "The contractors are to insure the building against loss or damage by fire, in a company to be approved, in the joint names of the owner and contractors, for half the value of the work executed, until it shall be covered in, and thenceforth until completion in three-fourths of the amount of such value, and are, upon request, to produce to the architect the policies and the receipts for the premiums for such insurance. All moneys received under such policies are to be applied in or towards the rebuilding or reparation of the work destroyed or injured. In case of neglect to insure, the employer is to be at liberty to insure the works and deduct the amount of the premiums from any moneys payable to the contractors."

The propriety of these clauses will be appreciated from what follows, and it will be seen that there are times when the owner should take out insurance in his own name, as when he lets a job in parts, as the masonry, carpentry, plumbing, and painting, to different contractors.* A policy of insurance issued to the owner will not, it seems, insure the contractor's interests.[1]

An agreement to repair, it seems, is not an undertaking to insure the existence of the structure,[2] but an agreement to keep in order was held to require the contractor to rebuild when a bridge was carried away by an extraordinary flood.[3] A tenant occupying a building under a lease, with an agreement to keep in repair, has been held bound to rebuild.[4]

674. Complete Performance Prevented by Misfortune Beyond the Control of Either Party—Casualty—Work Destroyed without Fault of Either Party. —If a contractor voluntarily agree to perform work or render service in consideration of payment *on completion of the whole*, and the full performance is prevented by accident, as by destruction of the works by fire, flood, or tempest, and without fault of the owner, he has no claim for the part performance before the disaster occurred.[5] If the contract for the erection of *a* structure be *entire*, and there is no provision in the contract against accident or inevitable necessity, and the structure is destroyed before its

[1] Trustees of Academy *v.* Insurance Cos. (Wis.). 66 N. W. Rep. 1140.
[2] Livingston Co. *v.* Graves 32 Mo. 479.
[3] Brecknock Co. *v.* Pritchard, 6 T. R. 750.
[4] Bullock *v.* Dommett, 6 T. R. 65; *and see* Appleby *v.* Myers, L. R. 2 C. P. 653.
[5] Leake's Digest of Contracts 68–70; *cases*, 29 Amer. & Eng. Ency. Law 906.

* See Sec. 676, *infra*.

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completion or acceptance by the owner, and without fault of eith . party, the loss falls upon the contractor, and he can recover no compensation for his labor and materials.[1] The obligation to build not being imposed by law, but arising from the contractor's own voluntary agreement, its nonperformance is not excused by inevitable accident.[2] If the contract be *entire*, or it is the express and evident intention of the parties to have the contract fully performed before any liability should arise, then the contractor cannot recover for a part performance of his contract.[3]

If the contract be for separate items of work and the price is apportioned to each item,[4] or if it be at a rate per unit measure,[5] so that the cost of each item may be determined,[6] then the contract is not *entire*, but severable. A contract to build a structure to be paid for by installments as the work progressed was held severable.[7] If the contract provide for the payment of definite sums at different periods, before the completion of the entire work, it is severable, and suit may be brought upon it as the installments come due.[8] An undertaking to build for a fixed sum was held an entire contract, though the work was to be paid for from time to time as it progressed at the price fixed by the estimates made by the engineer. Partial payments as work progresses do not alone make a contract severable.[9] *

When a landscape architect and dealer in gardeners' materials submitted an estimate for labor and materials in laying out grounds, specifying the different items of labor, trees, vines, grass-seed, etc., giving the price and sum of each item, and also recommended three tons of sheep manure for fertilizing the ground, which he could furnish at $38 per ton, and his estimate, including the manure, was accepted, there was an indivisible contract for the whole work and materials, and no action could be had separately for the manure without proof of performance of the whole contract.[10] A contract which has for its object the making of a stream navi-

[1] Adams *v.* Nichols (Mass.), 19 Pick. 279 [1837]; Eaton *v.* School District, 23 Wis. 374 [1868]; School Dist. *v.* Dauchy, 25 Conn. 530, *structure destroyed by lightning;* Lumber Co. *v.* Purdum, 41 Ohio St. 373 [1875]; Bacon *v.* Cobb, 45 Ill. 47; Appleby *v.* Myers (Eng.), L. R. 2 C. P. 651 [1867]; Fildew *v.* Besley, 42 Mich. 100; Parker *v.* Scott (Ia.), 47 N. W. Rep. 1078 [1891]; Tompkins *v.* Dudley, 25 N. Y. 272; Dermot *v.* Jones, 2 Wall. 1; Shines' Execs. *v.* Heimburger, 1 Mo. App. Reptr. 111; *and see* Cleary *v.* Sohier, 120 Mass. 310; Partridge *v.* Forsyth, 29 Ala. 200; Edwards *v.* Derrickson, 4 Dutch. 39; s. c. 5 Dutch. 468; Tompkins *v.* Dudley, 25 N. Y. 274.

[2] Haynes *v.* Second Baptist Ch., 88 Mo. 285; *and see* 29 Amer. & Eng. Ency. Law 906.

[3] Roberts *v.* Havelock, 3 B. & Ad. 404; Morton *v.* Read, 2 S. & M. 585; Chambers *v.* King, 8 Mo. 517; Kettle *v.* Harvey, 21 Vt. 301; Addison on Contracts, 500.

[4] Dibal *v.* Minott, 9 Iowa 403.

[5] Stewart *v.* Weaver, 12 Ala. 538.

[6] Wright *v.* Petrie, 1 Smed. & M. Ch. (Miss.) 282; *and see* Gomer *v.* McPhee (Colo. App.), 31 Pac. Rep. 119.

[7] Wright *v* Petrie, *supra.*

[8] Keeler *v.* Clifford, 62 Ill. App. 64; *affirmed in* (Ill. Sup.) 46 N. E. Rep. 248.

[9] Cox *v.* Western Pac. R. Co., 44 Cal. 18; Quigley *v.* DeHaas, 82 Pa. St. 267 [1876]; *and see* School Trustees *v.* Bennett, 27 N. J. Law 513; Butterfield *v.* Byron, 153 Miss. 517; Munsey *v.* Todella Pen Co. (Sup.) 38 N. Y. Supp. 159; Parker *v.* Troy & R. R. Co. 27 Vt. 766.

[10] Manda *v.* Sullivan County Club (Sup.), 38 N. Y. Supp. 55.

* *See* Sec. 677, *infra*

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gable, which is one undertaking for one price, was held *entire*, although the undertaking did consist of several items, and the price was apportioned to the several items for convenience, because the work was to be paid for as the work progressed, and the contract provided that "out of the above estimated costs of each of the respective divisions of the work the company shall be privileged to retain fifteen per cent. until the whole is completed in a satisfactory manner according to contract." The court held that notwithstanding the general rule that if a contract consist of several and distinct items, and the price to be paid is apportioned to each item to be performed, or is left to be implied by law, such a contract will be severable; yet the conditions of this rule will not override the clear intention of the parties, gathered from the whole subject-matter of the contract.[1]

A contract to pay sums of money for $1 and in consideration of the advantages that a railroad coming through a town would bring—a certain sum when the road was graded, another when ironed, the road to be completed by a certain date—was held an entire contract, and no recovery was allowed unless the road was completed.[2]

If the contractor has agreed to erect certain machinery on the owner's premises, the price to be paid on the completion of the whole, and in the course of the work the machinery and premises were destroyed by an accidental fire, he has no claim for the portions of the work which were done before the fire.[3] The court said: "The contractor having undertaken to do an *entire* work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the owner's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a subsequent agreement."[4]

If the accident or casualty can be attributed to the negligence or want of reasonable care, skill, and expense of the owner, it seems he is liable for work done prior to the destruction of the works. It was so held when a retaining wall was undermined by heavy rains and gave way, precipitating a land slide which destroyed the works. The owner was held to be required to provide a reasonably safe place for the erection of the structure, and that the contract implied an undertaking on the owner's part that the site chosen was free from danger.[5] In another case, where a building fell

[1] Quigley *v.* De Haas, 82 Pa. St. 267 [1876]; *but see* Crawford *v.* McKinney (Pa.), 30 Atl. Rep. 1047.

[2] Gray *v.* Hinton (Neb.), 7 Fed Rep. 81 [1881]; *see also* Norrington *v.* Wright, 115 U. S. 188; Stephenson *v.* Cady, 117 Mass. 6; Cohen *v* Platt, 69 N. Y. 348; Rugg *v.* Moore, 110 Pa. 236.

[3] Appleby *v.* Myers, L. R. 2 C. P. 651; Hughes *v.* Lenny, 5 M. & W. 183.

[4] *Accord*, Siegel *v.* Eaton & Prince Co. (Ill. Sup.), 46 N. E. Rep. 449 [1897]; *but see* Gilbert Mfg. Co. *v.* Butler (Mass.), 15 N. E. Rep. 76 [1888], where recovery was allowed. The fact that the materials used have become the property of the owner does not alter the case, if he has not accepted the structure as completed under the terms of the contract. Appleby *v.* Myers, L. R. 2 C. P. 651 [1867].

[5] Sinnott *v.* Mullin, 82 Pa. St. 333 [1876]; Whitfield *v.* Zellnor, 2 Cush. (Miss.) 663, *work a nuisance and enjoined.*

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before it was completed by reason of latent defects of the soil, it was held that the loss fell upon the contractor.[1] *

Buildings in process of erection upon the land of the owner, under an entire contract to pay upon completion, which are destroyed by fire, or by storms, or by floods come within the same rule. A printer engaged to print a work, which is destroyed by fire before delivery, cannot recover the price.[2] A person who covenanted to build a bridge and keep it in repair for a certain time, was held bound to rebuild the bridge, although it was broken down by an extraordinary flood,[3] and a bond conditioned for the building of a bridge on a certain site and to maintain it for seven years was held valid, and the obligee liable for damages for a breach of the condition, although the maintenance of a bridge on the site was found to be impossible.[4] An insurance company who undertook to reinstate the insured premises which had been damaged by fire, were held not to be excused from their contract by reason of the public authorities having subsequently taken down the premises as dangerous, although on account of defects not caused by the fire.[5] An agreement to build a bridge according to specifications drawn up by the engineer of the employer, and which were found to be impracticable, was held to have been made on both sides upon the assumed practicability of the specifications, and that the contractor could not charge the employer with an implied warranty that the plans were practicable.[6]

675. Destruction of Works Does Not Excuse Failure to Complete by a Specified Time.—If the contractor has undertaken to complete the structure on or before a certain date and for a price named, he is bound to do so, and the destruction of the building by fire or storm without fault of the owner will be no excuse at law for his failure to complete by the date named.[7] If delay is caused by owner, it may change the rule,[8] but the mere ordering of extra work will not absolve a builder from consequences of a delay in completing the work in accordance with the terms of his contract.[9] If the owner is not in default, no additional compensation for loss by contractor in consequence of the destruction of his works can be claimed; he can demand payment for his work when he has completed his contract, and then only the contract price.[10] Nor can the contractor recover a sum retained

[1] Ingle *v.* Jones. 2 Wall. (U. S.) 1; Stees *v.* Leonard, 20 Minn. 494; Trustee *v.* Bennett, 27 N. J. Law 513; Tompkins *v.* Dudley, 25 N. Y. 272; *and see* Gibbons *v.* United States, 109 U. S. 200, *as to ruins and their removal.*

[2] Adlard *v.* Booth, 7 C. & P. 108; Gillett *v.* Mawman, 1 Taunt 140.

[3] Brecknock Navigation Co. *v.* Pritchard, 6 T. R. 750; *but see* Bietry *v.* New Orleans, 22 La. Ann. 149

[4] Errington *v.* Aynesley, 2 Bro. C. C. 341; Walker *v.* London & N. W. R. Co. 36 L. T. Rep. 53 [1876].

[5] Brown *v.* Royal Ins. Co., 1 E. & E. 853, 28 L. J. Q. B. 275, Earl, J., dissenting.

[6] Thorn *v.* City of London, L. R. 1 Ap. Cas. 112.

[7] Many cases in 10 Amer. & Eng. Ency. Law 179; Adams *v.* Nicholas, 19 Pick. 275 [1837].

[8] *Semble*, Gilbert & B. Mfg. Co. *v.* Butler (Mass.), 15 N. E. Rep. 76 [1888].

[9] Harrison *v.* Trickett, 57 Ill. App. 515.

[10] Parker *v.* Scott (Ia.), 47 N. W. Rep. 1073 [1891].

* *See* Secs. 237-245, *supra*, and 678, *infra*.

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by the owner as security for the faithful performance and completion of the work, though nearly completed when destroyed and without the contractor's fault.[1]

Money advanced upon the contract, which was due only upon its complete performance, may be recovered back from the contractor,[2] and in addition thereto damages for his failure to complete it.[3] When a building has been destroyed under the conditions recited, and it has been rebuilt, neither the land nor the new building are subject to claims of contractor for work done or materials furnished for the building destroyed, none of the materials of the old structure having been used in the reconstruction.[4]

If the owner has accepted the structure or asserted his ownership and control by acts which amount to a waiver of the right to a complete performance, the contractor is relieved from liability in case of destruction, and may recover for what he has done and the materials furnished.[5] The taking out of a policy of insurance on the structure and receiving money thereon after the loss, has been held sufficient evidence of acceptance or control to entitle the contractor to recover,[6] as has occupation and use of a building by a tenant,[7] but mere occupation does not necessarily imply an acceptance.[8] Taking possession of a building and accepting work, does not, it seems, waive the owner's right to damages sustained because of delay in completing the contract.[9]

The rule is different when work and materials have been applied to a chattel which the employer can keep or return, and which the contractor can demand shall be paid for or returned. When an artist prepares a statue or a picture of a particular person to order, or a mechanic makes a specific article in his line to order, and after a particular measure, pattern or style, or for a particular use or purpose; when he has fully performed his part of the contract and tendered or offered to deliver the article thus manufactured according to contract, and the vendee refuses to receive and pay for the same, he may recover as damages in an action for breach of contract the full contract price of the manufactured article.[10] In general, when the contract is to supply a completed chattel to order, no claim can be made for any work done short of completion; as in the case of a coat to be made by a tailor who dies before completion.[11] If a workman has undertaken

[1] Cutcliff *v.* McAnnally (Ala.), 7 So. Rep. 331 [1890].

[2] Butterfield *v.* Byron, 153 Mass. 517; Trustees *v.* Bennett, 27 N. J. Law 513; Nollman *v.* Evenson (N. D.), 65 N. W. Rep. 686; *and see* Oakland Retreat *v.* Rathbone, 26 N. W. Rep. 742.

[3] Thompkins *v.* Dudley, 25 N. Y. 272 [1864]; *other cases* 29 Amer. & Eng. Ency. Law 907.

[4] Shines' Exec'r *v.* Heimburger, 1 Mo. App. Rep. 111; *and see* Rothwell *v.* Dean, 1 Mo. Rep. 309; *but see* Smith *v.* Newbaur (Ind.), 42 N. S. Rep. 40, *and see* Bratton *v.* Ralph (Ind. App.), 42 N. Y. Rep. 644.

[5] Galyon *v.* Ketchon, 85 Tenn. 55. [illegible] dew *v.* Besley, 42 Mich. 100; Lawing Rintles. 97 N. C. 350; *semble*. Eaton School Dist., 23 Wis. 374 [1868].

[6] Cook *v.* McCabe, 53 Wis. 250.

[7] Lord *v.* Wheeler, 1 Gray 282 [1854].

[8] Bozarth *v.* Dudley (N. J.), 2 Atl. J. 76 [1882], *many cases cited.*

[9] Felt *v.* Smith, 62 Ill. App. 637.

[10] Gordon *v.* Norris, 49 N. H. 376 [1870].

[11] Werner *v.* Humphreys, 2 M. & G. Lee *v.* Griffin, 1 B. & S. 272.

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repair certain defective articles and make them complete for a stated sum, and has done some work upon them, but failed to make them complete, he is not entitled to make any claim for the work done.[1] If the thing made is to be called for by the employer, and if it be completed and accepted, he is liable for it, though it burn up before he calls for it, without fault of the contractor.[2]

676. Destruction of Property when Alterations, Improvements, or Repairs are being Made, or the Contractor has Undertaken a Part only of the Work.—Cases in which the contractor is to do something to property of the owner, such as decorations, improvemets, repairs, etc., are frequently decided by putting upon the owner the responsibility of preserving or keeping his property where it can be wrought, improved, or repaired. This is sometimes called the New York rule, and is generally applied to such cases as contracts to do painting, plumbing, decorating, etc. It has been held not to apply when a contract including repairs and alterations and new work was entire, and payments were to be made in installments. An installment not entirely earned was held not recoverable.[3] It does not apply, it seems, when a man has ordered a portrait of himself painted and dies before it is completed. The artist probably could not recover from the man's executors for the material and work performed, the contract being for a completed portrait.[4] Yet under a contract to paint a picture on the wall of a house or to carve a panel, the destruction of the house would not preclude the contractor from recovery for what he had done.

There are cases that distinguish a contract for a completed job and payment on completion from one in which there is no such stipulation. An early (1867) English case distinctly rejected the idea that there was an implied warranty on the part of the owner to keep his premises in a fit state to receive the work or improvements which the contractor undertook to install or perform.[5] In this case the contract required the furnishing of certain machinery and its erection upon certain premises, and the premises and partly completed work were destroyed by fire. It was held that there was no absolute promise or implied warranty on the part of the owner to keep the premises fit to receive the machinery. This was hardly a simple case of repair to an existing structure, but a contract for a new structure to be paid for on completion, and was to be kept in repair for two years thereafter.[6]

A few cases in this country follow the English case just cited.[7] The better authority is decidedly in favor of the contractor's recovery, as already set forth.[8]

[1] Sinclair *v.* Bowles, 9 B. & C. 92.
[2] Cent. Lith. Co. *v.* Moore (Wis.), 43 N. W. Rep. 1124.
[3] Clark *v.* Collier (Cal.), 34 Pac. Rep. 677.
[4] Pollock on Contracts (4th ed.) 375.
[5] Appleby *v.* Meyers, L. R. 2 C. P. 651 [1867].
[6] *But see* Gilbert & Barker Mfg. Co. *v.* Butler (Mass.), 15 N. E. Rep. 76 [1888].
[7] Brumby *v.* Smith, 3 Ala. 128; *and see* Fildew *v.* Besley, 42 Mich. 100; *but see contra*, Cook *v.* McCabe, 53 Wis. 250; *and* Hollis *v.* Chapman, 36 Tex. 1.
[8] Niblo *v.* Binsse, 1 Keyes (N. Y.) 476, 8 Abb. Pr. 375; Menetone *v.* Athawes, 3 Burr.

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If the contract be to do a thing which in itself is possible, the contractor will be liable for its breach, notwithstanding it was beyond his power to perform it; but where, from the nature of the contract, it is apparent the parties contracted on the basis of the continued existence of a given person or thing, a condition is implied that if the performance becomes impossible from the perishing of the person or thing, that shall excuse the performance. Therefore a contractor who undertook to work a coal mine for a certain length of time in a good and workmanlike manner is liable for a breach of his covenant, notwithstanding it was beyond his power to perform it; but if the coal mines become exhausted, that will excuse him from any further performance.[1] If the subject-matter be destroyed before the time for the performance of the agreement, the parties are discharged from the contract, as in the case of a lease of a music-hall which was destroyed.[2] If the performance depends upon the existence of a specific person or thing, and that person or thing is accidentally destroyed, as by an act of God, and without fault of either party, the parties are excused from further performance.[3]

If by the contract a builder is to furnish materials and perform labor in altering and repairing a structure already erected according to specifications agreed on, there being no agreement as to when payment should be made, and by neither party's fault the structure itself is destroyed by fire before the alterations are completed, the owner must pay the builder full compensation for the work done and materials furnished before the fire; and whether constructing or repairing the building of another, it has been held not negligence on the part of the builder to fail to insure it against fire.[4]

A contract to cut, cure, and stack hay on a ranch at a price per ton which does not certify what number of tons are to be cut, nor any given number of acres to be mowed, and under which neither the work to be done nor the amount to be paid is in gross, is a separable, not an entire contract; and where the hay is burned the loss falls on the owner, and the contractor, being innocent, can recover for his labor notwithstanding.[5]

The same rule holds for work which forms only a part of a new building, as the carpenter-work or mason-work or painting.[6] Thus where labor is performed and materials furnished under a contract to do the carpenter's work *only* of a building, the risk of destruction by fire is on the owner, and a decree giving the carpenter a lien on the lot for the sum due him for work and material will not be disturbed.[7] The carpenter cannot, however,

1592; Clark *v.* Busse, 82 Ill. 515; Lord *v.* Wheeler, 67 Mass. (1 Gray), 282; Schwartz *v.* Saunders, 46 Ill. 18; Rawson *v* Clark, 70 Ill. 656; Haynes *v.* Baptist Ch., 88 Mo. 285; Weis *v.* Devlin (Tex.), 3 S. W. Rep. 726, *and cases cited supra.*

[1] Walker, *et al.*, *v.* Tucker, *et al*, 70 Ill. 527 [1873]; *see also* Pollock on Contracts (4th ed.) 351.

[2] Taylor *v.* Caldwell, 32 L. J Q. B. 164 [1863]; s. c., 3 Best & Smith 826.

[3] Pollock on Contracts (4th ed.) 367; *cases collected*, 10 Amer. & Eng. Ency. Law 181.

[4] Weis *v.* Devlin 67 Tex. 507 [1887]; *see also* Lord *v.* Wheeler, 1 Gray 282 [1854].

[5] Hindrev *v.* Williams (Colo.), 12 Pac. Rep. 436 [1887].

[6] 10 Amer. & Eng. Ency. Law 180 and Vol. 29 *Id.* 907.

[7] Sontag *v.* Brennan, 75 Ill. 279 [1874]; Dexter *v.* Norton, 47 N. Y. 62; Wilson *v.*

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recover for the value of materials which he had procured for use in the building but which he had not used at the time of the fire.[1] *

When the contract was to do a part of the work of a structure or to furnish a part of the materials and the remainder was to be provided by the owner or some other contractor, and the structure was destroyed, the contractor was allowed to recover, even though the price was an aggregate sum and no payments were to be made until house was completed.[2]

The law was laid down by Justice Knowlton in a Massachusetts case[3] in the following words: "It is well established law that where one contracts to furnish labor and materials and build a house or other structure on the land of another, that he will *not* ordinarily be excused from performance by the destruction of the building without his fault, before the time fixed for completion.[4] It is equally well settled that where work is to be done under a contract on a building or chattel which is not wholly the property of the contractor, or for which he is not solely accountable, as, for example, where repairs are to be made on the property of another, the agreement on both sides is upon the implied condition that the building or chattel shall continue in existence, and the destruction of it, without the fault of either party, will excuse performance of the contract and leave no right of recovery of damages in favor of either party.[5] The implied condition is a part of the contract as if it were written into it, and by its terms the contract is not to be performed if the subject-matter is destroyed without the fault of either party before the time for completion has arrived. From the very nature of the agreements as applied to the subject-matter, it is manifest that while nothing is expressly said about it, that the parties contemplated the continued existence of the subject-matter to which the contract applies.

"The fundamental question then is, what is the true interpretation of the contract? Was the house while in the process of construction to be in the control and at the sole risk of the contractor, or was the owner to have a like interest in a part of it? Was the builder's undertaking to go on and *build* and *deliver* such a house as the contract called for, even if he should be obliged repeatedly to build anew on account of the destruction again and again of a partly completed building by inevitable accident, or did his contract relate to one building only? A contract to contribute certain labor and materials toward the erection of a house on the land of the owner, for

Knott, 3 Humph. (Tenn.), 473; Clark *v.* Franklin, 7 Leigh (Va.) 1; Hollis *v.* Chapman, 36 Tex. 1; Weis *v.* Devlin, 67 Tex. 507; Garrety *v.* Brazell, 34 Iowa 100; *and see* Taylor *v.* Caldwell, 3 B. & S. 826; Menetone *v.* Athawes, 3 Burr 1592.

[1] Hayes *v.* Gross (Sup.), 40 N. Y. Supp. 1098; Eichelberger *v.* Miller, 20 Md. 332.

[2] Cook *v.* McCabe, 53 Wis. 250 [1881].

the owner had taken out insurance on the structure; *but see* Tilden *v.* Besley, 42 Mich. 100; *and compare with* Garretty *v.* Brazell, 34 Iowa 100.

[3] Butterfield *v.* Byron (Mass.), 27 N. E. Rep. 667 [1891].

[4] *Numerous cases cited.*

[5] *Cases cited; and see* Niblo *v.* Buisse (N. Y. App.), 3 Abbott 375.

* *See* Secs. 272, 273, *supra.*

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which the owner was to do and furnish the grading, excavating, stonework, brickwork, painting, and plumbing, is not a contract to erect and furnish complete a house, but a contract to finish a house on the owner's land which had been constructed from materials and by labor furnished in part by the contractor and in part by the owner. The contractor is no more responsible that the house should continue in existence than was the owner. The contract was like a contract to make repairs on the house of another. The contractor's undertaking and duty to go on and finish the work was upon an implied condition that the house, the product of their joint contributions, should remain in existence. The destruction of the house discharges the contractor from his contract.

"As to what are the rights of the parties the law of England and that of the United States are at variance. The general rule in the United States is that the contractor may recover for what he has done or furnishes.[1] Thus a plasterer who was to do work at a price per yard was allowed to recover for the work he had done before the building was burned.[2] The contractor has been allowed to recover *pro rata* under his contract, *i.e.*, on an implied *assumpsit* at the contract rate.[3] He has been allowed to recover a proportional part of the contract price."[4]

Under a contract to put certain fixtures into a church for a gross sum to be paid on completion and acceptance, it was held that the contractor might recover on a *quantum meruit* for the work he had done, the church having been destroyed by fire without fault of either party.[5] The fact that such work is to be paid for upon the estimate of an architect does not seem to alter the case. For when a party sought to recover the price of iron manufactured for a building which he was to put up and be paid upon the estimate of an architect, and the building was destroyed by fire before the ironwork could be put up, it was held that the case contemplated for the architect's certificate never arose, and that the contractor could recover without it according to the contract price.[6] So under a contract to varnish clock-cases at specified prices per case, the work being done in owner's factory, payment being made on regular pay-days for work completed, which had been examined and pronounced satisfactory by defendant's agent, the factory being destroyed by fire and a large number of cases being burned upon which the plaintiff had performed work, some having been completed but not inspected, it was held that the defendant was liable for the work done, and plaintiff was entiled to recover the contract price for the completed work, and upon a *quantum meruit* for the unfinished, and this

[1] *Several cases cited.*

[2] Cleary *v.* Sohier, 120 Mass. 210; *see also* Lord *v.* Wheeler, 1 Gray 282; Wells *v.* Calnan, 107 Mass. 514, 517.

[3] Cook *v.* McCabe, 53 Wis. 250.

[4] Hollis *v.* Chapman, 86 Tex. 1; Clark *v.* Franklin, 7 Leigh 1; Schwartz *v.* Saunders, 48 Ill. 18; Rawson *v.* Clark, 70 Ill. 656.

[5] Haynes *v.* Second Baptist Church, 88 Mo. 285 [1885].

[6] Rawson *v.* Clark, 70 Ill. 656; Clark *v.* Busse, etc., 82 Ill. 515.

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whether the relation of master and servant existed between the parties or plaintiff was a contractor to do the work.[1]

677. Work Destroyed which was to be Paid for as It Progressed.—When by the terms of a contract payments are to be made, as the work progresses, in weekly or monthly installments, or upon the certificate of the engineer, and the structure is destroyed before all the payments are due, the installments not due according to the terms of the contract cannot be recovered,[2] though the amount already due under the terms of the contract may be recovered.[3] If the contract be severable, as when a portion of the pay is to be made when a certain portion of the work is completed, then it is payable when that part is done.[4] The same was held when a part had been accepted, though the contract was entire.[5] When the last installment was due on completion of the work it was held not recoverable when the house was destroyed before it received a second coat of paint, all the doors were hung, the fastening put on the doors and windows, or the building was delivered to the owner.[6]

A contractor agreed to build a house subject to inspection and approval of the engineer, payments to be made in installments on or before a specified day, or as soon thereafter as the specified stages of work was completed, and seven installment had been paid, the engineer approving of the work, and the eighth installment was to be paid when the exterior was finished and one-half of the interior woodwork finished, the cooking-range set, and the plumbing done. All but setting the cooking-range was done, but the engineer had not approved when the building was burned. It was held that the contract was entire, and that the contractor was not entitled to the eighth installment.[7]

If the contract be to pay for work or services from time to time as it is performed, the claim for the part performed remains valid, although further performance may be prevented by accident and the part performed become useless; as where a shipwright was employed at continuous work upon the repairs of a ship, which was accidentally destroyed by fire before the repairs were completed, he was held entitled to charge for his work and materials rendered up to that time.[8] Likewise if payments are to be made according to the work and materials furnished on measurement, and the

[1] Whelan *v.* Ansonia Clock Co., 97 N.Y. 293 [1884].

[2] 3 Amer. & Eng. Ency. Law 917; Clark *v.* Collier (Cal.), 34 Pac. Rep. 677.

[3] Siegel *v.* Eaton & Prince Co., 60 Ill. App. 639.

[4] Morgan *v.* Ward, Wright 474.

[5] Robinson *v.* Snyder, 25 Pa St. 203; *but see* School Trustees *v.* Bennett, 27 N. J. Law 513; *and* Butterfield *v.* Byron, 153 Mass. 517, where the owner recovered back the partial payments he had made; Nollman *v.* Evenson (N. D.), 65 N. W. Rep. 686.

[6] Clark *v.* Collier (Cal.), 34 Pac. Rep. 677.

[7] Newman Lumb. Co. *v.* Purdum, 41 Ohio St. 373; 3 Amer. & Eng. Ency. Law 917; *see also* Simonds *v.* Pearce, 31 Fed. Rep. 137; Richardson *v.* Shaw, 1 Mo. App. 234; *and* Miller *v.* Hubbard, 4 Cranch C. C. 451; *and see* Eichelberger *v.* Miller, 20 Md. 332.

[8] Menetone *v.* Athawes (Eng.), 3 Burr. 1592; Baeder *v.* Carnie, 44 N. J. Law 208; Leake's Digest of Contracts 68–70.

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works are destroyed before completion, the loss falls upon the owner, and the contractor may recover for what he has supplied.[1]

In a case where the contractor was to be paid a certain percentage on the value of the work as it progressed, on the certificate of the architect, but the last payment was not to be made until all the claims for extras had been agreed upon and the contractor had proceeded with the building and did considerable amount of extra work, but before the completion of the building it was destroyed by fire, it was held in an action on the contract that the contractor was entitled to recover the percentage of value of the work done, though the building never was completed.[2] If certain work was to be performed at a certain rate and part of the work has been performed, and the performance of the residue has been prevented without the fault of either party, the contractor is entitled to payment in proportion, at the rate agreed upon for the whole. When installments are due and have been paid as work progresses, it seems they cannot be recovered back, the full performance of the work having become impossible. It was so held when boilers and engines had been made for a ship, which ship was destroyed before the machinery had been installed.[3]

678. Work Becoming More Difficult or Arduous.—It is well settled that if the performance of a contract is not impossible in its own nature, but the impossibility is due to particular circumstances, whether existing at the time the contract was made or arising from subsequent events, it is no excuse for the failure to perform an unconditional contract.[4] The fact that work has become more difficult, onerous, or expensive, not by the fault of the owner or his agents, does not entitle the contractor to extra pay in consequence of the extra work.[5]*

Although accidental or natural causes may make the work much more difficult and expensive than was expected, the contractor is bound to do all that is necessary to make it reasonably effective for the purpose it was intended to accomplish,[6] and this is so even if every item is not specifically mentioned in the contract.[7] If a substantial performance can be carried out it will be required, though a complete performance in the exact terms be impossible.[8]

[1] Wilson *v.* Knott, 3 Humph. (Tenn.) 473; Clark *v.* Franklin, 7 Leigh (Va.) 1; *and see* Perkins *v.* Locke (Tex.), 27 S. W. Rep. 783; Schwartz *v.* Saunders, 46 Ill. 18; Garretty *v* Brazell, 34 Iowa 100.

[2] Flood *v.* Morrisey, 4 Pugsley & B. (N. B.) [1880]; *semble* Hargrave *v.* Conroy, 19 N. J. Eq. 281 [1868]; *and see* Cutcliff *v.* McAnnally, 88 Ala. 507.

[3] Anglo-Egyptian Nav. Co. *v.* Rennie, L. R. 10 C. P. 271; *but see* School Trustees *v.* Bennett, 27 N. J. Law 513; *and* Butterfield *v.* Bryon, 153 Mass. 517.

[4] Flemming *v.* Manne Ins. Co., 4 Wharton 59; Baker *v.* Manfrs Ins. Co., 12 Gray 603; Blodgett *v.* Amer. Nat. Bank, 49 Conn. 9; Hay *v.* Holt, 10 Norris (Pa.) 88

[5] Gifford *v.* Hoffman, 3 Phila. 127; Norton *v.* Fancher (Sup.), 36 N. Y. Supp. 1032; Classen *v.* Elmendorf (Tex.), 37 S. W. Rep. 245; Cannon *v.* Wildman, 28 Conn. 472; Boyle *v.* Agawam C. Co., 32 Pick. (Mass.) 381; Ambler *v.* Phillips, 132 Pa. St. 167; Rigby *v.* Bristol, 29 L. J. Exch. 359; Wiseman *v.* Thompson (Iowa), 63 N. W. Rep. 346.

[6] I. B. & W. Ry. Co. *v.* Adamson, 114 Ind. 282 [1887].

[7] Currier *v.* B. & M. R. Co., 34 N. H. 498 [1847].

[8] Williams *v.* Vanderbilt, 28 N. Y. 217;

* *See* Secs. 582–590, *supra.*

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The fact that the contractor has adopted the usual and most advantageous means of performance, which both parties contemplated, and has failed, will not be a defense for noncompletion of the contract, unless it is so provided in the contract.[1] *

A statutory enactment which makes the performance of a contract more burdensome or expensive will not excuse the contractor from performance,[2] but if the statute makes the performance unlawful it will be a good excuse.[3]

Sickness creates no impossibility when the act is not one requiring personal service, for it may be performed by proxy. If the contractor be dead, his personal representatives must perform or respond in damages.[4] The visitation and prevalence of a contagious and fatal disease, which renders it imprudent to work and impossible to procure suitable workmen, has been held to excuse performance of a personal contract.[5] If part of the work has been executed before the disease came the contractor may, it seems, recover for it on a *quantum meruit*.[6]

If a manufacturer has contracted to furnish certain materials and supplies to the contractor, he cannot excuse non-delivery of the materials by pleading that his mill burned down,[7] or that the mills could not be operated because of the drought and lack of water,[8] or that the materials could not be delivered because the river was frozen and navigation closed, or that they could not be shipped on account of the weather, danger from freezing, dampness, etc.[9] A contractor's inability, by reason of accident, want of means or insolvency, lack of skill of himself or any of his workmen or subcontractors,[10] does not excuse a full performance of his contract.[11]

It is not enough that the work done "is a fair average job for that class of building," when he has undertaken to furnish a certain quality of material and work.[12] †

The fact that weather was unsuitable for the progress of the work will not excuse its completion within the time specified,[13] or that the contract required it to be done during the winter months. The severity of the

White *v.* Manne, 26 Me. 361; Chase *v.* Barrett, 4 Paige 148.

[1] Eng ter *v.* West, 35 La. Ann. 119; Hand *v.* Baynes, 4 Wharton 204; Harmony *v.* Bingham, 1 Dur. 210, 12 N Y. 99; *and see* Owens *v.* Butler Co., 40 Iowa 190, whether a failure to complete work according to certain plans and specifications furnished by the owner, and made a part of the contract, would be a defense to an action by the contractor.

[2] David *v.* Ryan, 47 Iowa 642; Baker *v.* Johnson 42 N Y. 126.

[3] 10 Amer. & Eng. Ency. Law 182

[4] Siler *v.* Gray, 86 N. C. 566; Hawkins *v.* Ball, 18 B Monr. 816; Smith *v.* Coal Co., 83 Ill. 498.

[5] Dewey *v.* Alpena School Dist., 43 Mich. 480.

[6] Lakeman *v.* Pollard, 43 Me. 463; Sickles *v.* United States, 1 Ct. of Cl. 214.

[7] Booth *v.* Spuyten Duyvil R. M. Co., 60 N. Y. 487.

[8] Eddy *v.* Clement, 38 Vt. 486.

[9] 10 Amer. & Eng Ency. Law 179.

[10] Sherman *v.* Bates (Neb.), 17 The Reporter 86 [1883]; *and see* McGonigle *v.* Klein (Colo.), 40 Pac. Rep. 465.

[11] Jones *v* Anderson (Ala.), 20 So. Rep. 911 [1887].

[12] Golden Gate L Co. *v.* Sahrbacher (Cal.), 38 Pac. Rep. 635.

[13] Margon *v.* Carter, 4 Car. & P. 295.

* *See* Secs. 236–242. Sufficiency of Plans. *supra.*

† *See* Substantial Performance, Secs. 701–702, *infra.*

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weather is alone insufficient as an excuse for failure to perform, if the work could have been carried on by the exercise of extra means or effort.[1]* The fact that an unbridged river between defendant's residence and the place of performance was swollen by recent rains, and impassable at the time set for the performance of the contract, will not excuse the performance of the contractor's obligation when it is not shown that such a condition of the river was unusual at that season of the year and could not have been anticipated by ordinary prudence.[2] The same was held when materials were to be delivered at a certain place which became inaccessible; it was held that the contractor must deliver at a new place established conveniently near to the original place of delivery.[3]

The defective condition of the soil under a house, in consequence of which the walls sank and cracked and the house had to be taken down and rebuilt on artificial foundations, will not excuse the performance of a contract to build, complete, and deliver over the house by a certain day named, nor entitle the builder to extra compensation. He must either rebuild or answer in damages for his failure to complete his contract.[4] A covenant to build a bridge and keep it in repair for a certain time requires the builder to rebuild the bridge, although it was broken down by an extraordinary flood.[5] So when an arch fell, it was held there had been no performance and therefore no recovery was allowed.[6]

679. Excavations More Difficult than was Supposed when Contract was Taken.—A very common claim for extra compensation is that for the extra labor required to excavate rock and hard-pan. What has been said of work becoming more onerous than was anticipated or estimated will apply to this class of work. To prevent hardship and litigation, a contract for excavations should always specify a price for solid rock, loose rock, hard-pan, clay, quicksand, common earth, and other stuff the excavation and handling of which entail greater or less cost, and each should be described clearly.

If a contract requires the contractor "to furnish at his own cost and expense all necessary labor and materials, and excavate and build a certain sewer," and according to specifications which provided that "the contractor shall make all necessary excavations for the sewer in such directions, and of such width and depth as shall be necessary," no extra compensation can be recovered for excavating rock, though neither party contemplated that rock would be met.[7] If the contractor had protested when he discovered the

[1] Reichenbach *v* Sage (Wash.), 43 Pac. Rep. 354.

[2] Ryan *v*. Rogers (Cal.), 31 Pac. Rep. 244; *but see* Pengra *v*. Wheeler (Or.), 34 Pac. Rep. 354.

[3] Robson *v*. Miss R Log. Co., 61 Fed. Rep. 893.

[4] Dermott *v*. Jones, 69 U. S. (2 Wall.) [1865], s. c., 4 Amer. Law Reg. (N. S.) 504; Supt. of Schools *v*. Bennett, 27 N. J. Law (3 Dutch.) 513; *see also* Stees *v*. Leonard, 20 Minn. 494; *but see* Burke *v*. Dunbar, 128 Mass. 499.

[5] Brecknock Nav. Co *v*. Pritchard, 6 T. R. 720; *and see* Leake's Digest of the Law of Contracts p. 696; *see also* Police Jury *v*. Taylor, 2 La. Ann. 272.

[6] Dunmead *v* Coburn, 15 Md. 29 [1860].

[7] McCauley *v* City of Des Moines, 83 Iowa 212 [1891]; Cannon *v*. Wildman, 28

* *See* Secs. 326, 585, and 670, *supra*.

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rock, and induced the owner to agree that each should bear the expense of blasting the rock equally, the courts very likely would hold the settlement a fair one, and allow him to recover.' *

A contract to construct a section of a canal at a price per cubic yard for excavations and embankment, payments to be made on monthly estimates of the engineer, reserving 25 per cent., and the balance when completed, requires the contractor to re-excavate earthworks and repair embankments which have been filled up or washed away by floods before the works were finished, and without extra compensation.[2] Under an agreement to pay as a "compensation for such excavation, refilling and repaving," as follows: "for the digging" and refilling, seven cents per cubic yard; for repairing, etc., four cents per square yard; evidence that in the work undertaken hard-pan and rock were met, the excavation of which was worth ten to fourteen times the price named, and that the price agreed upon was the lowest price for common earth excavations, is not admissible, and the contractor can recover only the prices agreed upon.[3] Under a contract to excavate "solid rock" at a certain price, no extra charge can be made for flint rock, though it costs four or five times as much to excavate it than limestone rock, there being no proof that the words "solid rock" have any particular meaning.[4]

When another contract fixed the price of earth excavations and allowed an extra compensation for rock excavations, it was held no extra pay could be had for excavating "hard-pan."[5] However, another court held it error to exclude evidence that hard-pan was neither rock nor earth, under a contract providing for earth excavation at one price and rock excavation at another, and that work not classified therein shall be paid for at cost and 15 per cent. added.[6]

What hard-pan is and whether any was found are not questions of science or skill, and it is not necessary that a witness should be shown to be qualified as an expert before he can be interrogated in regard thereto.[7] Hard-pan had been defined among farmers and well-diggers as "a hard, earthy substance, composed of gravel, sand, and clay, very compact, nearly impervious to water, and too hard to be excavated by the spade;" and by others as a hard, compact earth, generally composed of sand, pebbles, cemented by clay, lime, or iron, or by clay combined with other ingredients.[8]

Conn. 472; Sherman *v.* New York, 1 N. Y. 316; Devlin *v.* New York, 4 Duer 337.

[1] Hellwig *v.* Blumenberg 7 N. Y. Supp. 746, which held that the word "excavating" did not necessarily include "blasting."

[2] Boyle *v.* The Awagam Canal Co., 22 Pick. 381 [1839].

[3] Sherman *v* Mayor, 1 N. Y. 316 [1848]

[4] Fruin *v* Crystal Ry. Co. (Mo), 14 S. W. Rep. 557 [1886].

[5] Nesbitt *v.* Louisville C. & C. R. Co. (S. C), 2 Spears 697; Dhrew *v.* City of Altoona 121 Pa. St. 401.

[6] Dickinson *v* Commrs. of Poughkeepsie, 2 Hun 615 [1874], *and see* Hellwig *v.* Blumenberg, 7 N. Y. Supp. 746.

[7] Currier *v.* B. & M. R., 34 N. H. 498 [1857].

[8] Spader *v.* Lawler, 17 Ohio 397; *and see* 77 Proceedings Inst. of C. E. 249 [1884].

* *See* Secs. 69, 131, and 560-563, *supra*, *re* the consideration of the promise in such a case.

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680. No Extra Compensation can be Recovered for furnishing Better Work and Materials than the Contract Requires.—If a contractor, in executing and completing a job under a contract for a stipulated price, use materials of a better kind than those contracted for, or furnish a better quality of work without notice to the owner, he cannot for that reason alone charge more than the price named in his contract, nor can he require the materials so wrought into the building to be returned because the owner will not pay the extra price demanded on account of the better materials employed.[1]

[1] Wilmot *v.* Smith, 3 C. & P. 453; Perkinson *v.* Fehlig, 21 Mo. App. 327 [1886]; *and see* Chicago, etc., R. Co. *v.* Thomlinson, 33 Ill. App. 388.

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CHAPTER XXIV.

NONPERFORMANCE OF CONTRACT. BREACH OR RESCISSION.

BREACH OF OWNER OR COMPANY AND MEASURE OF DAMAGES TO CONTRACTOR.

681. What will Amount to a Breach of a Contract?—To answer such a question one must be informed fully as to the facts of the case in point. A statement of the terms of the contract and of the wrongful acts of the offending party alone will not determine the question. The period or the time when the act was committed or when the failure or refusal to act was made known may have an important bearing on the question, as may also the intention and the efforts of the delinquent party. When no part of the contract has been performed, the law demands a literal compliance with its terms. If the owner or contractor fail or refuse to carry out his undertaking in the beginning, or "*in limine*" (at the threshold), as the courts say, such an act may be held a breach of the contract, when it would not be so held at a later stage of the performance of the contract. Before *any* performance, the law requires a *literal* performance; after *part* performance, the law demands only a *substantial* performance. After the contractor or owner has in good faith made preparations to carry out the contract and has entered into the undertaking, the breach must go to the essence or substance of the contract in order to relieve the other party from his obligation to perform his part. This rule is based upon the ground that a benefit has been conferred upon the party who seeks to take advantage of the breach, and it is not equitable for him to take advantage of another's misfortune. If the owner has been benefited by the part performance of the contract and the contractor has failed to fulfill some of the terms and conditions of his contract, yet he should be remunerated for the benefit he conferred on the owner if his breach was unimportant or did not go to the essence of the contract.[1] If, however, full benefit has resulted to the contractor, he cannot recover, for he has already been compensated. Sometimes when the plaintiff has been benefited by defendant's breach he is allowed nominal damages.[2]

[1] Linnenhohl *v.* Winkelmeyer, 54 Mo. App. 570; Kirkland *v.* Oates, 25 Ala. 465; Prince *v.* Thomas, 15 Ark. 378; Light, Heat & Water Co. *v.* Jackson (Miss.), 19 So. Rep. 771.

[2] Excelsior Needle Co. *v.* Smith, 61 Conn. 56.

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It is also held that to hold a party for damages for a breach on his part of his undertakings, the circumstances must be such that it may reasonably be supposed to have been contemplated by the parties, when making the contract, that such loss would probably follow its breach, and hence that the party consented to become liable for it, and such circumstances if relied upon must be pleaded and proved.[1]

682. When Owner has Forbidden Contractor Completing or Continuing the Work.—Where a contract is executory, one party has the power to stop performance by the other side by an explicit direction to that effect, subjecting himself to such damages as will compensate the other party for being stopped at that stage in its execution; and the party thus forbidden to proceed cannot go on and complete the contract and recover the contract price, his remedy being for damages for the breach.[2] If the owner refuse to carry out the contract before the commencement of the work, the contractor cannot go ahead and erect the building, notwithstanding such refusal, and recover the contract price, but must leave matters as they stand and sue for the breach of the contract.[3]

If an agent of the owner, as the superintendent, by authority prevent the contractor from continuing his work, and for a defect not occasioned by the contractor, and completion was made a condition precedent to recovery, he is thereby discharged from performance of the condition, and is entitled to recover for what he has done.[4] The contractor need not allege that he was ready and willing to perform when he and his workmen have been ordered off the premises by the owner.[5] An express repudiation by owner dispenses with the necessity of a tender of performance by the contractor before he can begin his action for the breach.[6] A contractor can sue for damages for breach of contract by the owner if the owner refuses to allow the contractor to do the work contracted for, even though it contains a stipulation for arbitration in case of dispute as to the true value of extra work or of work omitted. His damages will include his probable gain or prospective profits.[7]

In an action to recover for work done under a contract and for breach of the contract by defendent in preventing further performance, a report

[1] Liljengren F. & L Co. *v.* Mead (Minn.), 44 N. W. Rep. 306; *following* Frohreich *v.* Gaunnon, 28 Minn. 476; *and see* 5 Amer. & Eng. Ency. Law 32-33.

[2] Gibbons *v.* Bente (Minn.), 53 N. W. Rep 756; McGregor *v.* Ross, 96 Mich. 103; *see* Heavilon *v.* Kramer, 31 Ind. 241; Miller *v.* Phillips, 31 Pa. St. 218.

[3] Davis *v.* Bronson (N. D.), 50 N. W. Rep. 836; *semble*, Epperson *v.* Shelby Co., 7 Lea (Tenn.) 275; Danforth *v.* Walker, 37 Vt. 239; Société, etc. *v.* Milders, 49 L. T. 55.

[4] Heine *v.* Meyer, 61 N. Y. 171 [1874]; Clark *v* Franklin, 7 Leigh (Va.) 1; Derby *v.* Johnson, 21 Vt. 17; Guerdon *v* Corbett, 87 Ill. 272; Bannister *v.* Reed, 1 Gilman 92; Goodman *v.* Pocock, 15 Q B. 576; Potts *v.* Pt. Pleasant Ld. Co. (N. J.), 8 Atl. Rep 109 [1887]; Justice *v.* Elwert (Oreg.), 43 Pac Rep. 649.

[5] Current *v.* Fulton (Ind. App.), 38 N. E. Rep. 419.

[6] Stokes *v* Mackay (N. Y. App.), 41 N. E. Rep. 496

[7] Brandt *v.* Schuhman, 60 Mo. App. 70; Boyd *v.* Meighan, 8 Central Rep. 689; 1 Amer. & Eng. Ency. of Law 670; Jones *v.* Judd, 4 N. Y. 411.

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made to plaintiff by his workmen that they had been stopped by defendent, accompanied by proof that they had been stopped by defendent, is competent to show the reason why plaintiff ceased further performance of the contract.[1]

If the contractor first break his contract, and the owner by reason thereof fails or refuses to proceed with his part, the latter is not guilty of a breach of his contract. It was so held when a contractor agreed to employ members of a labor union, which agreed to supply him with workmen on demand. The union having called out its men because the contractor discharged one of its members, it was held the contractor was entitled to employ non-union men, that the breach was on the part of the union.[2] The liability for the non-performance of a contract is upon the one who was the cause of the contract not being carried out.[3] If the contract has been wrongly terminated by one party, the other is entitled to recover for the breach thereof without showing that he continued to be ready and willing to perform his part after such termination.[4] Where the contractor, before the day of performance, declares that he will not fulfill, the other party may take him at his word and at once bring suit for a breach of the contract.[5] The fact that the work is unnecessary or useless, or that the owner cannot determine how he will have it done, will not annul or discharge the contract to build.[6] The insolvency of a company and the placing of its property in the hands of a receiver is not of itself a breach of a contract to purchase materials so as to entitle the contractor to recover damages without placing himself in a position to perform.[7] If one party has disabled himself from performing his contract by his own act, the other party may treat it as rescinded.[8] An agreement that the time within which it shall be incumbent on the contractor to complete his contract shall not be less than four years was held a covenant on the part of the company that it would allow the contractor four years to complete it in, and that the unlawful driving him away from the work within that time was a breach of the covenant.[9]

If owner has refused to permit the contractor to complete the works, he cannot show what he has expended to supervise the completion of the work or its value for the purpose of establishing a counterclaim against the contractor.[10]

[1] Raven *v.* Smith (Sup.), 33 N. Y. Supp. 972.

[2] Davis *v.* Bonn (Sup.), 37 N. Y. Supp. 688; *see also* World's Columbian Exposition *v.* Liesegang, 57 Ill. App. 594; *and* Chicago, etc., R. Co. *v.* Cochran (Neb.), 60 N. W. Rep. 894; Hyde *v.* Grisby, 11 La. 240; Oxnard *v.* Locke, 13 La. 449.

[3] Lloyd's Law of Building 40.

[4] Bond *v.* Carpenter (R. I.), 8 Atl. Rep. 539 [1887]; Howell *v.* Gould, 2 Abb. App. Dec. (N. Y.) 418; Morier *v.* Moran, 58 Ill. App. 235; *but see* Allphin *v.* Working (Ill.), 24 N. E. Rep. 54 [1890]; Hudson *v.* Feige, 58 Mich. 148.

[5] Engesette *v.* McGilvray, 63 Ill. App. 461.

[6] Graves *v.* Caruthers, Meigs (Tenn.) 58, 65.

[7] Diamond State Iron Co. *v.* San Antonio, etc., Ry. Co. (Tex.), 33 S. W. Rep. 987; *and see* Girard L. I. Co. *v.* Cooper (C. C. A.), 51 Fed. Rep. 332; *accord*, Amsden *v.* Atwood (Vt.), 35 Atl. Rep. 311.

[8] Robson *v.* Drummond, 2 B. & Ad. 303; Planche *v.* Coburn, 8 Bing. 14.

[9] Randel *v.* Chesapeake & Del. Canal, 1 Harrington (Del.) 233–322 [1833].

[10] The Memphis, etc., R. Co. *v.* Wilcox, 48 Pa. St. 161 [1864]; Stone *v.* Assip, 18 N.

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683. A Suspension of the Work will Not Justify Contractor in Abandoning Contract Work.—If the owner suspend the work for six months and refuse to give the contractor any assurance that the work would be resumed, it is sufficient cause to permit the contractor to recover for what he has done, including the per cent. that was by the contract to be retained until the completion of the work, and this is so notwitstanding a provision that no claim should be made for damages in case the work was suspended or delayed.[1]

The question, "What is an unreasonable delay in renewing work that has been suspended?" is one for a jury to determine.[2] A suspension of work for six months, with no assurance that it will be resumed, has been held sufficient to authorize the contractor to abandon the work.[3]

When the owner suspends work he is liable for any injury which the contractor suffers in consequence thereof, as where a water company contracted for work to be done, and afterwards, because of a rise in the river and danger to some of its buildings, it desired to stop the work.[4] But when a stipulation provides that a suspension of the work by the owner shall give the contractor *no* claims for damages, he will not be entitled to any damages for a suspension made in good faith.[5]

684. Suspension of Work is Not Always a Rescission of Contract.—Consent of both parties to the omission of some of the items of a building contract does not amount to a rescission of the entire contract; the residue remains in full force.[6] Generally, however, an agreement for rescission implies a total rescission.[7] A mere suspension of the work by mutual consent of the parties is not a rescission of the contract which entitles the contractor to ignore its terms and refuse to accept the engineer's estimate of the work done prior to suspension as provided by the contract.[8] The fact that the owner, upon the statement by a contractor that his failure to prosecute the work was owing to his inability to get mechanics, employed extra men himself does not show a rescission of the contract by the owner nor cause for rescission by the contractor.[9] A postal card from one party to the other party asking that nothing be done about building certain cars, contracted to be built, until further instructions, and setting the time within which such instructions would be given, has been held not to constitute a rescission of the contract, the same amounting only to a request to suspend the construction for the time named:

Y. Supp. 441; *and see* Bonnett *v.* Glatfeldt, 8 West Rep. (Ill.) 637.

[1] Curran *v.* Del. & O. R. Co. (N. Y. App.) 34 N. E. Rep. 201; *and see* Sheible *v.* Klein (Mich.), 50 N. W. Rep 857; *and* Snell *v.* Brown, 71 Ill. 133; Hulle *v.* Heightman, 2 East. 145; Moulton *v.* Trask, 9 Met. 577.

[2] Sullivan *v.* N. Y. & R. C. Co. (N. Y.), 23 N. E. Rep. 830.

[3] Curnan *v.* Del. & O. R. Co., *supra.*

[4] Vicksburg Water Supply Co. *v.* Gorman (Miss.), 11 So. Rep. 680.

[5] Snell *v.* Brown, 71 Ill. 133.

[6] Menne *v.* Neumeister, 25 Mo. App. 300; *see* White *v.* Soto, 82 Cal. 654; McFadden *v.* O'Donnell, 18 Cal. 160.

[7] Thompson *v.* Lyons, 54 N. Y. Super. Ct. 101.

[8] Monon Nav. Co. *v.* Fenlon, 4 Watts & S. 209.

[9] McGonigle *v.* Klein (Colo. App.), 40 Pac. Rep. 465.

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and upon neglect to give the further notice in a positive form not to construct within the time named, the contractor had a right to go on with the work.[1] A suspension of work under a contract for a length of time prohibited by its terms, when rendered excusable by act of God, is not a breach of the contract, and the other party is not thereby justified in terminating it.[2] Ordinarily if work is suspended until after the time for its completion by order of the owner, the contractor is released from his obligation to complete the work, and he may sue for the breach of the contract by the owner.[3] In a case where the president of a company owned nearly all the stock, and furnished all the money to build the road, and he and his private secretary, who was also secretary of the company, attended to all its business, a letter to a contractor written by the secretary on the death of the president saying that the president's executor desired the work suspended, constitutes a suspension by the company, especially when the company made no demand on the contractor to proceed.[4]

A provision that in case the company is delayed in acquiring title to lands, or for other reasons, the contractor shall not be entitled to damages therefor, but shall have an extension of time, does not apply to delay caused by company in failing to have a survey made for the work.[5] If a contractor promptly protests against a decision of the other party in suspending work or putting an unwarranted construction upon the contract, he saves his right to damages.[6]* The contractor is not bound when he receives an order suspending the work to either acquiesce or throw up the contract. He may notify the other party that he objects and holds him liable for the hinderance.[6] Rescission of the contract is a right of which the contractor may avail himself, but he is not bound to rescind. If the builder continue the work notwithstanding an order suspending it, and the company ultimately has the benefit of it, it is liable for it at the contract price.[6]

685. Breach of Contract when there are Several Joint Parties.—One of several joint contractors cannot rescind the contract unless the others assent to it.[7] Nor can a contract be rescinded by the husband alone when he and his wife are united as one party.[8] A recent case is authority for the statement that when the contract is with several persons to erect a building for them, and one only of them refuses to carry out the contract, and the contract is entire, the refusal of the one releases the contractor from liability to the others if he should not carry out the contract;[9] that the contractor

[1] Gill Mfg. Co. v. Hurd, 18 Fed. Rep. 673.
[2] Asplund v. Mattson (Wash.), 46 Pac. Rep. 341.
[3] Kugler v. Wiseman, 20 Ohio 361.
[4] Curnan v. Delaware & O. R. Co. (N. Y. App.), 34 N. E. Rep. 201.
[5] O'Connor v. Smith (Tex.), 19 S. W. Rep. 168 [1892].
[6] Roettinger v. United States, 26 U. S. Ct. of Cl. 391 [1891].
[7] Brewster v. Wooster, 9 N. Y. Supp. 312.
[8] Spencer v. St. Clair, 57 N. H. 9.
[9] Davis v. Bronson (N. D.), 50 N. W. Rep. 836.

* *See* Secs. 578–581, *supra*.

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cannot proceed with the erection, and recover therefor, because the refusal of one owner to perform releases the contractor from liability to the other owners.[1] The discharge of a builder by one of a board of school trustees, who has been selected to superintend the work, without knowledge or consent of the other trustees, will rescind the contract of employment.[2]

686. Failure to Make Specific Payments when Due, a Breach of Contract.—When by the terms of the contract payments are to be made by the owner at stated periods or at specific stages of the work as it progresses, a failure to meet the payments or to pay the estimate is such a breach of the contract on the part of the owner as will justify the contractor in abandoning the work[3] and rescinding the contract.[4] When payment is to be made upon completion of specific stages of the work the payment is a condition precedent to the further prosecution of the work.[5] A refusal by contractor to proceed with the work, until the last installment due is paid, is not a breach on his part.[6] The fact that the contractor has not obtained the monthly estimate and certificate will not excuse the owner from making stipulated monthly payments, as the estimate of the engineer is solely for the benefit of the owner.[7] It seems the contractor should ask for an estimate, and demand the payment.*

687. Provision that Failure to Make Stipulated Payments shall not be a Just Cause for Rescission.—To prevent such a rescission by the contractor the following clause is sometimes employed:

> Clause: "Nor shall any omission or failure on the part of the owner or company to pay the amount of such certificate or monthly payment at the time the same shall be payable be held or deemed to vitiate, abrogate, or avoid this contract, but in such case the contractors shall be entitled to interest thereon at and after the day it is due, at the rate of ten per cent. (10%) per annum for such time as such payment shall be deferred or delayed."

If a contract provide that work shall be estimated and paid for in installments, and a certain per cent. is reserved as liquidated damages or security for full performance of the contract, and payments have not been made as

[1] Davis *v.* Bronson (N. D.), 50 N. W. Rep. 836; *semble*, Brodeck *v.* Farnum (Wash.), 40 Pac. Rep. 189.

[2] Scofield *v.* McGregor, 1 Thomp. & C. (N. Y.) 404.

[3] Cunningham *v.* M. S. & Ft. C. R. Co., 18 N. Y. Supp. 600 [1892]; Lincoln *v.* Schwartz, 70 Ill. 134 [1873]; Canal Co. *v.* Gordon, 6 Wall 561 [1867]; Geary *v.* Bangs, 138 Ill. 77; Scheible *v.* Klein (Mich.), 50 N. W. Rep. 857; DeLoache *v.* Smith (Ga.), 10 S. E. Rep. 436; Grand Rapids R. Co. *v.* Van Dusen, 29 Mich 431; Hunter *v.* Walter (N. Y. App.), 29 N. E. Rep. 145; Schwartz *v.* Sanders, 46 Ill. 18; Miller *v.* Sullivan (Tex.), 33 S. W. Rep. 695; Phillips & C. C. Co. *v.* Seymour, 91 U. S. 646; Bennett *v.* Shaughnessy, 6 Utah 273 [1889]; Keeler *v.* Clifford (Ill.), 46 N. E. Rep 248.

[4] Porter *v* Arrowhead Res. Co., 35 Pac. Rep. 146; Palmer *v.* Breen, 34 Minn. 39; Jones *v.* Judd, 4 N. Y. 412 [1850]; 29 Amer. & Eng. Ency. Law 912, *and see* County of Ch. *v.* Oveholt, 18 Ill 223.

[5] Bennett *v.* Shaughnessy, 6 Utah 273 [1889].

[6] Raabe *v* Squier (N. Y. App.), 42 N. E Rep 516; Johnson *v.* Tyng (Sup.), 37 N. Y. Supp. 516.

[7] Rusling *v.* Union Pipe & Const. Co. (Sup.), 39 N. Y. Supp. 216.

* *See* Sec. 414, *supra.*

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agreed, the contractor may recover the full amount of such installments earned and unpaid, together with the per cent. reserved on all the work done,[1] and without regard to what it cost the owner to complete the job,[2] and regardless of what the work is worth to the owner.[3] This is so notwithstanding a provision for the rate of interest which the deferred payment should bear in case of failure to meet monthly payments,[4] or a provision for a supplementary agreement to be executed which would have limited the liability of the promisor to protecting the structure against liens.[5]

It seems the contractor may act upon the failure to make payments, and treat the contract as broken the same day that the owner fails or refuses to meet his obligations to pay.[6] If, however, the contractor has failed to perform the conditions that entitle him to payment, for which reasons the owner refused to make the payment, such refusal does not rescind the contract so as to preclude the owner from proceeding against the sureties.[7]

The fact that the contractor has been dilatory in the work from the beginning does not entitle the owner to refuse to pay an installment which is fully earned, and to terminate the contract as for a breach, when the owner has acquiesced in the delay up to the time the installment was due.[8] The fact that a party has not performed his contract even according to its legal effect does not necessarily entitle the other party to rescission, if either or both have partly performed, and circumstances of embarrassment have thereby arisen which make it impracticable to restore the parties to their original status.[9]* It is not every partial neglect or refusal to comply with some of the terms of the contract which will entitle the other party to abandon the contract. To justify an abandonment the object of the contract must have been defeated or rendered unattainable by the misconduct or default of the party.[10]

Some of the cases hold that the nonpayment must amount to a refusal or be under such circumstances as to warrant the belief that the contractor was prevented from completing the contract.[11] He must, it seems, be justified in abandoning the work. A contract providing that payments should be made on estimates as the work progressed, implies that the estimates shall be made at reasonable intervals as the work progresses at the con-

[1] Phillips & C. C. Co *v.* Seymour, 91 U. S. 646; Schwartz *v.* Sanders, 46 Ill. 18; Curnan *v.* Del. & O. R. Co. (N. Y. App.), 34 N. E. Rep. 201; Dunn *v.* Johnson, 33 Ind. 54; Hill *v.* Hovey, 26 Vt. 109.

[2] Phillips & C. C. Co. *v.* Seymour, *supra;* Thomas *v.* Stewart (N. Y. App.), 30 N. E. Rep. 577.

[3] Money *v.* York Iron Co. (Mich.), 46 N. W. Rep. 376 [1890].

[4] Canal Co. *v.* Gordon, 6 Wall. 561 [1867].

[5] Thompson *v.* Goble, 16 Pac. Rep. 718 [1888].

[6] Canal Co. *v.* Gordon, 6 Wall. 561 [1867]; *but see* Cox *v.* McLaughlin, 76 Cal. 60.

[7] Casey *v.* Gunn, 29 Mo. App. 14; *semble*, Raabe *v.* Squier (N. Y. App.), 42 N. E. Rep. 516.

[8] Smith *v.* Corn, 23 N. Y. Supp. 326; *and see* Kilgore *v.* N. W. Baptist Ed. Soc. (Tex. Sup.), 37 S. W. Rep. 598.

[9] Blake *v.* Pine Mountain Iron & Coal Co (C. C. A.), 76 Fed. Rep. 620.

[10] Selby *v.* Hutchinson, 4 Gilm. 319; Young *v.* Preston, 4 Cranch 239; Andrews *v.* Montgomery 19 Johns. 205.

[11] Wilson *v.* Bauman, 80 Ill. 493 [1875].

* *See* Sec. 681, *supra.*

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tractor's request, so that, on the landowner's refusal to make the estimates in that manner after demand, and to make payments, the contractor was warranted in refusing to complete the contract.[1] When the contract provides that if the contractor fail to pay for labor and materials, the owner may refuse to pay installments, otherwise payable, such refusal is no proof of the abandonment of the contract, nor is the fact that the owner has had the work done when the contractor has refused to finish it.[2]

To claim prospective profits that contractor would have earned had he completed the contract, there are cases to the effect that either performance must have been made dependent on such payments being made, or the non-payment and other acts must have prevented the contractor's performance.[3] There are several decisions which are authority for the statement that a failure to make a specific payment will not permit the contractor to recover the contract prices for work done, nor the profits he would have made had he completed work, but that his recovery should be upon a *quantum meruit* for the value of the work actually done. The court said:[4] "A failure to make a specified payment does not authorize a contractor to abandon the work and sue on the contract, but he may have an action for damages. It does not terminate the contract or authorize the contractor to rescind the contract. Where it is known that the party in default is struggling to perform, it is as unreasonable as it is unjust, to conclude from a temporary failure to perform that he consents to a rescission. A total failure of performance, which indicates a disposition to abandon the contract or a refusal to go on with it, may be considered as a consent to a rescission."

Other cases hold that in order to justify a contractor in abandoning further performance and suing for future profits, it is not sufficient that the other party has broken substantial provisions of the contract and manifests an intention to continue such breaches, but it must also be shown that the breaches prevented the innocent party from executing the contract, or rendered its objects unattainable by proper performance.[5] When an owner

[1] Newton *v.* Highland Imp. Co. (Minn.), 64 N. W. Rep. 1146.

[2] Casey *v.* Gunn, 29 Mo. App. 14.

[3] Wharton & Co. *v.* Winch, 19 N. Y. Supp. 477; *reversed in* (N. Y. App.), 35 N. E. Rep. 589.

[4] Cox *v.* McLoughlin, 54 Cal. 605, *and* 76 Cal 60 [1888].

[5] Lake Shore & M. S Ry. Co. *v.* Richards (Ill.). 32 N. E Rep 402, 40 Ill. App. 560; *reversed;* William Wharton & Co. *v.* Winch (Com. Pl.), 19 N. Y. Supp. 477; *accord,* Cox *v.* McLaughlin, 76 Cal. 60; Christian Co. *v.* Overholt, 18 Ill. 223; Bethel *v.* Salem Imp. Co. (Va.), 25 S. E. Rep. 304; *and see* Graf *v.* Cunningham (N. Y.), 16 N. E. Rep. 551 [1888]; *semble,* Watson *v.* Gray's Harb. B. Co. (Wash.), 28 Pac. Rep. 527; *and semble,* Quinn *v.* United States, 99 U. S. 30 [1878]; *semble,* McGonigle *v.* Klein (Colo. App.), 40 Pac. Rep. 465; Fairfield *v.* Jeffreys, 68 Ind. 578; Chapman *v.* Deane, 34 Mich. 375; Bergen *v.* New Orleans, 35 La. 523; *but see* De Mattos *v.* Jordan (Wash.), 46 Pac. Rep 402. The Illinois case was subsequently overruled, the court holding that where one party to a contract violates some of its substantial provisions, so as to deprive the other party of the benefits of the contract and manifests an intention to continue such breaches, the other party may abandon further performance of the contract and sue for future profits, although such breaches did not amount to a physical obstruction or prevention of performance by such other party. Lake Shore & M. S Ry. Co. *v.* Richards (Ill. Sup.), 38 N. E. Rep. 773.

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notified the contractor that if he did not complete a structure he (the owner) should, at the expiration of three days, complete it himself, and the contractor informed the owner that he would proceed as soon as he could obtain certain materials, and afterwards the contractor notified the owner that he could not secure the materials, but that if the owner could get them elsewhere he would send men to finish the building, it was held that the contractor remain in charge of the building, and was responsible for its proper construction.[1]

To be entitled to prospective profits it seems that the contractor must have abandoned the contract in its entirety. Whether he did or has so abandoned it, is a question for the jury.[2]

If the contractor acknowledge his inability to proceed with the contract, it has been held not necessary for the owner to demand a performance before suing for the breach.[3] If either party, by his words or conduct, shows a fixed intention to abandon it, the other party is justified in treating it as abandoned,[4] and the latter may bring his action though the time for completion has not arrived, if the party in default disregards the terms of his contract and refuses to fulfill his agreement.[5] His failure to perform need not have been wilful, it seems.[6]

688. Abusive Conduct of Owner may be a Just Cause for Abandonment by Contractor.—It has been held that a contractor may at his option continue work, or abandon it and recover for what he has done, where he has asked for money and has been told "to go on with the work or leave the building," he having left.[7] But when the owner told the contractor, "If you won't go on with your work, go away!" when he was complaining of unnecessary delay on part of owner in supplying materials, it was held not to amount to a rescission of contract.[8] Abusive conduct, threats, and an assault by the owner, accompanied with an order "never to come upon the works again," was held to justify an abandonment of the work by the contractor and a recovery for what was done, even though the contractor was ordered by the owner to complete the works.[9] Where a contract provides that a certain payment should be made when the work is completed, and the contractor was delayed in his work by the delay of another independent contractor's work which was to be done first, and the contractor used all diligence in prosecuting the work after it was possible for him to do so, and went pre-

[1] Washburn *v.* Dettinger (Sup.), 27 N. Y. Supp. 540.

[2] Wm. Wharton & Co. *v.* Winch (N. Y. App.), 35 N. E. Rep. 589.

[3] Dwyer *v.* Tulane Ed. Fund's Admr's. (La.), 17 So. Rep. 796; *but see* Clark *v.* Nat. Ben. & Cas. Co. (C. C.), 67 Fed. Rep. 222, *contra; and see* Davidson *v.* Jersey Co. Ass'n., 71 N. Y. 333.

[4] Kilgore *v.* Northwest Tex. Baptist Ed. Soc. (Tex.), 37 S. W. Rep. 473.

[5] Sloss Marblehead L. Co. *v.* Smith, 11 Ohio Cir. Ct. Rep. 213.

[6] Bacon *v.* Green (Fla.), 18 So. Rep. 870.

[7] Clayton, *et al.*, *v.* McConnell, 14 Ont. Rep. 608 [1887].

[8] Clayton *v.* McConnell, 15 Ont. App. 560 [1888]; *following* Midland R. Co *v.* Ontario R. M Co., 10 Ont App. 677.

[9] Sprocsig *v.* Kentel, 17 N. Y. Supp. 839.

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pared to finish the job, but was ordered off by the owner, who had put other men on the work, it was held a substantial compliance, and to entitle the contractor to his payment.[1]

If the owner has once given the contractor just cause for rescinding the contract, and the latter has not again taken up the work as if under the contract, the owner cannot bring him back under its terms by giving him notice, written or otherwise, to proceed with the work. Such a notice does not effect the contractor's right to take advantage of the owner's breach and to recover damages for it if he has *not* resumed work under it or in obedience to it.[2]

It has been held that a refusal to grant an extension of time for performance of a contract rescinded the contract, when the election to rescind within a certain time was reserved to either party by the terms of the contract.[3]

689. Neglect or Refusal of Owner to Provide Materials, Labor, Lines, Levels, Plans, Site, or Permits, as He Agreed to Do, may be a Cause for Abandonment by the Contractor.*—If the owner has agreed to furnish certain essential parts or things to the contractor, and he fails or refuses to provide them pursuant to his contract, such failure or refusal may justify the contractor in abandoning the job.[4] It was so held when the owner neglected to furnish well-seasoned boards for flooring as they were wanted, which the contractor was to lay. The contractor having abandoned the job, it was held he could recover for what work he had done; that there was a condition precedent to performance that the boards should be furnished as they were wanted, and that when the owner had means of knowing when the boards would be wanted, that the contractor was under no obligation to make a special demand for the materials.[5] So when a contractor was to paint a house for a certain sum, the materials to be supplied by the owner, who neglected to furnish more materials when the paint gave out, it was held he could recover compensation, as for day work.[6]

The state is equally liable with a person for its failure to have other contractors provide work or materials, and for acts and negligence of state agents and officers.[7] If the contractor is to furnish the labor but not

[1] Highton *v.* Dessau (Com. Pl.), 19 N. Y. Supp. 395; Current *v.* Fulton (Ind. App.), 38 N. E. Rep. 419.

[2] Rayburn *v.* Comstock (Mich.), 45 N. W. Rep. 378 [1890]; Sproessig *v.* Kental, 17 N. Y. Supp. 839; *semble*, Graf *v* Cunningham (N. Y.), 10 N. E. Rep. 551 [1888].

[3] Thayer *v* Allison, 109 Ill. 180.

[4] Hill *v* Hovey, *et al.*, 26 Vt. 109 [1853]; Bennett *v.* Shaughnessy, 6 Utah 273 [1889]; McCullough *v.* Baker, 47 Mo. 401; Fitzgerald *v.* Hayward, 50 Mo. 516.

[5] Hill *v.* Hovey, 26 Vt. 109; *and see* Greene *v.* Haley, 5 R. I. 260, *and* Hollister *v.* Mott, 132 N. Y. 18; *but see* Scales *v.* Wiley (Vt.), 33 Atl. Rep. 771

[6] Cargain *v* Everett (Sup.), 16 N. Y. Supp. 688; Palmer *v.* Breen, 24 N W. Rep. 322; *accord*, Anderson E. Co. *v.* Cleburne W. I. & L. Co. (Tex.), 27 S. W. Rep. 504.

[7] State *v.* Farrish, 23 Miss. 483; United States *v.* Mueller, 113 U. S. 153.

* *See* Secs. 324, 326, 439, 440, and 674–680, *supra*.

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materials, and nothing is said as to who shall furnish the materials, the owner must provide the materials.[1]

If the owner fails to get the necessary permits to move or erect a building in a city, he is nevertheless liable to the contractor for his services rendered in preparing or trying to carry out his contract.[2] When the owner has failed to furnish the requisite plans and specifications according to his agreement, the contractor need not demand further specifications nor deliver the balance of the materials to recover for the breach.[3]

It seems that when the owner fails or refuses to perform the undertakings he has assumed and which are requisite to the completion of the contractor's agreement, that the latter may himself furnish the same or other means of performing his contract, even against the owner's will and wishes, and that he may recover the expense of such extras. Under such circumstances it was held that a contractor could recover for scaffolding erected about a water-tower, the owner having failed to perform his agreement to keep the water in the tower at any height desired by the contractor, so that he could work on a float inside the tower.[4] A contractor was held entitled to recover sums paid for engineering, which the company was to pay for or provide by the terms of the contract.[5] If the contractor cannot provide the things or information which the owner was to supply, he may omit so much and recover the contract price, less the cost of applying or fitting the things which the owner failed to supply.[6]

If the owner fails to furnish materials per contract at proper time, the contractor is entitled to damages for the delay, even though he has continued the work to completion.[7] Whether or not the contract was upon a condition that the owner should give lines and grades for the work has been held a proper question for a jury.[8]

The fact that a contractor was prevented from appropriating, to his own use, certain materials of excavation under a contract for the construction of

[1] Perine *v.* Standfield (Mich.), 65 N. W. Rep. 541.

[2] Theobald *v.* Burleigh (N. H.), 23 N. E. Rep. 367 [1891]; *and see* Lanahan *v.* Heaver (Md.), 29 Atl. Rep. 1036, *and* Thorp *v.* Ross, 4 Abb. App. Dec. (N. Y.), 416, *and* Deeves *v.* New York (Super. Ct.), 17 N. Y. Supp. 460.

[3] DeLoache *v.* Smith (Ga.), 10 S. E. Rep. 436; Wood *v.* Malone, 131 Pa. St. 554; Roberts *v.* Bury Commrs., L. R. 4 C. P. 310, *and* 5 C. P. 325; *and see* Benner *v.* Phœnix F. & T. Co. (Sup.), 30 N. Y. Supp. 290, where owner was to make improvements; Weeks *v.* Little, 89 N. Y. 566; Van Buren *v.* Digges, 11 How. (U. S.), 461; McAndrews *v.* Tippetts, 39 N. J. Law 105; Smith *v.* Roe, 7 Col. 95; Sinnott *v.* Mullin, 82 Pa. St. 333.

[4] Nason Mfg. Co. *v.* Stephens, 50 Hun 606 [1888]; *but see* Thorp *v.* Ross, 4 Keyes (N. Y.), 546.

[5] Central Trust Co. *v.* Condon (C. C. A.), 67 Fed. Rep. 84. For grading the location of a structure, Becker *v.* Natl. Prohib. Park Co. (Sup.), 23 N. Y. Supp. 380.

[6] Eastern Granite Co. *v.* Heim (Ia.), 57 N. W. Rep. 437; Louisville & N. R. Co. *v.* Hollerbach, 3 West. Rep. 364.

[7] Tobey *v.* Price, 75 Ill. 645 [1874]; *and see* Grannis Lumber Co. *v.* Deeves (Sup.), 25 N. Y. Supp. 375; *and* Hood *v.* Raines, 19 Tex. 400; Bulkley *v.* Brainard, 2 Root (Conn.) 5; *and see* Blanchard *v.* Blackstone, 102 Mass. 343, where the site of a structure was not selected.

[8] Hammond *v.* Beeson (Mo.), 20 S. W. Rep. 474; *and see* O'Connor *v.* Smith, 84 Tex. 232, where subcontractor was delayed by owner's failure to have surveys made, *and* White *v.* School District (Pa.), 28 Atl. Rep. 136.

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sewers, a portion of which ran through private property, will not entitle the contractor to rescind his contract, as the right to the stone did not accrue until the work was completed.[1] If the owner contracts for the carpentry work upon a building, the same to proceed forthwith without delay, he must have the building ready for the carpenter within a reasonable time, or compensate him in damages for the delay.[2]

Delay caused by the owner's inspector rejecting (in good faith) materials which he considered were not according to specifications, under a power conferred by the contract, is not chargeable to the owner or company.[3]

An injunction restraining the contractor from performing his contract will excuse non-performance if the injunction is not dissolved in time for him to proceed with the work;[4] * but it will give the contractor no right to damages against the owner unless the jury find that the owner failed to use reasonable diligence in getting the injunction removed.[5] If, however, the contractor has been enjoined from moving a house by a third party with notice of the the contract and the then position of the house on a beach, he may recover, as damages, the value of his time thereby lost, the wages of men for such extra time as he was obliged to pay them on account thereof, the expense of protecting the house from the sea, and the value of apparatus lost by high tide, without fault of his, while protecting it, together with the profits which he would have made but for the injunction.[6]

690. Measure of Recovery when Contractor has been Prevented from Performing His Contract — Two Lines of Action He may Pursue.— If the contractor has been prevented or excused from a full performance of his contract by the orders or conduct of the other party, he may, in his discretion, either elect to consider the contract rescinded, and recover on the common counts for the value of the work and materials he has furnished, *i. e.*, on a *quantum meruit*,[7] *i.e.*, for its reasonable value, though it be in excess of the

[1] Becker *v.* Philadelphia (Pa.), 16 Atl. Rep. 625 [1889]; *and see* Saug *v.* Duluth (Minn.), 59 N. W. Rep. 878.

[2] Thorp *v.* Ross, 4 Keyes (N. Y.) 546; Allamon *v.* Albany, 43 Barb. (N. Y.) 33; Tobey *v.* Price, 75 Ill. 645, *mason work;* Schwartz *v.* Saunders, 46 Ill. 18; Mansfield *v.* N. Y. C. R. R. Co., 102 N. Y. 205.

[3] Montgomery *v.* New York (Super.), 29 N. Y. Supp. 687; *accord*, White *v.* School Dist. (Pa.), 28 Atl. Rep. 136.

[4] Burkhardt *v.* Georgia School Tp. (S. D.), 69 N. W. Rep. 16. The same will hold if own r prevent contractor from doing work. Wills *v.* Webster (Sup.), 37 N. Y. Supp 354; Whitfield *v.* Zellnor, 2 Cushman (Miss.) 663; *and see* Heme *v.* Meyer, 61 N. Y. 171; Jones *v.* Judd, 4 N. Y 412.

[5] Phila., etc., R. Co. *v.* Howard, 13 How. 307; Mathewson *v.* Grand Rapids (Mich.), 50 N. W. Rep. 656.

[6] Galveston City R. Co. *v.* Miller (Tex.), 38 S. W. Rep 1132.

[7] Hunter *v.* Walter (N. Y. App.), 29 N. E. Rep. 145; *affirming* 12 N. Y. Supp. 60; Porter *v.* Arrowhead Res. Co. (Cal.), 35 Pac. Rep. 146; Simmons *v.* Lawrence, 133 Mass. 298; Fox *v.* Burchard, 130 Mass. 424; Canal Co. *v.* Gordon, 6 Wall. 561 [1867]; Belshaw *v.* Colie, 1 E. D. Smith 213 [1851]; Kelley *v.* Rowane, 33 Mo. App. 440 [1889]; Caldwell *v.* Meyers (S. D.), 51 N. W. Rep 210 [1892]; Fitzgerald *v* Hayward, 50 Mo 416; Jones *v.* Judd, 4 N. Y. 412; Ehrlich *v* Ætna Ins Co., 4 West. Rep 40; Ahern *v.* Boyce, 2 West Rep. 405; McElwee *v.* Bridgeport Ld. Co., 54 Fed. Rep. 627; Clark *v* Mayor, etc., 4 N. Y. 338 [1850]; Adams *v.* Burbank (Cal.), 37 Pac. Rep. 640; *other cases*, 29 Amer. & Eng. Ency. Law 903; Byron *v.* Mayor, 54 N. Y. Super. Ct. 411 [1827], which held

* *See* Sec. 556, *supra.*

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contract rate;[1] or he may sue upon the contract and recover for the work he has completed at the contract prices, and in addition, the profits he would have made if he had been allowed to complete the work, and any other losses sustained by the breach.[2]

691. Contractor must Follow the Line of Action Adopted — He cannot Adopt Contract and at Same Time Repudiate It.—A breach of the contract by the owner, if it goes to the essence of the contract, does away with the contract entirely if the contractor so elect. If the contract prices and terms are in the contractor's favor he will be likely to bring an action for damages for its breach, and if the prices in the contract are low, and its requirements a burden, he will of course take advantage of the company's breach and bring suit to recover for the actual value of his work and materials, treating the contract as rescinded. He can adopt either mode of redress, but he cannot employ both. "He cannot affirm the contract for one purpose and repudiate it for another."[3]

When the contractor is prevented from completing his contract by an unauthorized declaration of a forfeiture, the value of the work done and materials furnished by him under the contract must be fixed by the prices and stipulations of that contract as far as they can be applied, and he cannot proceed upon a *quantum meruit* or *quantum valebat* in disregard of the special contract.[4] If the contract itself furnish no rule or schedule by which the value of work done can be determined, then the contractor may recover for its reasonable value.[5]

If the contractor is compelled to abandon the work in consequence of obstacles and embarrassment and delays, the rule that the special contract

that a defense that the contractor had not obtained the engineer's certificate as required by the contract could not be set up.

[1] Hemminger *v.* Western Assur. Co. (Mich.), 54 N. W. Rep. 949; Clark *v.* Mayor, etc., of New York, 4 N. Y. 338 [1850]. Nor will the contractor's claim be restricted to what is coming to him by the final estimate of the engineer The Memphis, etc., R. Co. *v.* Wilcox, 48 Pa. St 161 [1864]; *semble*. Tennessee, etc., R. Co. *v.* Danforth (Ala.) 13 So. Rep. 51 [1893]; or he may recover less than the contract price, if his work is not reasonably worth it. Allen *v.* McKibben, 5 Mich 449

[2] Jones *v.* Judd, 4 N. Y 412; Gibbons *v.* Bente (Minn.), 53 N W Rep. 756; Phillips Co *v.* Seymour, 91 U. S. 646; Windmuller *v.* Pope (N. Y.), 14 N E Rep 436 [1888]; McEwee *v.* Bridgeport Ld. & Imp. Co., 54 Fed. Rep 627; Gostlin *v.* Weeks (Ind. App.), 28 N. E Rep. 331 [1891]; Danforth *v.* Tennessee & C. R. Co (Ala.), 11 So. Rep. 60; Nourse *v.* United States, 25 Ct. of Cl. 7; Wilson *v.* Bauman, 80 Ill 493; Webster *v.* Enfield, 5 Gilm. 300; Selby *v.* Hutchinson, 4 Gilm. 319, Olson *v.* Nonenmacher (Minn.), 65 N. W. Rep. 642; Potts *v.* Pt. Pleasant Ld. Co. (N. J.), 8 Atl. Rep. 109 [1887]; Clark *v.* Mayor, etc., 4 N. Y. 338 [1850]; Heine *v.* Mayor, 61 N. Y. 171 [1874].

[3] Byron *v.* Low (N. Y. App.), 16 N. E. Rep. 45 [1888]; *compare* Dutch *v.* Warren, Keener's Cases of *Quasi* Contracts 61.

[4] City of Chicago *v.* Sexton, 115 Ill. 230 [1885]; Meyer *v.* Hallock, 2 Robt. (N. Y.) 284; Clark *v.* Scanlan, 36 Ill. App. 48 [1888]; Koon *v.* Greenman, 7 Wend. (N. Y.) 121; *and see* Lincoln *v.* Schwartz, 70 Ill. 134 [1873]; Chambers *v.* King, 8 Mo. 517; McCausland *v.* Cresap. 3 G. Gr (Ia.) 161; Hayden *v.* Madison, 7 Me. 76; Walsh *v.* Jenney (Md.), 36 Atl. Rep. 817; Sands *v.* Potter (Ill. Sup.), 46 W. E. Rep. 282; Kocher *v.* Mayberry (Tex.), 39 S. W. Rep. 604 [1897].

[5] Lincoln *v.* Shwartz, 70 Ill. 134; *but see* Fladung *v.* Dawson (Cal.), 43 Pac. Rep. 1107.

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rate must control the amount of recovery no longer prevails, and the contractor is entitled to the actual value of his work.[1]

If the contractor has elected to consider the contract rescinded [broken] by the owner or company and brings his action for labor and materials generally, he cannot recover prospective profits on the unexecuted part of the contract, he can recover the reasonable value of the work and materials furnished and no more.[2] The general rule of recovery when deviations and alterations are made is the contract price.[3]* The contract is admissible in evidence as proof of the value of the work, but is not conclusive on that point.[4]

When the contractor has elected to sue upon the contract he cannot recover on a *quantum meruit* for the reasonable value of his labor and materials.[5] He cannot show the actual value of the work done,[6] nor can he show the performance of the contract was waived, he must win or lose upon the contract sued on,[7] unless the court permit an amended complaint to be filed.[8]

If the contractor has ignored the contract and brought suit for the value of the work and materials furnished on the common counts, his recovery will be confined to the actual or reasonable value of what he has done under the contract; he cannot introduce evidence of a contract to do the work, etc., for a fixed amount.[9] If the owner prove a special contract and that there was no breach when the contractor has declared generally for labor and materials, he cannot recover,[10] unless the court allows him to amend his complaint.[11] If contractor has sued on a *quantum meruit* for work fully performed under an express contract, the owner cannot for the first time, on appeal, object to the form of the action.[12]

As heretofore explained, when the contractor has been refused the right to complete his contract, or the progress of the work has been interrupted arbitrarily by the owner, the measure of recovery for the breach

[1] Doughty *v.* O'Donnell, 4 Daly (N. Y.) 60; *and see* Kearney *v.* Doyle, 22 Mich. 294; Ehrlich *v.* Ætna, 15 Mo. App. 552, 88 Mo. 249; McCullough *v.* Baker, 47 Mo. 401; Stowe *v.* Buttrick, 125 Mass. 449; Tilden *v.* Besley, 42 Mich. 100; Planche *v.* Colburn, 8 Bing. 14; Lawson *v.* Wallesey, etc., 48 L. T. 507; Allen *v.* McKibben, 5 Mich. 449.

[2] Clark *v.* Mayor, etc., 4 N. Y. 338 [1850].

[3] Wilson *v.* Bauman, 80 Ill. 493 [1875].

[4] Adams *v.* Burbank (Cal.), 37 Pac. Rep. 640; *but see* Imhoff *v.* House (Neb.), 53 N. W. Rep. 1032; *and see* Folliot *v.* Hunt, 21 Ill. 654; Fitzgerald *v.* Hayward, 50 Mo. 516; Kelly *v.* Rowane, 33 Mo. App. 440.

[5] Warson *v.* McElroy, 33 Mo. App. 553 [1889]; Coudran *v.* New Orleans (La.) 9 So. Rep. 31; Fresh *v.* Gilson, 5 Cranch C. C. 533 [1838].

[6] Gibney *v.* Turner (Ark.), 12 S. W. Rep. 201 [1889]; Seibert *v.* Householder (Pa.), 10 Atl. Rep. 784 [1887].

[7] Fauble *v.* Davis, 48 Ia. 462 [1878]; *semble*, Carter *v.* Gordon (Ind.), 23 N. E. Rep. 268; *and see* Rathbun *v.* Thurston Co., 8 Wash. 238; Price *v.* Price's Exec'r (Ky.), 39 S. W. Rep. 429.

[8] Cox *v.* McLaughlin, 76 Cal. 60.

[9] Imhof *v.* House (Neb.), 53 N. W. Rep. 1032.

[10] Willis *v.* Melville, 19 La. Ann. 13 [1867]; Murphy *v.* Taylor (Pa. Sup.), 33 Atl. Rep. 104.

[11] Cox *v.* McLaughlin, *supra* (Cal.), 18 Pac. Rep. 100 [1888]; *semble*, Robinson *v.* Parish, 62 Ill. 130 [1871].

[12] Gillies *v.* Manhattan B. Imp. Co. (N. Y. App.), 42 N. E. Rep. 196.

* *See* Extra Work, Secs. 569–576, *supra*.

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of the contract is: (1) The value of the work and materials already furnished at the contract prices.[1] (2) Any loss or damages he has suffered on labor, materials, or subcontracts, engaged or entered into for the performance of the contract.[2] (3) Any extra materials and labor he has furnished at the request of the owner or with his knowledge and consent, outside of the special contract. (4) Such profits as he would, with reasonable certainty,[3] have made had he completed the contract.[4] Briefly stated, the rule is recompense to the contractor for the part performance, and indemnity for his loss in respect to the part unexecuted.[5]

The measure of damages has been held the difference between the contract price and the amount it would have cost the contractor to perform the contract, including as a part of such cost the reasonable value of the time he would have used.[6] It seems that the attorney's fees expended in an injunction suit to remove a barrier to the work cannot be recovered as an item of damages.[7]

692. Work only Partly Performed, which was to be Completed for a Lump Sum.—If the whole work has been undertaken for a lump sum, to be paid on completion, the contractor may recover for what he has done, such a proportional part of the whole contract price as the work and materials furnished bears to the whole work to be done, under the contract.[8] The fact that the work performed is easier and less expensive than that which remains is no ground for a reduction of the amount to be paid.[9]* Another court makes the measure of recovery such a proportion of the entire price as the *fair cost* of the work done bears to the *fair cost* of the whole work,[10] which rule avoids the question of whether the work done was less or more expensive than what remains to be done. †

693. Recovery of Expenses Incident to Preparation to Undertake Work.—The second item of recovery includes any loss the contractor has incurred to provide means for furnishing or doing the unexecuted part of the work.[11]

[1] Taylor *v.* Saxe (N. Y. App.), 31 N. E. Rep. 258; Wilson *v.* Bauman, 80 Ill. 493 [1875].

[2] Van Dorn *v.* Mengedoht (Neb.), 59 N. W. Rep. 800; *semble*, King *v.* Des Moines (Iowa), 68 N. W. Rep. 708; Taylor *v.* Saxe (N. Y. App.), 31 N. E. Rep. 258.

[3] Tennessee & C. R. Co. *v.* Danforth (Ala.) 18 So. Rep. 51.

[4] Allphin *v.* Working (Ill.), 34 N. E. Rep. 54 [1890]; Roberts *v.* Drehmer (Neb.), 59 N. W. Rep. 911.

[5] Upstone *v.* Weir, 54 Cal. 124 [1880]; *and see* Cutter *v.* Powell, 2 Sm. Leading Cas. (H. & W. *notes*) 44; Lawson *v.* Wallasey, etc., 48 L. T. 507; Hale *v.* Johnson, 6 Kans. 137.

[6] Joske *v.* Pleasants (Tex. Civ. App.), 39 S. W. 586 [1897].

[7] Burruss *v.* Hines (Va.), 26 S. E. Rep. 875 [1897].

[8] Upstone *v.* Weir, 54 Cal. 124 [1880]; Thomas *v.* L'Hote, 23 La. Ann. 73, *when contractor was dead; and see* Planche *v.* Colburn, 8 Bing. 14; "Contract price" is the price agreed upon less the proper deductions for delay, etc. Johnson *v.* White (Tex.), 27 S. W. Rep. 174.

[9] Jones *v.* Judd, 4 N. Y. 412 [1850], *a strong dissenting vote.*

[10] Kehoe *v.* Rutherford (N. J.), 27 Atl. Rep. 912; McCausland *v.* Cresap, 3 G. Gr. (Ia.), 161.

[11] Upstone *v.* Weir, 54 Cal. 124 [1880], Van Dorn *v.* Mengedoht (Neb.), 59 N. W. Rep. 800.

* *See* Sec. 581, *supra.*

† *See* Sec 697, *infra.*

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Damages that could have been avoided by reasonable exertion and care cannot be recovered.[1] The contractor may waive the breach of his contract and recover in assumpsit for materials and tools used and destroyed which were left in the owner's possession.[2]

The contractor may show that he bought materials which, by reason of their design, cannot be used elsewhere, and must therefore be sold at a loss.[3] He cannot, it seems, recover for lumber purchased before the contract was executed, though it was bought at the request of the owner, the contract not having been completed.[4] He may show what the use of his tools is worth to assist in determining the value of his services.[5] He is not, it seems, entitled to the expenses of moving his outfit to the field of operation, that being an item of cost in performing the work, and an item of expense which figures prominently in determining his profits on the job.[6]

A contractor's book of wages paid his workmen is admissible to show the value of work and services, though it seems entries therein are not evidence against him of the wages or prices he was to receive.[7]

The first and second items of recovery may be had in all cases, and do not depend upon the fourth; *i.e.*, a failure to prove profits will not prevent a contractor from recovering the first and second items.[8]

694. Recovery of Prospective Profits.—The fourth item of recovery, that of profits, gives the most trouble to determine. Courts usually content themselves with a statement that the contractor is entitled to the profit he would have realized had he been permitted to complete the work, without any further explanation as to how the cash value of such profits is to be determined.[9]

It is well for the contractor that courts and juries do not have the same knowledge and appreciation that engineers and contractors possess of the uncertainty of profits under a construction contract. The reader of this volume must have some idea of the many misfortunes, accidents, and casualties that may overtake the most cautious men and wipe out the largest prospective gains. If the profits or value of the obligation broken cannot be ascertained or estimated, then the contractor can recover only the reasonable value of the services and materials furnished or the actual losses suffered.

[1] Hodges *v.* Fries (Fla.), 15 So. Rep. 682.
[2] Elgin *v.* Joslyn (Ill.), 26 N. E. Rep. 1090 [1890].
[3] Wells *v.* Bd. of Ed. (Mich.), 44 N. W. Rep 267 [1890].
[4] Jackson *v.* Carson (Mass.), 35 N. E. Rep 483.
[5] O Keefe *v.* St. Francis' Church, 59 Conn. 551 [1890].
[6] Hawley *v.* Corey (Utah), 33 Pac. Rep. 695: *accord* O'Connor *v.* Smith (Tex.), 19 S. W. Rep. 168 [1892].
[7] Currier *v.* Boston & M. R. Co., 31 N. H. 209.
[8] United States *v* Behan 110 U. S. 338.
[9] Nelson *v.* Morse, 52 Wis. 240; Boyd *v.* Meighan, 48 N. J. L. 404 [1886]; Watson *v.* Gray's Harbor B. Co (Wash.), 28 Pac. Rep. 527; Upstone *v.* Weir, 54 Cal. 124 [1880]; Co. of Christian *v.* Overholt, 18 Ill. 223; Kehoe *v.* Rutherford (N. J.), 27 Atl Rep. 912; Gordon *v* Norris, 49 N. H. 376 [1870] *and see* McClair *v.* Austin (Colo.), 31 Pac Rep 225; Hawley *v.* Corey (Utah), 33 Pac. Rep. 695; Nourse *v.* United States, 25 Ct. of Cl. 7; Shoemaker *v.* Acker (Cal.), 48 Pac. Rep. 62; *but see* Louisville & N. R. Co. *v.* Hollerbach, 3 West. Rep. 364.

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A refusal by a railroad company to give an annual pass over its road in consideration of services rendered according to its contract was held an instance where the value was impossible of proof,[1] and the profits that a theatrical performance might have netted, was held not ascertainable.[2]

These cases illustrate the wisdom and necessity of inserting in a construction contract a clause for stipulated damages, not only for the breach of the contractor, but for the breach of the owner or company as well. If the value of a pass or of an evening's entertainment cannot be estimated, when there are so many cases from which an average could be struck, and so many circumstances, such as the former use or patronage that the same and other parties had enjoyed, how can it be hoped to estimate the damages resulting from a breach of a contract for a large engineering or architectural undertaking.

695. What Prospective Profits may be Recovered.—It has been held that the profits need not be certain; that if they were reasonably probable they might be recovered, but not if speculative, contingent, or remote.[3] They must be certain both in respect to their nature and the cause from which they proceed.[4] The profits should be the direct fruit of the contract, and not be too remote nor speculative.[5]

Profits or advantages which are the direct and immediate fruits of a contract are part and parcel of the contract itself, something stipulated for, and the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. Such profits and benefits are presumed to have been taken into consideration and deliberated upon before the contract was made, and may have formed the chief inducement to make the agreement.[6] Therefore it is frequently held that profits as well as damages recoverable must be such as can be fairly supposed to have been within the contemplation of the parties when the contract was made.[7] It has therefore been held that written estimates made by the company's engineers after the contract had been entered into, and which could not have been considered in making the contract, could not be placed before the jury to disprove the amount of profits that would have been realized had they been allowed to complete the contract.[8]

A number of cases have described prospective profits in such cases as the difference between the amount which the contractor would have received for

[1] Brown *v.* St. Paul M. & M Ry. Co. (Minn.), 31 N.W. Rep. 941 [1887]

[2] Bernstein *v.* Meech (N. Y. App.) 29 N. E. Rep 255.

[3] Tennessee & C. R. Co. *v* D nforth (Ala.), 13 So. Rep. 51; *see* Abbott *v.* Gaich, 13 Md. 314, *and* McConey *v.* Wallace (Mo.), 4 West. Rep. 843.

[4] Hunt *v.* Oregon Pac. Ry. Co., 36 Fed. Rep 481 [1888].

[5] United States *v.* Behan, 110 U. S. 338 [1884]; 5 Amer. & Eng Ency. Law 32, 33.

[6] Masterton *v.* Mayor of Brooklyn, 7 Hill (N. Y) 62; *and cases collected in* 5 Amer. & Eng Ency Law 32, 33.

[7] Hunt *v.* Oregon Pac. Ry Co., 36 Fed. Rep. 481 [1888]; Liljingren F. & F. Co. *v.* Mead (Minn), 44 N W. Rep. 306; Frohreich *v.* Gaunnon, 28 Minn. 476.

[8] Tennessee, etc., R. Co. *v.* Danforth (Ala.), 13 So. 51 [1893].

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the entire work at the contract price and what it would cost him to perform it.[1]

The amounts of work to be performed which may be taken as the basis of such an estimate of the cost are the quantities given in the specifications,[2] or shown on the plans and described in the contract,[3] and it is submitted that the advertisement and proposal might be utilized if the contract specifications and plans did not furnish an estimate of its magnitude, but not, it seems, estimates by the company's engineers made after the contract was entered into.[4]

What a contractor "thinks" or "calculates" he would have made but for the breach of the owner cannot be received as evidence;[5] nor can witnesses be allowed to give their opinions as to the value of prospective profits.[6] The best evidence of prospective profits of a job is a careful estimate of the actual value of the work in comparison with the contract price, supported by proof that the values adopted are reasonable and fair.[7] The cost of the work, so far as it was prosecuted by the contractor, may be shown to determine the cost of the unfinished work, the unfinished part being essentially the same as that completed.[8]

Some cases hold that the contractor should make reasonable reductions for his own time which it would require to perform, and for his relief from the care, trouble, risk, responsibility, and anxiety attending a full performance of the contract.[9]

696. Profits made by Contractor on Other Jobs Cannot be Considered.—The measure of damages is not the difference between the contract price of the work and the sum which the contractor actually received from other employments during the time which he would have been required to complete the work.[10] Nor can the profit which he made out of other jobs during the same period be shown in mitigation of the damages suffered from the loss of profits in consequence of the termination of the contract by the owner.[11] When a contractor fails to have certain preliminary work done, thereby causing delay and preventing the subcontractor from peforming his part of the work; loss of profits by the subcontractor on work he was not permitted

[1] Balt. & O R. Co. *v.* Stewart (Md.), 29 Atl. Rep. 964; Baird *v.* Mayor, 88 N. Y. 54; Richter *v* Meyer (Ind.), 31 N. E. Rep. 582; Cincinnati, etc., Ry. Co. *v.* Lutes (Ind), 11 N. E. Rep. 784 [1887].

[2] Baird *v* Mayor. *supra.*

[3] Balt. & O. R. Co. *v* Stewart, *supra.*

[4] Tennessee, etc., R. Co. *v.* Danforth, *supra.*

[5] Birney *v.* Wabash, etc., R. Co., 20 Mo. App. 470.

[6] Wakeman *v.* Wheeler, etc., Co., 101 N. Y. 205.

[7] *Semble*, Balt. & O. R. Co. *v.* Stewart, *supra.*

[8] Tennessee & C. R. Co. *v.* Danforth, *supra*, and 20 So Rep. 502.

[9] Masterton *v.* Brooklyn, 7 Hill (N. Y.) 62; Goodrich *v.* Hubbard, 51 Mich. 63; Nash *v.* Hoxie, 59 Wis 384; Singleton *v.* Wilson, 85 Tenn. 344; Rice *v.* Candle, 71 Ga. 605; Joske *v.* Pleasants (Tex.), 39 S. W. Rep. 586 [1897], *contra.*

[10] Nilson *v* Morse, 52 Wis. 240; *but see* Cincinnati St. L. & C. Ry. Co. *v.* Lutes (Ind.), 11 N. E. Rep. 784 [1887].

[11] Watson *v.* Gray's Harb B Co. (Wash.), 28 Pac. Rep. 527; *semble*, Hawley *v* Corey (Utah), 33 Pac. Rep. 695; *and see* Cin., I., & St. L. Ry Co. *v.* Lutes (Ind.), 14 N. E. Rep. 706 [1888]; *but see* Sullivan *v.* McMillan (Fla.), 19 So. Rep. 840.

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to perform on the job may be assessed, but profits which subcontractor might have made, doing some other work, cannot be considered.[1]

The plaintiff must prove the amount of his loss; he cannot require the defendant to prove that it would have been less than the contract price nor less than what he claims.[2]

When a contract is broken in four particulars at the same time the contractor cannot have a separate cause of action for each breach. If he brings an action and gets judgment and satisfaction, it is a bar to any other actions for breaches which had occurred when the first action was brought.[3]

A bond "for the faithful performance of a contract" is not restricted by a subsequent condition expressed that the contractor shall faithfully perform his contract "during the construction of the works." A failure to begin the work at all constitutes a breach of the contract.[4]

[1] O'Connor *v.* Smith (Tex.), 19 S. W. Rep. 168 [1892].

[2] Benner *v.* Phœnix T. & T. Co. (Sup.), 30 N. Y. Supp. 290; *accord*, Roberts *v.* Minneapolis Th. Mch. Co. (S. D.), 67 N. W. Rep. 607.

[3] Coggins *v.* Bulwinkle, 1 E. D. Smith 434 [1852].

[4] City of Goldsboro *v.* Moffett (C. C.), 49 Fed. Rep. 218.

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CHAPTER XXV.

NONPERFORMANCE OF CONTRACT. BREACH OR RESCISSION.

BREACH BY CONTRACTOR, HIS RIGHTS, LIABILITIES, AND MEASURE OF RECOVERY. SUBSTANTIAL PERFORMANCE AND SPECIFIC PERFORMANCE OF CONTRACT.

697. Contractor Fails to Perform—His Rights and Liabilities.—When a contractor has failed to fully perform his contract he cannot, under a strict interpretation of the contract terms in general use, recover for what he has done. Payment is usually postponed by the contract until after a complete performance of all the terms and conditions of the agreement, and frequently until after the engineer shall have certified that the work is, in every particular, completed according to the contract. By the terms of his agreement, the contractor is bound to render a complete performance of every contract requirement, however technical or trivial it may be.

To enforce such an agreement would impose the greatest hardships[1] upon a class of men who are now burdened with iniquities, and would give to the owner and companies having work done, benefits to which they are in no wise justly entitled. Frequently a technical performance is well-nigh impossible; it may even have been made so by the act of the owner.[2]

The American courts have not been blind to this injustice, and in this country, if a contractor's failure to perform is excusable, the law implies a contract on the part of the owner to pay for whatever benefits he has received, to prevent unjust enrichment; the measure of recovery being the amount that the owner has been enriched or benefited.[3]

The law implies such an agreement on the part of the owner only because the equities of the case require it, and the action should be in general *assumpsit* on the implied promise, for an action on the special contract would be met with a plea of the contractor's breach and failure to perform.[4] What was said in the preceding sections applies with equal force here.

[1] See comments of Lord Campbell, Chief Justice of the English court in 1858 as to this element of hardship. Monroe *v.* Butt, 8 E. & B. 738 [1858].

[2] Smith *v.* Brady, 17 N. Y. 173; Nolan *v.* Whitney, 88 N. Y. 648; Heckman *v.* Pinkney, 81 N. Y. 211; Goldsmith *v.* Hand, 26 Ohio 101.

[3] Pinches *v.* Swedish Luth. Ch., 55 Conn. 183; Ford *v.* Smith, 25 Ga. 675; *and see* Hayward *v.* Leonard, 7 Pick. (Mass.) 181; *and see cases* 3 Amer. & Eng. Ency. Law 920–1, and 29 Amer. & Eng. Ency. Law 896–7.

[4] *See* Orem *v* Keelty (Md.), 36 Atl. Rep. 1030 [1897].

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Though the distinction may not be made in all jurisdictions; especially where the code has been established.

There can be no recovery for labor *under a contract* when not rendered in conformity to it, unless there has been some acceptance of it, or unless an exact performance has been waived, or unless the nonconformity is caused by the owner.[1] If the contractor has not completed his contract, or brought himself within its terms by completing the obligations imposed, he should not bring an action *upon the contract* to recover. His action should be in *assumpsit, i.e.*, for work, labor, and material on the general counts. In an action on the contract he cannot introduce evidence to prove that the work was done in a manner, nor with materials essentially different from that specified in the contract, as contractors are required to build substantially according to their contracts, but evidence that the work done as specified in the contract was properly done and in a workmanlike manner, is admissible.[2] If the contractor has alleged full performance, wherein time was of essence, he cannot show a modification of the contract, nor a waiver by the owner by way of excuse. Having alleged performance, he cannot show excuses for nonperformance.[3]

The contractor may recover if the works are substantially completed, though not according to the terms of the contract, even when the agreement is to pay "when the structure is completed"[4] When a building contract has not been so performed as to justify a recovery thereon, a recovery in *assumpsit* on the common counts for the work and materials used will be permitted only when owner has actually accepted the building. Such acceptance may be expressed or implied from circumstances, but mere occupation of the building does not necessarily imply such acceptance.[5]

698. Contractor must have Made an Honest Effort to Complete his Contract, or He Cannot Recover.—It follows that a right based wholly upon equitable grounds requires that the contractor come into court with clean hands and a good conscience, for if he has been guilty of willful departures, omissions, and breaches of his contract he is not in a position to invoke equity in his favor. Such a law would afford encouragement to contractors to break their contracts.

If the contractor has faithfully and honestly tried to perform his contract, or unintentionally or in blissful ignorance, or even knowingly, but for some good reason, has committed an unimportant breach of his contract, he has not in equity forfeited his right to invoke the assistance of the courts

[1] Andrews *v.* Portland, 35 Me. 475 [1858]; Sharpe *v.* Johnson, 60 Barb 144 [1871]; Sinclair *v* Bowles, 9 B. & C 92; Sickle *v.* Pattison 14 Wend. 257; Wade *v.* Haycock, 25 Pa. St. 382; Morton *v* Read, 2 S & M. 585; Cutler *v.* Powell, 6 T. R. 320; Lloyd's Law of Building 35, 36.

[2] Aldrich *v.* Wilmarth (S. D.), 54 N. W. Rep. 811.

[3] Higgins *v.* Lee, 16 Ill. 495 [1855]; Etting *v.* Dayton, 17 N. Y. Supp. 849.

[4] Russell *v.* Barry, 115 Mass. 300 [1874]

[5] Bozarth *v.* Dudley (N. J. Law) 27 Alb. L. J. 76 [1882], *many cases cited*; Elkridge *v.* Rowe, 4 Gilm. (Ill.) 91; McKinney *v.* Springer, 3 Ind. 59; Walsh *v.* Jenvey (Md.) 36 Atl. Rep. 817.

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to do him justice, though he has foregone those rights by the terms of his contract. He may have a cause of action against the owner and require him to restore the value of what the owner has been benefited at his expense.[1] If the contractor has acted honestly and in good faith substantially performed the contract,[2] he may recover in *assumpsit*.[3]

If the contractor has voluntarily abandoned the work, he can recover only the value of work and labor done, measured according to the contract, and not the contract price, though he may have had the right, under the contract, to abandon.[4]

699. Contractor's Failure to Perform or Complete must Not have been Willful nor Obstinate.—If a contractor alleges performance of his contract and has substantially complied with the same, and has not been guilty of fraud, or gross negligence, or of obstinate or willful refusal to fulfill his whole engagement, or of a voluntary or causeless abandonment of the work, he is entitled to recover the balance due him, subject to deduction for damages for imperfection and deficiencies in the work.[5]

When the contract is to pay when "this contract is fully performed and fulfilled," and the company takes forcible possession and opens the structure for use and tolls, and the contractor acting honestly, and intending to fulfill his contract, performs it substantially, but fails in some comparatively unimportant particulars, the owner will not be permitted to enjoy the fruits of such imperfect performance without paying a fair compensation according to the contract, receiving a credit for any loss or inconvenience suffered." Taking possession and turning the structure to the purpose intended by the party for whom it was constructed, shows it was substantially constructed. No mere imperfections or omissions, which does not virtually effect its usefulness can be interposed to prevent recovery, subject to deduction of damages consequent to the imperfections complained of.[6]

If the contractor has willfully refused or neglected without just cause to perform certain conditions and requirements of his contract, the law is generally that he cannot recover.[7] The continued failure on a contractor's

[1] 2 Keener's Cases on *Quasi*-Contracts 153, 173; Sinclair *v.* Tallmadge, 35 Barb. 602 [1861]; School Dist. *v.* Lund, 57 Kans. 731; Aldrich *v.* Wilmarth (S. D.), 54 N. W. Rep. 811 [1893]; Wohlreich *v.* Fettretch, 21 N. Y. St Reptr. 56 [1889]; *accord*, Brady *v.* New York (N. Y. App.), 30 N. E. Rep. 757; Ætna Iron & S. Wks. *v.* Kossuth Co., 79 Iowa 40; Danville Bdge. Co. *v.* Pomeroy, etc., 15 Pa. St. 151 [1850]; Nolan *v.* Whitney, 88 N. Y. 648; *and see* Miller *v.* Benjamin (Sup.), 21 N. Y. Supp. 1116.

[2] Stecker *v.* Overpeck, 127 Pa St. 446 [1889]; Smith *v.* District, 20 Conn. 312 [1850]; Quinn *v.* United States, 99 U. S. 30 [1878]; *semble*, Valk *v.* McKeize, 16 N. Y. Supp. 741; White *v.* School Dist. (Pa.), 28 Atl. Rep. 136; O'Dea *v.* City of Winona (Minn.), 41 Minn. 424 [1889]; Smith *v.* 1st Cong'l Ch., 8 Pick. 178; Hayden *v.* Madison, 7 Green 78; Crouch *v.* Gutmann, 134 N. Y. 45.

[3] Castagnio *v* Balletta (Cal.) 21 Pac. Rep. 1097 [1889].

[4] Powers *v.* Walker (Ky.), 39 S. W. Rep. 256.

[5] Danville Bdge. Co. *v.* Pomeroy, 15 Pa. St. 151 [1850].

[6] Danville Bdge. Co. *v.* Pomeroy, etc., 15 Pa. St. 151 [1850]; Mitchell *v.* Wiscotta Land Co., 3 Iowa 209; Emerson *v* Cogswell, 16 Me. 77; Davis *v.* Fish, 1 G. Gr. (Iowa) 406; *but see* Hartupee *v.* Pittsburg, 97 Pa. St. 107 [1881].

[7] 2 Keener's Cases on *Quasi*-Contracts,

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part to complete a building in the time specified in the contract is a continuous breach of the contract, of which the owner may avail himself at any time by terminating the contract.[1] Abandonment of a job in November without justification, and no offer to complete it until the following spring, has been held such neglect as to forfeit any rights to recover under the contract.[2] It seems that the contractor is expected to show that his failure to perform, fully, was not intentional.[3]

In England contractors are held strictly to the terms of their agreements, and no recovery can be had for the benefits conferred as on a *quantum meruit* when there has been an unintentional breach of an express condition (provision) of a contract, and this is one of very many illustrations of the leniency of the American courts and the disposition to alleviate suffering from hardships.[4] The New York and Maryland courts have shown a fickle disposition in requiring building contracts to be completely performed. Some cases hold to strict requirements for a substantial performance, while others decided by the same courts have shown great leniency. This is especially true of the courts of New York.[5]

700. Contractor's Recovery when there has Been a Substantial Performance.*—One who has begun the performance of work under a special contract, by which he is bound to finish it, cannot abandon the work without the consent or fault of his employer, and sue and recover for the value of the work which he has performed;[6] but where the work is actually performed, though not in exact conformity with the contract in immaterial particulars, or with variations assented to by the employer, or where the employer accepts the work as, and for, a complete performance of the contract, the contractor may recover.[7] The principle above stated is supported by many cases.[8] Even though the contract authorizes the commissioner of public works to designate when the work should commence, suspend work,

pp. 146, 148; Hollister *v.* Mott (N. Y. App.), 29 N. E. Rep. 1103; Wade *v.* Haycock, 25 Pa. St. 382; *semble*, Holmes *v.* Chartiers Oil Co. (Pa.) 21 Atl. Rep. 231 [1891]; Sinclair *v.* Tallmadge, 35 Barb. 602; Danville Bdge. Co *v.* Pomeroy, 15 Pa. St. 151 [1850]; Reed *v.* Board, 4 N. Y. 24; Crane *v.* Kimbel, 61 N. Y. 645 [1875]; Faxon *v.* Mansfield, 2 Mass. 147; *accord*, Stark *v.* Parker, 2 Pick. 267; Jennings *v.* Camp, 13 Johns. 94; McMiller *v.* Vanderlip, 12 Johns. 165; Adams *v.* Boston Iron Co., 10 Gray 495; Lantry *v.* Parks, 8 Cow. 63; Moll *v.* Foery, 48 Hun 476; Blythe *v.* Poultney, 31 Cal. 233; Sinclair *v.* Bowles, 9 B. & C. 93; *semble*, Elliott *v.* Caldwell, 43 Minn. 357 [1890]; Mammond *v.* Miller, 2 Mackey 145; *contra*, Britton *v.* Turner, 6 N. H. 481 [1834]; Davis *v.* Barrington, 30 N. H. 517, 529; 29 Amer. & Eng. Ency. Law 896, 910.

[1] Wyckoff *v.* Taylor (Sup.), 48 N. Y. Supp. 31.

[2] Scheible *v.* Klein, 89 Mich. 376.

[3] Weeks *v.* O'Brien (Super.), 12 N. Y. Supp. 720.

[4] Keener's Cases on *Quasi*-Contracts 131, 135, 139, English Cases; Monroe *v.* Butt, 8 E. & B. 728 [1858], *cases cited.*

[5] 2 Keener's Cases 165; Lloyd's Law of Building 37; Presby. Ch. *v.* Hoope's, etc., Co., 66 Md. 598 [1887]; s. c., 7 Cent. Rep. 432; Cronin *v.* Tebo 24 N. Y. Supp. 644; Hollister *v.* Mott (N. Y. App.), 29 N. E. Rep. 1103; *accord*, Ala. Gold Life Ins. Co. *v.* Garmany, 74 Ga. 51.

[6] Cases 29 Amer. & Eng. Ency. Law 910.

[7] White *v.* Hewitt, 1 E. D. Smith 395 [1852].

[8] Dubois *v.* The Del. & Hud. Canal Co., 4 Wend. 285; Heckman *v.* Pinkney, 81 N. Y. 211; Glaucus *v.* Black, 50 N. Y. 145;

* *See* Secs. 441–442, *supra.*

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order it to be begun again, consent to its being sublet or assigned, or declare the contract null, and re-award it, and though the contractor has covenanted to complete the work to the satisfaction of the commissioner, and in substantial accordance with the specifications and plan, a literal compliance with the specifications and plan is not required.[1]

Another test applied in many cases to determine whether there was such a substantial performance as will entitle the contractor to recover upon the contract is whether the structure or completed works is reasonably adapted to or will answer the purposes for which it was intended.[2] If defects exist throughout the work and are so numerous that the objects sought by the contract are not attained or accomplished, then there can be no recovery.[3]

It is not always necessary that the contractor shall have committed an open breach of his contract. If he voluntarily disables himself from performing specifically his contract he becomes at once liable in damages.[4] If he has by his own acts put it out of his power to perform his part of the agreement, he cannot maintain a bill for specific performance.[5]

701. Acceptance of Work or of Structure by Owner—Waiver of Strict Performance.*—If the owner has accepted or taken possession and put the structure to the use or the service for which it was intended, that, too, forms an element in determining a substantial performance and is evidence thereof.[6] The making of payments by the owner without objection or protest, after having taken possession of works, has an important bearing upon the question whether or not the owner has waived a complete performance.[7] The owner may, by accepting the building without objection and expressing his satisfaction with the work, be estopped from asserting a noncompliance

Jewel *v.* Schroeppel, 4 Cow. 564; Fecter *v.* Heath, 11 Wend. 484; Woodward *v.* Fuller, 80 N. Y. 312; Nolan *v.* Whitney, 88 N. Y. 648; Linningdale *v.* Livingston, 10 J. R. 36; Paige *v.* Ott, 5 Denio 406, *and cases cited;* Boteler *v.* Roy, 40 Mo. App. 238; Meburin *v* Stone, 37 Ohio St. 55; Jones *v.* Judd, 4 Comst. 411; Bronmel *v.* Rayner (Md.), 11 Atl. Rep. 833 [1887]; Jennings *v.* Wilter (Tex.), 32 S. W. Rep. 24; 29 Amer. & Eng. Ency. Law 891-898; Phelps *v.* Sheldon, 13 Pick. 50; Smith *v.* Lowell M. H., 8 Pick. 181; Dixon *v.* Gravely (N. C.), 23 S. E. Rep. 39; Ford *v.* Smith, 25 Ga. 675; Castagnino *v.* Balletta, 21 Cal. 1097; O'Connors *v.* Hurley, 147 Mass. 145; Ellis *v.* Lane, 85 Pa. St. 265; Cullen *v.* Sears, 112 Mass. 299.

[1] Brady *v.* City of New York (N. Y. App.), 30 N. E. Rep. 757

[2] Pinches *v.* Swedish Church, 10 Atl. Rep. 264; Holmes *v* Chartiers Oil Co., 138 Pa. St. 546; Gallager *v.* Sharpless (Pa.), 19 Atl. Rep 491; Crookshank *v.* Mallory, 2 G. Gr. (Ia.) 257; *semble*, Leeds *v.* Little (Minn.), 44 N. W. Rep. 309.

[3] Wohlreich *v.* Fettretch, 21 N. Y. St. Reptr. 56 [1889].

[4] Bolles *v.* Sachs, 33 N. W. Rep. 862; Robson *v.* Drummond, 2 B. & Ad. 303; Planche *v.* Colburn, 8 Bing. 14.

[5] Wollensak *v.* Briggs (Ill.), 10 N. E. Rep. 23 [1887].

[6] Holmes *v.* Chartiers Oil Co. (Pa.), *supra;* White *v.* School Dist. (Pa.), 28 Atl. Rep. 136; Pinches *v.* Swedish Church (Conn.), *supra;* McPhail *v.* Board of Com'rs (N. C.), 25 S. E. Rep. 958; Davis *v.* Badders (Ala.), 10 So. Rep. 422; *cases* 29 Amer. & Eng. Ency. Law 899, 900.

[7] Wildey *v.* School Dist., 25 Mich 419; *and see* Flannery *v.* Rohrmayer, 46 Conn. 558; Parton *v.* Stewart, 2 Aik. (Vt.) 417; Lucas *v.* Godwin, 3 Bing. (N. C.) 737; Boteler *v.* Roy, 40 Mo. App. 234; Taylor *v.* Williams, 6 Wis. 363.

* *See* Secs. 417, *supra*, and 721 and 726, *infra*.

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with the contract.[1] The act of a city forcibly taking possession of water works which were in a substantially completed condition, and the subsequent successful use of the same for the purposes for which they were intended, did not relieve the contractor from proving that the quality of the materials furnished was in accordance with the contract—in this case of the best quality, of a certain composition and tensile strength. As against public interests such as those of a municipal corporation, an implied waiver of the terms of a contract will not be favored.[2]

If work has been accepted by owner or he has waived his right to a strict performance, it seems the contractor may recover as if he had fully completed his contract;[3] but he is liable for damages that the owner has sustained in consequence of delay[4] or of the failure of contractor to complete his contract,[5] but not when he has accepted the work and paid therefor in full without objection.[6]

Use, occupation, and appropriation of works when they are a part of the realty to which they are attached do not of themselves amount to an acceptance,[7] nor do they amount to a waiver of a substantial performance.[8] The mere fact that the structure remains on the land and that the contractor cannot remove it, and that the owner enjoys the benefit of it, he having no option to reject it, is not such an acceptance as will imply a contract to pay for it—*i. e.*, the contract price.[9] The act of levying an assessment by a company on its members for the purpose of paying for the work does not of itself constitute an acceptance of the work from the contractor.[10] It seems that such acceptance, appropriation, and use may be a possession under claim of title and adverse to the contractor, so as to set the statute of limitations in motion.[11] It is not such an acceptance as imports a new promise to pay for them; but some positive acquiescence in the incomplete or existing state of the building is necessary to render the owner liable to pay according to measure and value.[12]

Part payment on a contract for work is an acquiescence in what has

[1] Strome *v.* Lyon (Mich.) 68 N. W. Rep. 983.

[2] Hartupee *v.* Pittsburgh, 97 Pa. St. 107 [1881.]

[3] Morrison *v.* Cummings 26 Vt. 486 [1854]; Beswick *v.* Platt, 140 Pa. St. 28. Cartwright *v.* Mt. Vernon (Sup.), 3 N. Y. Supp. 296.

[4] Snell *v.* Cottingham, 72 Ill. 161 [1874].

[5] Trowbridge *v.* Barrett, 30 Wis. 661; Mitchell *v.* Land Co. 3 Iowa 209; Adlard *v.* Muldoon, 45 Ill. 193; Wildey *v.* Fractional School, 25 Mich. 419.

[6] De Lambre *v.* Williams, 36 La. Ann. 330.

[7] Morrison *v.* Cummings, *supra.*

[8] Smith *v.* Brady, 17 N. Y. 173 [1858]; Mohney *v.* Reed, 40 Mo. App. 199; Gove *v.* Island City Co., 16 Oreg. 93; Yates *v.* Ballentine. 56 Mo. 530; Reed *v* Board, 4 N. Y. 24; Fitzgerald *v.* La Porte (Ark.), 40 S. W. Rep. 261 [1897].

[9] Elliott *v.* Caldwell, 43 Minn. 357 [1890]; Presby. Ch. *v.* Hoopes, etc., Co., 66 Md. 598; Curtis *v.* Hoyt, 19 Conn. 165; *cases*, 29 Amer. & Eng. Ency. Law 900–1.

[10] Gilliam *v.* Brown (Cal.), 48 Pac. Rep. 486 [1897].

[11] Texas W. & G. Co *v* Cleburn (Tex.), 21 S. W. Rep. 393.

[12] Burn *v.* Miller, 4 Taunt 745; Lucas *v.* Godwin, 3 Bing. N. C 737; Monroe *v.* Butts, 8 E & B. 738 [1858]; Ford *v.* Smith, 25 Ga. 675; Estep *v.* Fenton, 66 Ill. 467; Leakes' Digest of Contracts, pp. 68, 69, 70; Blythe *v.* Poultney, 31 Cal. 233; Wallis *v.* Smith, L. R. 21 Ch. D. 243; Wildey *v.* Fractional School, 25 Mich. 419;

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been done only to that extent,[1] and then only as to defects and insufficiencies of which he has knowledge.[2]* Regular partial payments on account of contract for work not fully completed have been held not to amount to an acceptance of what has been done.[3]

Therefore proof that the owner visited the building and called the contractor's attention to certain defects therein, and, on being asked if there was anything else wrong, failed to say anything, does not constitute a waiver on his part of defects consisting of the use of doors of one-eighth of an inch less in thickness than required by the contract, inferior grade of tin and boards for roofing, and other defects not apparent.[4] A defect in work done on a public building is not waived where the commissioner of public works takes possession from necessity, but expressly states that this is done without prejudice to any rights against the contractor, and refuses to give a certificate that the work is satisfactory.[5] If the contractor will recover he must prove a substantial performance on his part or a waiver of performance on the part of the owner. Without proof of a waiver by owner there must be a substantial performance.[6] The waiver of a substantial performance must be pleaded and proven.[7]

It is well settled that a substantial performance requires that the deviations and omissions must be slight and unimportant.[8] Ornamentation has been held a matter of substance and variations or omissions from the specifications have been held to amount to a breach of the contract.[9] If the departures and omissions are so substantial that they cannot be remedied, or that an allowance out of the contract price will not give the owner essentially what he contracted for,[10] or give him full indemnity for deviations and omissions[11] there can be *no* recovery. An erection of a structure, with col-

but see McClay *v.* Hedge, 18 Ia. 66, *and* Pixler *v.* Nichols, 8 Ia. 106, *semble contra.*

[1] Morrison *v.* Cummings, 26 Vt. 486 [1854]; *semble*, Smith *v.* Gugerty, 4 Barb. 614; Lindsay *v.* Gordon, 13 Me. 60.

[2] Korf *v.* Lull, 70 Ill 420 [1873]; Veazie *v.* Bangor, 51 Me 509; Andrews *v.* Portland, 35 Me. 475 [1853]; *and see* City of Nashville *v.* Sutherland (Tenn.), 29 S. W. Rep. 228.

[3] Moulton *v* McOwen, 103 Mass. 587; Bond *v.* Carpenter (R. I.), 8 Atl. Rep. 539; Katz *v.* Bedford, 77 Cal. 319; Nollman *v.* Evenson (N. D.), 65 N. W. Rep. 686; Andrews *v.* Portland, 35 Me. 472.

[4] Eaton *v.* Gladwell (Mich.), 66 N. W. Rep. 598.

[5] MacKnight F. Stone Co. *v.* New York (Sup.), 43 N. Y. Supp. 139.

[6] Sinclair *v.* Tallmadge, 35 Barbour 602 [1861]; Gustaveson *v.* McGay, 12 Daly 428 [1884]; Heckman *v.* Pinkney, 81 N. Y. 211 [1880].

[7] Winona *v.* Minn. Constr'n Co., 27 Minn. 415; *see other cases*, Lloyd's Law of Building 53.

[8] Fauble & S. *v.* Davis, 48 Iowa 462 [1878]; Aldrich *v.* Wilmarth (S. D.), 54 N. W. Rep. 811; Hayward *v.* Leonard, 7 Pick. 187; Cullen *v.* Sears, 112 Mass. 299; Freeman *v.* Aylor, 1 Mo. App. Reptr. 582; Wohlreich *v.* Fettretch (N. Y.), 21 N. Y. St. Reptr. 56 [1889]; Sinclair *v.* Tallmadge, 35 Barb. 602; *semble*, Leeds *v.* Little (Minn.), 44 N. W. Rep. 309; Lewis *v.* Yagel, 77 Hun (N. Y.) 337; Highton *v.* Dessau, 19 N. Y. Supp. 395; Nolan *v.* Whitney, 88 N. Y. 648; Woodward *v.* Fuller, 8 N. Y. 312.

[9] McEntyre *v.* Tucker, 5 Misc. Rep. (Com. Pl. N. Y.) 228.

[10] Elliott *v.* Caldwell, 43 Minn. 357 [1890]; Pullman *v.* Corning, 14 Barb. 174; Taft *v.* Montague, 14 Mass. 282.

[11] Wohlrich *v.* Fettretch, 21 N. Y. St. Reptr. 56 [1889].

* *See* Secs. 467, 468, *supra.*

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umns substantially like the ones the contract required,[1] or that was "equal in strength, value and convenience," or that will as well answer the purpose desired, is not a performance of a contract to erect according to certain plans and specifications,[2] or of specific dimensions.[3]* Though the structure did cost more and was better adapted to the purposes for which it was intended, it cannot make the erection of a mill 78×100 feet a substantial performance of a contract to build a mill 50×150 feet.[4]

To avoid a waiver of a strict performance and a full completion of the contract, the following clause is sometimes recommended to be inserted in the contract:

> "It is further agreed between the parties that no payment of money under this contract, nor any acceptance or possession taken of the work done by the contractors shall be evidence of the performance of this contract or be construed as a waiver of any of its provisions by the owner; nor shall any waiver of any breach of this contract be held to be a waiver of any other or subsequent breach."[5]

702. What will Be a Substantial Performance.—A review of a large number of decisions will give some impression of what is a substantial performance. The question is not one of law but one of fact for the jury, which determines whether the defects and omissions are technical and unimportant, whether there has been a substantial performance, and also whether the departures and omissions were intentional and willful.[6] The jury may decide whether the work was substantially performed in good faith, and whether the contractor was justified in abandoning or stopping the work, and whether there had been a material variation without the consent of the owner.[7] The determination of the question depends, therefore, upon the make-up of the jury as well as the circumstances and conditions attending each case.[8]

It has been held that a contractor was not prevented from recovering, under his contract, the contract price less the damages resulting from his failure to complete, when the ceiling of a church was two feet too low, the windows too short and the seats too narrow, the edifice being reasonably

[1] Lynch *v.* Paris Lumber Co. (Tex.), 14 S. W. Rep. 701 [1890].

[2] Fauble & S. *v.* Davis, 48 Iowa 462 [1878]; Winona *v.* Minn. R. Constr'n Co., 27 Minn. 415; MacKnight Stone Co. *v.* New York (Sup.), 43 N. Y. Supp. 139.

[3] Gillespie Tool Co. *v.* Wilson (Pa.), 16 Atl. Rep. 36 [1889].

[4] Swain *v.* Seamens, 9 Wall. (U. S.) 254; Hill *v.* Featherstonhaugh, 7 Bing. 569; Times F. Assur. Co. *v.* Hawke, 28 L. J. Ex. 317; Farnsworth *v.* Garrard, 1 Camp. 38.

[5] Clark's Architect, etc., Before the Law.

[6] Phillips *v.* Gallant, 62 (N. Y. 256 [1875]; Gibbons *v.* Russell, 13 N. Y. Supp. 879; Clapp *v.* Thayer, 112 Mass. 296 [1873]; Rush *v* Wagner 12 N. Y. Supp. 2; Bracco *v.* Tighe, 27 N. Y. Supp. 34; Boughton *v.* Smith, 22 N. Y. Supp. 148; Murphy *v* Stickley-Simonds Co. (Sup.), 31 N. Y. Supp 295; Glaucus *v.* Black 50 N. Y. 145 [1872]; *see also* Muth *v.* Frost, 75 Wis. 166.

[7] Morton *v.* Harrison, 52 N. Y. Supr. Ct. 305 [1885].

[8] *But see* Cutler *v.* Dix (Vt.) 31 Atl. Rep. 780.

* *See* Secs. 256, 257, 467, and 468, *supra*.

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adapted [1] to the purposes for which it was built; nor when the roof of an addition to a house was five inches too low, the mistake not affecting its appearance materially; [2] nor when inferior materials have been used in a house and the work has not been performed in the manner agreed; [3] nor when the plastered walls were cracked from settling.[4] Walls of a building have been held *completed* and a partial payment due, when they were ready to receive the roof, although they were not covered with a mastic, in accordance with the complete design of the building.[5]

A building in which the floors are not laid, with portions of it exposed to the weather, and proof that some of the work done had to be done over, was held *not* substantially completed.[6] A payment due "when the plastering is finished" is not recoverable as under a substantial performance when the parlor and hall have not had their last coat of plaster and the stairs, under which there should have been plastering, are not erected.[7] Pine sub-sills were held not to satisfy a contract which specified oak sub-sills in a sidewalk; [8] nor a floor that leaks, one that was required to be water-tight.[9] The omission of a few locks, door-knobs, some door-steps, and a small amount of plastering in a house in New York, was held not a substantial performance of a contract to complete a partly finished building, the cost being $267.[10]

A barn constructed without collar-beams to join together the purlin-posts as required by the plans and specifications, in consequence of which "the sides spread and the roof sank, rendering the barn unsightly and dangerous," was held not a substantial performance.[11]

The use of a different mortar from that required by the contract [12] will not prevent a recovery by the contractor.

While the determination of the question of a substantial performance is for the jury, yet a finding of damages by a jury or referee may be so gross as to authorize a holding by the court as a matter of law that the contract had not been substantially performed.[13] Thus a finding by a referee that a build-

[1] Pinches *v.* Swedish Church (Conn.), 10 Atl. Rep. 264.

[2] Oberlies *v.* Bullinger, 132 N. Y. 598

[3] Marsh *v.* Richards, 29 Mo. 99 [1859]; *and Missouri cases cited;* Golden Gate Lumb. Co. *v.* Sahrbacher (Cal.), 38 Pac. Rep. 635.

[4] Walsh *v.* Campbell (Sup.) 37 N. Y. Supp. 362.

[5] Worcester Med. Inst. *v.* Harding, 11 Cush. (Mass.) 285; *see also* Woodward *v.* Fuller, 80 N. Y. 312; Johnson *v.* DePeyster, 50 N. Y. 666; Bixby *v.* Williamson, 25 Minn. 481.

[6] Zimmerman *v.* Jourgensen (Sup.), 24 N. Y. Supp. 170.

[7] Van Clief *v.* Van Vechten, 130 N. Y. 571.

[8] Denton *v.* City of Atkinson, 34 Kan. 438 [1885].

[9] Sherwood *v.* Houtman (N. Y.), 73 Hun 544; Weeks *v.* O'Brien (Super.), 12 N. Y. Supp. 720.

[10] Smith *v.* Sheltering Arms, 35 N. Y. Supp. 62; Zimmerman *v.* Jourgensen (Sup.), 24 N. Y. Supp. 170; *and see* Masters *v.* Houck, 39 Mich. 431.

[11] Ketchum *v.* Herrington, 18 N. Y. Supp. 429 [1892]; *accord*, Andersen *v.* Petereit (Sup.), 33 N. Y. Supp. 741; *see also* Oberlies *v.* Bullinger (Sup.), 11 N. Y. Supp. 264; Cahill *v.* Heuser (Sup.), 37 N. Y. Supp. 736; Smith *v.* Brady, 17 N. Y. 173; Glaucus *v.* Black, 50 N. Y. 146; Flannery *v.* Sahagian (Sup.), 31 N. Y. Supp. 360.

[12] Ligget *v.* Smith, 3 Watts (Pa.) 331.

[13] Phillip *v.* Gallant, 62 N. Y. 256 [1875];

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ing was constructed "substantially in accordance with the contract and specifications," when important members of the framing had been omitted which rendered the structure unsightly and dangerous, and when $750 would be required to remedy the departure, the contract price being $2500, was held inconsistant with the facts and not sufficient to support a recovery of the contract price and extras, less the damages for defective construction.[1] It is only technical, inadvertent, or unimportant omissions or defects which may be disregarded in an action on a building contract,[2] and it may be safely said that no case has ever gone so far as to hold that defects which amount in value to one-third of the contract price, and which render the building unsightly and even unsafe for occupation, could be so disregarded.[3] The deviation may be so gross and reprehensible that the contractor cannot recover anything at all for his work.[4]

It has been held not a substantial performance when the ratio of the expenses of making the work conform to the agreement to the contract price was as $267 to $3400;[5] a ratio of $75 to $865 has been held not inconsistent with a finding of substantial performance;[6]* defects of $275 on a $7000 job was held not inconsistent with substantial performance where contractor tried to fulfill his contract.[7] A ratio of $656 for defects to a contract price of $6000,[7] or of $13.80 to $390,[8] or of $150 to $2100,[9] or of $200 to $11,700,[10] or of only 2 per cent.,[11] or of 6 per cent.[12] of contract price, did not prevent the contractor from recovering. A ratio of $600 to $3500 was held to show a failure to perform substantially.[13]

A defect in the construction of a building may be a substantial defect, though it does not run through the entire building, and even though it can be remedied without disturbing or interfering with the main building.[14]

703. Rule or Measure of Recovery—When Contractor Is in Default.—The rules or measures of recovery have been variously stated by differ-

Rose *v.* O'Riley, 111 Mass. 57 [1872]; Higsler *v.* Owen, 61 Mo. 270, *and cases cited.*

[1] Ketchum *v* Herrington, 18 N. Y. Supp. 429 [1892].

[2] Sinclair *v.* Tallmadge, 35 Barb. 602.

[3] Haysler *v.* Owen (Mo.), 61 Mo. 270, *and cases cited; and see* Bozarth *v.* Dudley, 15 Vroom (N. J.) 304 [1882], *and many cases reviewed.*

[4] Smith *v.* Sheltering Arms, 35 N. Y. Supp. 62.

[5] Phillips *v* Gallant, 62 N. Y. 256 [1875]

[6] Valk *v.* McKeize, 16 N. Y. Supp. 741 [1891].

[7] Cronch *v.* Gutman, 134 N. Y. 45 *affirming* 10 N. Y. Supp. 275; Follet, C. J., Vann, and Landon, dissenting. The owner was credited with only $439 amount expended by him to remedy defects.

[8] D'Audre *v.* Zimmerman (Sup.), 39 N. Y. Supp. 1086.

[9] Monteverde *v.* Queens Co., 78 Hun 267.

[10] Nolan *v.* Whitney, 88 N. Y. 648.

[11] Charles *v.* Halleck Lumber Co. (Colo.), 43 Pac. Rep. 548.

[12] Murphy *v.* Stickley-Simonds Co., 31 N. Y. Supp. 295.

[13] Flaherty *v.* Miner, 123 N. Y. 383.

[14] Oberlies *v.* Bullinger, 27 N. Y. Supp. 19; *and see* Boughton *v.* Smith, 142 N. Y. 674. For substantial performance and construction of terms used in well-drilling cases, *see* Littrell *v.* Wilcox, 11 Mont. 77; American Well Works *v.* Rivers, 36 Fed. Rep. 880; Waggoner *v.* Stocks, 41 Ill. App. 151; Book *v.* New Castle W. N. Co., 151 Pa. St. 499; Madden *v.* Oestrich, 46 Minn 538; Bohrer *v.* Stumpf, 31 Ill. App. 139; Bennett *v.* Tutzel, 34 Ill. App. 295; Colburn *v.* Wescott, 36 Ill. App. 347;

* *See also* Secs. 441–442, *supra.*

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ent courts, several of which are the following: If the work has not been performed pursuant to the contract, but there has been a substantial performance, the contractor may recover for it, upon a *quantum meruit*,[1] as much as it is worth to the owner.[2] In Missouri the contractor may recover the reasonable value of the work done, as when inferior materials have been used and the work has not been performed in the manner agreed.[3]

It is submitted that any of the foregoing rules for determining the amount of recovery that the contractor is entitled to, which do not make the contract price the basis of an estimate of the value of the work done, are faulty, for the actual or market value of the part performance of the contract might exceed the contract price agreed upon for the whole work. If those rules are adopted, due regard must be had for the contract price in determining the reasonable value of the work done. It has therefore been held that in an action of assumpsit for work done under a special contract, no breach being charged to the owner, the contractor cannot recover more than the contract price;[4] he may recover such sum as the labor and services are worth, not exceeding the contract price.[5] Under *this* rule the real worth of the work might be all out of proportion to the contract prices, the value of one-half of the work might be equal to two-thirds of the contract price, and *vice versa*.[6]

The owner has a right to a house as good as that which the contractor agreed to furnish, and at the price agreed upon, and any rule which does not leave him as well off as he would have been had the contract been fully performed is a faulty rule.[7] Many rules have been adopted to this end in different courts, which may have been justified in the particular case in which they were applied, but which cannot be applied generally.

A common rule is one that limits the contractor's recovery to the contract price less the reasonable cost of completing the work according to the contract or making it conform thereto,[8] the difference between the value of the work as it is delivered over to the owner and what it will cost to com-

Genni *v.* Hahn, 82 Wis. 92; Blum *v.* Brown (Tex.), 33 S. W. Rep. 145.

[1] Addison on Contracts 409; Chitty on Contracts 826; Greenleaf on Evidence, § 104, 79 Ill. 181, 24 Ill. 262; *contra*, Cohn *v.* Plummer (Wis.), 60 N. W. Rep. 1000.

[2] Morris *v.* Cummings, 26 Vt. 486 [1854].

[3] Marsh *v.* Richards, 29 Mo. 99 [1859]; Yeates *v.* Ballentine, 56 Mo. 530 [1874], *and cases cited, and cases collected in* Shepard's Marginal Citations, *and see* 97 Mo. 371, and 87 Mo. 429; *many cases in* 29 Amer. & Eng. Ency. Law 899; Chapel *v.* Hickes, 2 C. & M. 214; May *v.* Menton (City Ct.), 41 N. Y. Sup. 650.

[4] Williams *v.* Chicago, S. F. & C. Ry. Co. (Mo.), 20 S. W. Rep. 631; Atkins *v.* Co. of Barnstable, 97 Mass. 428; Monncacy Bdge. Co. *v.* Amer. I. Bdge. Co., 83 Pa. St. 517; Christie Mfg. Co. *v.* Travers Bros. Co. (Com. Pl.), 35 N. Y. Supp. 1079.

[5] Atkins *v.* Barnstable Co., 97 Mass. 428; Becker *v.* Hecker, 9 Ind. 497; Bishop *v.* Price, 24 Wis. 480; Estep *v.* Fenton, 66 Ill. 467; Britton *v.* Turner, 6 N. H. 481; Lloyd's Law of Building 37, *and Massachusetts cases cited, and see* City of Sherman *v.* Conner (Tex.), 25 S. W. Rep. 321.

[6] *Accord*, Walsh *v.* Jenvey (Md.), 36 Atl. Rep. 817 [1897].

[7] Kidd *v.* McCormick, 83 N. Y. 391 [1881].

[8] Phelps *v.* Beebe (Mich.) 39 N. W. Rep. 761 [1888]; Walworth *v.* Finnegan, 33 Ark. 751; Gonzales *v.* McHugh, 21 Tex. 259; Haysler *v.* Owen, 61 Mo. 270 [1875]; An

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plete it in strict conformity with contract.[1] Another court found this rule difficult to apply where the expense of making the work conform to the contract was very great, and quite out of proportion to the injury suffered by the owner. It is very easy to imagine some trifling defect, as in the foundations, that would require great expense to make conform to the original plan. Therefore the court held that in such a case, if the structure erected answered the purposes for which it was intended, the rule should be modified so as to allow a reduction of the contract price by an amount equal to the diminution in value of the structure by reason of the deviations and omissions.[2]

An Ohio court divided the work into two classes, and held that as to unfinished work, the contractor might recover the balance due on the contract less such sums as it would require to complete the unfinished work; and that as to deviations made during the progress of the work by consent of both parties, the contractor could recover at contract prices less the difference in the value of the parts so constructed and their value as the contract required them to be made.[3] A Nebraska case makes the measure of damages which the owner has suffered the difference between the value of the works as constructed and as contracted for.[4]

The rule of recovery which has had by far the most general adoption in this country gives to the contractor the contract price less the damage which the owner has suffered or has been caused by imperfections and omissions not willfully made;[5] or as another case puts it, "the contract price less the damages resulting from breach," and though the work has

derson *v.* Nordstrom (Minn.), 61 N. W. Rep. 1132; Kocher *v.* Maybery (Tex.), 39 S. W. Rep. 604 [1897]; Mills *v.* Paul (Tex.), 30 S. W. Rep. 558.

[1] Sticker *v.* Overpeck, 127 Pa. St. 446 [1889]; Wells *v.* Bd of Ed 78 Mich. 260; Beha *v.* Ottenberg, 6 Mackey (D. C.), 348; Scofield *v.* Graw, 63 Vt. 283; Rector *v.* McDermott (Ark.). 13 S. W. Rep. 884 [1890]; 29 Amer. & Eng. Ency. Law 898.

[2] Pinches *v.* Swedish Church, 55 Conn. 183 [1887]; *see also* Heckman *v.* Pinkney, 81 N. Y. 213, *and* White *v.* Oliver, 36 Me. 92.

[3] Goldsmith *v.* Hand (Ohio), 3 Am. Law Times 93 [1876]; *but see* Estep *v.* Fenton, 66 Ill. 467, *and see* Hunt *v.* Elliott, 77 Cal. 588.

[4] White *v.* McLaren (Neb.), 24 N. E Rep. 911 [1890]; Jennings *v.* Willer (Tex), 32 S. W. Rep. 24.

[5] Leeds *v.* Little (Minn.), 44 N. W. Rep. 309; McKenzie *v.* Decker, 94 N. Y. 650; Aldrich *v.* Wilmarth (S. D.), 54 N. W. Rep. 811; White *v.* School Dist. (Pa.), 28 Atl. Rep. 136; Hayward *v.* Leonard, 7 Pick. (Mass.), 181 [1828]; Ponce *v.* Smith, 84 Me. 266; Holmes *v.* Chartiers Oil Co. (Pa.), 21 Atl. Rep. 231 [1891]; Sheldon *v.* Leahy (Mich), 69 N. W. Rep. 76; *accord*, Gallagher *v.* Sharpless (Pa.), 19 Atl. Rep. 491; Ætna Iron & S. Wks. *v.* Kossuth Co., 79 Iowa 40, *and see also* Blakeslee *v.* Holt, 42 Conn. 226; Chapel *v.* Hickes, 2 C. & M. 214; Thornton *v.* Place. 1 M & R. 218; *but see* Ellis *v.* Hamlen, 3 Taunt. 52; Sinclair *v.* Bowles, 9 B. & C. 92; Wooten *v.* Read, 2 Sm. & M. (Miss.) 585; Hilm *v.* Wilson, 4 Mo. 41; White *v.* Oliver, 36 Me. 95; Smith *v.* First Cong., 8 Pick. (Mass.) 178; Taft *v.* Montague, 14 Mass. 282; Olmstead *v.* Beale, 19 Pick. (Mass.) 528; Snow *v.* Ware, 13 Metc. (Mass.) 42; Lord *v.* Wheeler, 1 Gray (Mass) 282; Hayden *v.* Madison, 7 Greene (Me.) 76; Jennings *v.* Camp, 13 Johns. (N. Y.) 94; Kettle *v.* Harvey, 21 Vt. 301; Burn *v.* Miller, 4 Taunt. 745; Gastlin *v.* Weeks (Ind. App.), 28 N. E. Rep. 331 [1891]; Orem *v.* Keelty (Md.), 36 Atl. Rep. 1030 [1897]; Ibers *v.* O'Donnell, 25 Mo. App. 120; Gregg *v.* Dunn, 38 Mo. App. 283; Bozarth *v.* Dudley, 15 Vroom 304; Bush *v.* Jones, 2 Tenn. Ch. 190; Monacacy Bdge. Co. *v.* American I. Bdge. Co., 83 Pa. St. 517; Bishop *v.* Price, 24 Wis. 480; Florida R Co. *v.* Smith, 21 Wall. (U S) 255; Ellerbe *v.* Minor (La.), 21 So. Rep. 583; Wolf *v.* Gerr, 43 Iowa 339; Lee *v.*

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not been accepted, it having become a part of the realty;[1] or in the words of yet another case, "the contract price less the injuries suffered by omissions and defects."[2]

It has been held that the amount saved by reletting to another contractor is not the measure of the amount that is equitably due the prior contractor who failed to complete the works.[3] If, however, the finding as to damages is indefinite, the contractor should be allowed to recover the value of the work done (contract price), less payments made on account.[4]

In determining the amount of recovery the point should not be lost sight of, that it is the benefit conferred that gives the contractor his right of action. If the work and materials are any benefit whatever to the owner the contractor may recover for them,[5] but if the owner is not benefited, or was injured more than he was benefited, the contractor cannot recover, however much expense he has incurred.[6]

704. Contractor is Responsible for Losses Suffered by Owner in Consequence of Breach.—If the contractor's failure to complete his contract has caused the owner further losses, which are the direct result of such failure, then he must answer for *them* also. Such losses are more frequently caused by a failure to complete the works in the time required by the contract, or from accidents resulting from defective work or materials. Generally the contractor is held for all gains prevented and losses sustained which are the direct result of his breach, together with the expense of obtaining legal redress. Such may be rents, revenues, and profits that are certain, and any additional expense which is the result of the contractor's breach,[7] but not damages from failure to rent offices in the building.[8] From rents, revenues, etc., should be deducted charges for interest upon mortgages and other incumbrances, taxes, and insurance, so as to determine the net profit[9] or loss sustained by the owner.

A contractor who had failed to complete a railroad within the time specified was held liable for the loss of the use of the road, but not for freight it had made arrangements to carry, for that was under a collateral contract; nor for what it would cost to complete the road in excess of the con-

Ashbrooke, 14 Mo. 379; Kelly *v.* Rowan 33 Mo. App. 440; Eyerman *v.* Mt Sinai Cem. Assn., 61 Mo. 489; 29 Amer & Eng. Ency. Law 898.

[1] Ætna I. & S. Co. *v.* Kossuth Co , 44 N. W. Rep. 215.

[2] Hunt *v.* Elliott (Cal.), 20 Pac. Rep. 132; *In re* Cook *v.* Gleason, 3 Chic. Leg. News 410; Bank *v* Gries, 35 Pa. St. 423; White *v.* School Dist., 159 Pa. St. 201; *see also* 3 Amer. & Eng. Ency. Law 921.

[3] People *v.* Detroit (Mich.), 2 The Reporter 244; *semble*, Quinn *v.* United States, 99 U. S. 30 [1878]; *semble*, McDonald *v.* Dodge Co. (Neb.), 60 N. W. Rep. 366.

[4] City of Sherman *v.* Conner (Tex.), 25 S. W. Rep. 321.

[5] School Dist. *v.* Lund, 57 Kan. 731.

[6] Hunt *v.* Elliott (Cal.), 20 Pac. Rep. 132 [1889]; *semble*, Garnsey *v.* Rhodes (Sup.), 18 N. Y. Supp. 484; Excelsior Needle Co. *v.* Smith, 61 Conn. 56.

[7] *Accord*, Corsaul *v.* Sheldon (Neb.). 52 N. W. Rep. 1104; Abbott *v.* Gatch, 13 Md. 314; Somerby *v.* Tappan, Wright (Ohio) 229.

[8] Clifford *v.* Leroux (Tex.), 37 S. W. Rep. 172.

[9] Kid *v.* McCormick, 83 N. Y. 391.

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tract price, for that was uncertain.[1] Loss occasioned to the company by reason of another contract with a third party for use of the road cannot be considered.[2] The owner has been allowed to charge the contractor with the necessary cost of completing the works and all payments made to the contractor, the amount of all valid liens for labor and materials furnished the contractor, and the amount of damages suffered by the owner by reason of the contractor's default, and the difference between the aggregate of these charges and the contract price was held to be the measure of recovery of either the contractor or owner.[3]

In the purchase of materials and tools from dealers or manufacturers the measure of damages for the failure of the dealer or manufacturer to deliver the goods is the difference between the price agreed upon and the market value at the time and place they should have been delivered.[4]

The amount of damages which the owner may recover or the amount of reimbursement for the cost of completing the work is not limited to the amount due the contractor and retained by the owner or company.[5]

It has been held that the owner is not obliged to employ some one else to do what the contract bound the other party to do, in order to lessen the injury resulting from a breach of contract by the contractor.[6]

705. Specific Performance of Contract.—Sometimes when great interests have been at stake, as the operation of a railroad or a canal, or when the safety and preservation of works require that work be completed forthwith, the assistance of the courts has been invoked to compel the contractor to proceed with the work and to complete it according to his contract.

It frequently happens that the work may require skilled mechanics and such tools and machinery as are not to be obtained on short notice, so that the owner (or company) cannot complete it himself nor readily secure the services of others to undertake it. Under such circumstances, it is natural for the company to appeal to a court of equity for a mandamus requiring the contractor to proceed with the work, or at least to enjoin him from interfering with the company when they undertake to complete it with his tools and appliances.

An interesting case came up[7] under a contract for the construction

[1] Hunt *v.* Oregon Pac. Ry. Co., 36 Fed. Rep. 481 [1888].

[2] Snell *v.* Cottingham, 72 Ill. 161 [1874].

[3] Dorn *v.* Mengedoht (Neb.), 59 N. W. Rep. 800; Cook *v.* Gleason, 3 Chic. Leg. News 410, where the contractor had become bankrupt; *semble*, Lawson *v.* Wallasey, 45 L. T. 507; Elkridge *v.* Rowe, 4 Gilm. 91.

[4] Russell *v.* Horn, etc., Mfg. Co. (Neb.), 59 N. W Rep. 901.

[5] Langdon *v.* Northfield (Minn.), 44 N. W. Rep. 984 [1890]; Rector *v.* McDermott (Ark.), 13 S. W. Rep. 334 [1890]; Tompkins *v.* Dudley, 25 N. Y. 272; Davis *v.* Ford (Md.), 32 Atl. Rep. 280.

[6] Gulf, C. & S. F. Ry Co. *v.* Hodge (Tex. Civ. App.), 30 S. W. Rep. 829.

As to what damages may or may not be assessed, *see* Herman *v.* City of E. St. Louis, 58 Ill. App. 166, benefits resulting in common with others in the locality; *and see* Coos Bay, etc., Nav. Co. *v.* Nosler (Oreg.), 48 Pac. Rep. 361; Berlin Iron Bdge. Co. *v.* Bonta (Pa. Sup.), 36 Atl. Rep 867, depreciation of value of stocks of the project.

[7] Texas & St. Louis Ry. Co. *v.* Rust, 17 Fed. Rep. 280 [1882].

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of a railroad bridge, in which the contractor was under a heavy penalty to complete it by a certain day. The work having been delayed until long after the day named for completion, the contractor flatly refused to continue it unless the company would release him from the penalties accrued and come to terms about extra work, etc.

The railroad was nearly completed and traffic delayed because the bridge was not finished, and the contractor, knowing this, sought to bring the company to his terms. The court, it seems, was not asked to decree a specific performance of the contract, but the bill prayed the court to seize the contractor's plant and to enjoin the contractor from interfering while the court itself undertook its completion. This the court declined to do, expressing the belief that it could not lawfully seize the property of one person for the benefit of another without a trial and a hearing, and that no exigency of a railway company and no considerations of public convenience, however great, would justify such an act; that a citizen could not be deprived of his property "without due process of law."[1]

706. Specific Performance will not be Required if Damages can be Assessed that will Compensate the Losses Sustained.—Broadly stated, but subject to exceptions, it is a general principle of equity that a decree of specific performance will not be granted when adequate compensation can be obtained in an action for damages.[2]

It may be gravely doubted, that a court will undertake to enforce the specific, or the substantial performance even, of a construction contract.[3] It is pretty generally held that courts of chancery will not exercise such a power either with regard to the erection of structures or to repairs upon them. Usually, if not always, the owner can be compensated for his injuries suffered in consequence of the contractor's failure to complete by a money consideration, so that it is not necessary, it would seem, to decree a specific performance. A further reason given frequently by the courts when their assistance has been sought is that it would be impracticable, if not impossible, for an officer of the court to carry out such a decree,[4] and it is the performance of those contracts which present the greatest difficulty, which is sought. A contract which any one can complete would be carried out by subcontracting, and would not require the services of the contractor nor the assistance of a court of equity.

[1] Texas & St. Louis Ry. Co. *v.* Rust, 17 Fed. Rep. 280; *citing* City of Chicago *v.* Hutchinson, 15 Fed. Rep 129; Glover *v.* Shepperd, 15 Fed. Rep. 833; Phœnix Mut. L. Ins. Co. *v* Walrath, 16 Fed. Rep. 161; Public G. & S. Ex. *v.* West. U. Tel. Co., 16 Fed. Rep. 289; *settlement of case is reported*, Texas & St. L. Ry. Co. *v.* Rust, 19 Fed. Rep. 239 [1883]: *accord*, Greenhill *v.* Isle of Wight R. Co., 23 L. T. (N. S.) 885; Brace *v.* Wehnert, 25 Beav. 351.

[2] New Orleans *v.* N. O. & N. E. R. Co. (La.), 10 So. Rep 401 [1892]; Kendall *v.* Frey, 74 Wis. 26; Payne *v.* Still (Wash.), 38 Pac. Rep. 994; 22 Amer. & Eng. Ency. Law 914; 29 Amer. & Eng. Ency. Law 913; Lloyd Law of Building, etc., chap. vi; Emden's Law of Building, etc., chap. xvii; The Justices *v.* Corft, 18 Ga. 473.

[3] Texas & St. Louis Ry. Co., 17 Fed. Rep. 275.

[4] 22 Amer. & Eng. Ency. Law 996-7, *and cases cited.* English cases in Emden's Law of Building and Leases, chap. xvii;

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It has been frequently held that contracts to build will not be specifically enforced, because of the impracticability, if not impossibility, of the court supervising the work, and for the reason that a remedy of damages will afford full redress for the injury suffered from nonperformance.[1]

It has been held that a decree will not be granted to compel the construction nor repair of a railroad, nor a bridge, nor a building;[2] but there are many cases which are exceptions to any general rule to that effect, if indeed they may not be taken as contrary to such a rule.

The courts have enforced contracts to build railroad crossings,[3] to maintain a railway station at a certain location described,[4] to erect a station building at a certain place and a bridge at a certain crossing, to construct a siding.[5] These cases are usually contracts relating to the sale of, or right of way over, real estate, or they are cases in which the consideration for the obligation to build was the conveyance of real estate, which real estate has become so encumbered with structures that it cannot be restored to the owner in its original condition.[6] If the violation of the contract obligation cannot be adequately compensated in damages, then a specific performance may be required by the court. Such cases are those where an adjoining property owner has undertaken for a valuable consideration to build or improve his land for the benefit of his neighbor, as to make or maintain a road across his land,[7] to build a roadway and wharf[8] or an arched passageway,[9] to keep the banks of a river in repair,[10] or to alter the elevation of a house so as to correspond with adjoining houses.[11] The Scotch courts have decreed the specific performance of contracts to build, and have directed the work by appointing an engineer or architect to superintend it.[12]

Lloyd's Law of Building, § 42; 29 Amer. & Eng. Ency. Law 913.

[1] Beck *v.* Allison, 56 N. Y. 366; Mastin *v.* Halley, 61 Mo. 196; Blanchard *v.* Detroit, etc., R. Co., 31 Mich. 43; Kendall *v.* Fry, 74 Wis. 26; South Wales R. Co. *v.* Whythes, 5 DeG. M. & G. 880; Greenhill *v.* Isle of Wight R. Co., 23 L. T. (N. S.) 885; Lucas *v.* Commerford, 3 Bro. C. C. 166; Peto *v.* Brighton R. Co., 1 H. & M. 468; Raymer *v.* Stone, 2 Eden 128; London *v.* Nash, 3 Atk. 515; London, etc., R. Co. *v.* Humphrey, 6 W. R. 784; Paxton *v.* Newton, 2 Sm. & Giff. 431; Texas & P. L. Ry. *v.* Rust, 17 Fed. Rep. 275; 19 Fed. Rep. 239; Elec. Ltg. Co. *v.* Mobile, etc., Ry Co. (Ala.), 19 So. Rep. 721; Ross *v.* Union Pac. R. Co., 1 Woolw. (U. S.) 26; Prospect Pk., etc., R Co. *v.* Coney Isd., etc., R. Co. (N. Y. App.), 39 N. E. Rep. 17; 19 Amer. & Eng. Ency. Law 878

[2] *Cases collected in* 22 Amer. & Eng. Ency Law 996–7, *notes.*

[3] Post *v.* West Shore R. Co., 123 N. Y. 581; Sanderson *v.* Cockermouth, etc., R. Co., 11 Beav. 497.

[4] Lawrence *v.* Saratoga Lake R. Co., 36 Hun 467 [1885]; Minneapolis, etc., R. Co. *v.* Cox, 76 Iowa 306; *but see* Wilson *v.* Northampton Ry. Co., L. R. 9 Ch. App. 279; *and see* Blanchard *v.* Detroit R. Co., 31 Mich. 43.

[5] Lawrence *v.* Saratoga Lake R. Co., *supra;* Green *v.* West Cheshire R. Co., L. R. 13 Eq. 44.

[6] Lawrence *v.* Saratoga Lake R. Co., *supra; but see contra,* Conger *v.* N. Y., etc., R. Co., 45 Hun (N. Y.), 296; Texas, etc., R. Co. *v.* Marshall, 136 U. S. 393, in which cases it would have been inequitable to so decree.

[7] Lytton *v.* G. N. Ry. Co., 2 K. & J. 394; Sanderson *v.* Cockermouth, etc., Ry. Co., 11 Beav. 497.

[8] Firth *v.* Midland Ry. Co., L. R. 20 Eq. 100; Wilson *v.* Furness Ry. Co., L. R. 9 Eq. 28.

[9] Storer *v.* Gt. Western Ry. Co., 2 Y. & C. C. C. 54.

[10] Kilmorey *v.* Thackery, 2 Bro. Ch. 65.

[11] Franklyn *v.* Tuton, 5 Madd. 469.

[12] Clarke *v.* Glasgow Assurance Co., 1 M'Queen 668.

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The reasons advanced by the courts for refusing to decree specific performance of building agreements are the following: First, because if one contractor will not build another can; secondly, because the owner can get along with a house built by another contractor; thirdly, because such contracts are for the most part too uncertain and too technical for a court to carry them out; fourthly, the enormous inconvenience attending building operations, which a court is loath to undertake; fifthly, the great difficulty of determining whether the court's decree has or has not been carried out and fully performed, and the litigation which would be likely to result to determine such a question.[1]

In spite of these difficulties there are several jurists who have expressed the belief that if the thing to be done be clear, definite, and certain, it should be enforced by specific performance.[2] Mr. Story, in his Equity Jurisprudence, § 728, says: "It is by no means clear that complete and adequate compensation can in such cases be obtained at law. * * * The damages must be quite conjectural and incapable of being reduced to any absolute certainty. * * * It would not, therefore, be surprising if, after all, the doctrine" of specific performance of a definite agreement "should obtain a firm hold in equity jurisprudence, as it stands well supported by analogy as well as by high authority."[3] The weight of authority is, however, against specific performance of a building contract, for the reasons named above. The fact that courts do decree and enforce specific performance in cases where the consideration is an interest in land would seem to negative objections three, four, and five.

707. Specific Performance of a Contract to Furnish Materials the Supply of Which Is a Monopoly.—Contracts for the sale of supplies and materials will not be specifically enforced if the character of the materials be such that the breach of the contract to furnish them can be adequately compensated in damages. If like materials are essential to the work, and they cannot be obtained from other sources, specific performance may, in the discretion of the court, be decreed and the materialman required to furnish them pursuant to his contract.[4]

A case of special interest to contractors and builders, and to the profession, was a recent Oregon case in which the mason contractor agreed to furnish stone for a church edifice from his quarry and to do the mason work. When the work was two-thirds done, the contractor became insolvent and was unable to perform his contract. It was shown that the stone was of a peculiar kind and color and could be procured only from the defend-

[1] Emden's Law of Building, chap. xvii.

[2] Lord Hardwick, in London, *v.* Nash, 3 Atk. 512; Lord Roslyn, in Moseley, *v.* Virgin, 3 Ves. 184; Lord Loughborough, in Brace, *v.* Wehnert, 25 Beav. 348; Hepburn *v.* Leather, 50 L. T. 660; Clarke *v.* Glasgow Ass. Co., 1 M'Queen 668; Fry's Spec. Pref. (2d ed.) 38.

[3] Story's Eq. Jurisprudence, § 728.

[4] Equitable Gas Lt. Co. *v.* Bal. Coal Tar & Mfg. Co., 63 Md. 285; Gloucester Isinglass, etc., Co. *v.* Russia Cement Co., 154 Mass. 92; Buxton *v.* Lister, 3 Atk. 384, a contract for ship timber in large quantities; *and see* Price *v.* Corporation, 4 Hare 506-9.

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ant's quarry, and that to use any other kind of stone would destroy the harmony and beauty of the structure. It was held that the contractor should be compelled to furnish the stone necessary to complete the building and to permit the owner to enter on his premises to procure such stone, and to permit him to use his derricks at the quarry and at the church building in quarrying, transporting, and raising the stone.[1] In this case the court does not seem to have been troubled with the argument of the case in Sec. 705, that such a decree would be a depriving of the contractor of his property without due process of law. If, as in the latter case, the courts can decree that the contractor shall permit the owner to use his derricks and stone to complete a church, it would seem proper that in another case the contractor could be required to furnish his derricks and the members of a railroad bridge. To an engineer the exigencies of the former case would seem to be greater than in the latter.

Contracts for the sale and delivery of maps, drawings, etc., have been specifically enforced.[2] A contract to furnish a patented or copyrighted article would be enforced by mandamus in the same manner, in all probability, if the damages could not be ascertained and compensated by a money consideration.

A contractor may be enjoined from interfering with an owner who undertakes to complete work which he has refused to do.[3] A contractor will not be enjoined for doing his work upon a street otherwise than according to his contract, at the suit of a property owner.[4] In these cases it should be remembered that specific performance cannot be demanded as an absolute right, but that it rests largely with the court, to be exercised in strict conformity with equity and justice.[5]

708. Neither will Specific Performance of a Construction Contract be Decreed against the Owner.—On the grounds recited in previous sections, the owner or company cannot be compelled to proceed with the construction of a structure at the instance of the contractor.[6] The contractor, if he be not himself in default, has a just claim against the owner for damages, and his remedy is an action at law for such damages.[7] If he is prevented from bringing his action at law, as when the favorable decision of the engineer is made a condition precedent to any recovery under the contract, he may, when the engineer has been guilty of fraud or unfair conduct, go into a court of equity and get relief. An English court, in a case of unfair treatment by the architect, decreed payment of the balance due on the contract, relieved the contractor from all penalties, declared the architect's decision

[1] Rector, etc., *v.* Wood (Oreg.), 34 Pac. Rep. 18.
[2] McGowan *v.* Remington, 12 Pa. St. 56.
[3] Corporation *v.* Rooney, 7 L. R. Ir. 191.
[4] McCafferty *v.* McCabe, 13 How. Pr. (N. Y.) 275.
[5] New Orleans *v.* N. O. & N. E. R. Co. (La.) 10 So. Rep. 401 [1892].
[6] Garrett *v.* Banstead, etc., Ry. Co., 4 DeG. J. & S. 462.
[7] Lord *v.* Thomas, 64 N. Y. 107 [1876]; People *v.* Harmon (Sup.), 36 N. Y. Supp. 331.

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not binding, and ordered the defendants—the owner and architect—to pay the cost of the suit.[1]

709. Specific Performance of Contract for Personal Service.—Contracts for personal services to be performed involving the labor, skill, discretion, taste, talent, or inventive genius, of an engineer or architect in default, will not be specifically enforced because they are incapable of supervision or control. If an architect or engineer has undertaken the design and construction of a structure, or of the invention of a machine, and when partly completed he declines to proceed further with it, it seems that the only remedy that his employer can have is an action at law for damages, the value of which will be measured by the reliability of the employee.[2]

The cases cited are, for the most part, cases in which the employer has sought the assistance of the court to compel theatrical performers, singers, artists, and even acrobats and baseball players, to perform their contracts of service where they have been engaged for a season. The author is not familiar with any decision of a case where an engineer, architect, or landscape architect has, when the work was partly completed or well under way, refused to carry out the inception or plans which he has conceived and which perhaps he alone could do, successfully. The reader can imagine cases in which an engineer or architect, in the execution of a public work, or a landscape gardener, in the laying out and beautifying of a public park, might be so hampered, annoyed, and interfered with by boards and commissioners as to justify him in refusing to continue the work to the great detriment of his own professional reputation. In fact, it is too often the case with our public works and parks.

The protection which a company or owner may secure to itself is to insist that the plans shall be completed before the work is begun, or that they be so far completed as is possible to be done, and that the architect or engineer be required to report upon his project to a board of experts, or to a consulting engineer, if the work be of sufficient magnitude. When committed to paper in the shape of plans and drawings and sketches, the court will require the architect or engineer to deliver such plans over to the state, company, and owner, for that it can do.

It has been held that a contract for the services of an architect did not survive to his representative,[3] and that the latter could not recover on a contract partly performed.[4]

A public officer, as a city engineer, may be compelled by mandamus to furnish lines and levels in accordance with the terms of the contract.[5]

[1] Pawley *v.* Turnbull, 3 Gifford 70 [1861].

[2] Wollensack *v.* Briggs (Ill.), 23 The Reptr. 399, 119 Ill. 453 [1887]; Wilson *v.* Roots (Ill.), 10 N. E. Rep. 204 [1887]; Elec. Ltg. Co. *v.* Mobile, etc., Ry. Co. (Ala.), 19 So. Rep. 721; *In re* Walter Baker, 29 How. Pr. 485 [1865]; *Many cases collected in* 22 Amer. & Eng. Ency. Law 1004, *and* 10 Amer. & Eng. Ency. Law 948.

[3] Hall *v.* Wright, E., B. & E. 765; Taylor *v.* Caldwell, 3 B. & S. 835.

[4] Stubbs *v.* Hollywell Ry. Co., L R. 2 Ex. 311.

[5] State *v.* Bell (La.), 21 So. Rep. 724.

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CHAPTER XXVI.

NONPERFORMANCE OF CONTRACT.

POWER OF OWNER OR COMPANY TO TERMINATE, RESCIND, OR ANNUL CONTRACT FOR CERTAIN CAUSES. POWER TO EMPLOY OTHERS TO COMPLETE WORK IN CASE OF DELAY, DEFAULT OR BREACH OF CONTRACTOR. ENGINEER OR ARCHITECT MADE THE SOLE JUDGE.

710. Provision Conferring Power upon Owner to Terminate Contract in Case of Default by Contractor.

Clause: "If the contractors or builders shall become insolvent, or be declared bankrupt, or shall from any other cause, in the judgement of the engineer or architect, be unable to carry on the work, or if they shall make default in the due performance of the agreement, or of all or any of these conditions, or in duly proceeding with the work, and the engineer or architect shall give notice in writing of such delay, neglect, or default to the contractors or builders specifying the same, and the contractors or builders shall not for a period of .... days after such notice proceed satisfactorily in accordance therewith, then the said owner shall, on the written certificate of the engineer or architect of the fact of such delay, neglect, or default, and of the contractors' or builders' failure to comply with such notice, have full power and authority to terminate the contract by written notice under the hand of the said owner, and thereupon all sums of money that may be due to the contractors or builders, together with all materials, goods, chattels, and effects, including tools, machinery, and plant then lying in, upon, or about the buildings or grounds, shall become forfeited to the said owner, and may be employed or sold and disposed of as he may direct, and the said owner shall have full power and authority to employ any person or persons to complete the whole or any part of the work, or to enter into any new contract or contracts for the completion of the same or any part thereof, without prejudice, however, to any remedy which he may have against the contractors or builders for their breach of contract."

711. Provision for Builder's Failure.

Clause: "If the contractor or builder becomes a bankrupt, or compounds with his creditors, or neglects, or fails, or becomes unable to proceed with the work as directed by the engineer or architect (unless the work shall be interrupted by a general strike or refusal on the part of employees), the owner may, after a certificate from the architect to that effect, get the work done by any other builder or workman as he shall think fit, and the contractor and his assignees shall thereupon forfeit all claim to further payment under this contract, except to such balance

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(if any) as shall remain out of the said sum of .... dollars after the completion of the work by such other builder or workman, and the builder and his assignees shall not be at liberty to remove any scaffolding, tools, plant, or materials from the premises until the same shall cease to be required."

712. Provision that Owner may Terminate Contract for Certain Causes.

Clause: "And it is further expressly agreed that if the contractor, during the continuance of this contract, shall die or shall become bankrupt or insolvent, or shall compound with his creditors, or shall propose any composition with his creditors for the settlement of his debts, or shall commit any act of insolvency, or propose any composition with his creditors for the settlement of his debts, or shall assign, make over, or underlet this contract, or any part or benefit thereof, or make any subcontract for the execution thereof, or of any part thereof, or shall attempt to transfer or assign his contract without the consent of the owner or company, or its engineer, or if the same shall become vested in any other person, or shall carry on, or propose to carry on, his business under inspectors on behalf of his creditors, or shall commit any act of bankruptcy, or shall give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any officer or servant of the city, state, or government; or if by the report of the engineer it shall appear that the rate of progress of the said works is not such as to insure the satisfactory completion of the same within the time herein designated, or within any additional time which may have been granted, as in the said contract provided, or in case no additional time has been granted, and the said works are not completed within the time before limited; or in case of additional time being granted as aforesaid, then if the same are not completed within such additional time, or if at any time the works, or any part thereof, are in the opinion and according to the determination [judgment] of the engineer not executed, or not being executed, in a sound and workmanlike manner, and in all respects in strict conformity with the specifications and contract, and to his satisfaction, then the engineer, clerk of the council, or president of the company may, by a notice in writing under the hand of the engineer, clerk, or president, delivered or sent through the post-office in a registered letter addressed to the contractor, or his legal personal representative at the contractor's usual or last known place of abode or business, give notice to the contractor thereof, and in case he shall refuse or neglect within forty-eight hours to take down, rebuild, repair, alter, or amend any defective or unsatisfactory work, or to comply with any order he may so receive to that effect, or in case the works, from the want of sufficient or proper workmen, or materials, are not proceeding with what the engineer shall consider to be due dispatch, or if the contractor shall persist in any course violating any of the provisions of his contract, then the engineer may after two days' notice to the contractor to do what is necessary, and upon his failure to do so (or in case of the contractor's bankruptcy, insolvency, or of his compounding with his creditors, or of his making any proposition therefor, or of his transferring or assigning this contract, or making any attempt to do so, then without previous notice) the engineer shall have the power, at his discretion, without process or action at law, to take the work, or any part thereof, mentioned in such

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notice, out of the hands of the contractor, and either to re-let the same to any other person, or persons, and upon such conditions as he may think fit, without its being previously advertised, or to employ workmen and provide materials, tools, implements and apparatus, transportation and all other necessary things at the expense of the contractor, or to take such other steps as he may consider necessary or proper in order to secure the completion of the said works, or any of them, or for repairing or remedying, or endeavoring to remedy or repair any defects which may appear therein, without thereby affecting the obligations, liabilities, and responsibilities of the contractors, the whole of which shall, unless otherwise agreed in writing to the contrary, and except as is otherwise hereinafter mentioned, continue to be in force as fully and to the same extent and for the same period as if the contract had not been so determined, and as if the works subsequently executed had been executed by or on behalf of the contractor, and without thereby creating any trust in their favor, and to enter in and to take possession of the works, and of the plant, tools, and materials of the contractor, and to use or sell, or to use and to sell, the same as the absolute property of the owner, company, or city, and the contractor in every case shall be liable for all damages and extra expenditure which may be incurred by reason thereof. And all the powers of the said engineer with respect to the determination of any doubts, disputes, and differences, and with respect to the settlement of the contract, and the determination of the sum or sums, or balance of money to be paid to or received from the said contractor, and otherwise in respect to the said contract, shall nevertheless continue in force with respect to the same, as though such contract had not been determined nor interrupted."

713. Provision that if Work does not Progress Satisfactorily, Owner may, After Giving Notice, Employ Other Persons and Provide Materials and Complete Work at Expense of Contractor.

Clause: "If at any time the works or any part thereof, are, in the judgment of the engineer, not executed or are not being executed in a sound and workmanlike manner, and in all respects in strict conformity with this specification, and the contract of which it is made a part, and to his satisfaction, the same shall be intimated to the contractor in writing or otherwise, and in case he refuses to take down, rebuild, repair, altar, or amend any defective or unsatisfactory work, or comply with any order he may so receive to that effect, or in case the works, from the want of sufficient or proper workmen or materials, are not proceeding with all the necessary dispatch, then the said board or company shall, on the report of the engineer, after giving three days' notice in writing thereof to the contractor, his agent, or foreman, have full power without vitiating this contract, to take the works wholly or in part out of the hands of the said contractor, to appropriate and use any or all materials, tools, and appliances belonging to the contractor or provided by him for the works as may be suitable and acceptable, and to engage or employ any other persons or workmen and procure all requisite materials and implements for the due execution and completion of the said works; and the costs and charges incurred by them in so doing shall be ascertained by the engineer, and paid for or allowed to the said board or company by the contractor; and it shall be competent to the said board to deduct the amount of such costs and charges out of any

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money due or to become due from them to the said contractor under this or any other contract with the said board on behalf of the corporation."

714. Provision that Owner may under Certain Conditions Take Work from Contractor and Employ Others to Complete It.

Clause: "The said part...of the second part further agree...that if the work to be done under this agreement shall be abandoned, or if the conditions as to the rate of progress hereinbefore specified are not fulfilled, or if this contract shall be assigned by the part...of the second part otherwise than as is hereinbefore specified, or if at any time the engineer shall be of opinion, and shall so certify, in writing, to the said commissioners, that the said work or any part thereof is unnecessarily or unreasonably delayed, or that the said contractor is violating any of the conditions or covenants of this contract, or executing said contract in bad faith, or if the work to be done under this contract be not fully and entirely completed within the time herein stipulated for its completion, the said owner, or commissioners, or board shall have the power to notify the aforesaid contractor to discontinue all work or any part thereof under this contract; and thereupon the said contractor shall discontinue the said work or such part thereof as the said owner or board may designate; and the said owner or board shall thereupon have the right, at its discretion, to contract with other parties for the delivery or completion of all or any part of the work left uncompleted by said contractor, or for the correction of the whole or any part of said work, or to hire and place such and so many persons, and obtain by purchase or hire such materials, animals, carts, wagons, implements, and tools, by contract or otherwise, as said owner or commissioners or board deem necessary to complete the work herein described, or such part thereof, and to procure materials for the completion of the same, and to charge the expenses of said labor and materials, animals, carts, wagons, implements, and tools to the aforesaid contractor. And in case the expense so incurred by said board is less than the sum which would have been payable under this contract if the same had been completed by the said contractor, then the said contractor shall be entitled to receive the difference; and in case such expense shall exceed the last said sum, then the contractor, shall, on demand, pay the amount of such excess to said owner, company, or city, but such excess to be paid by the contractor shall not exceed the amount of the security for the performance of this contract."

715. Provision that Owner may Annul or Rescind Contract in Case of Default by, or Legal Proceedings against, Contractor.

Short clause: "And it is hereby further agreed that in case the said contractor shall not well and truly, from time to time, comply with and perform all the terms hereinbefore mentioned, or in case it shall appear to said chief engineer that the work does not progress with sufficient speed or in proper manner, or in case of interference with said work by legal proceedings instituted against the contractor by other parties than the said company, the said company or its chief engineer shall have power to annul this contract if it [he] shall determine so to do by giving notice in writing, etc., * * * when.

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upon such serving of said notice, the foregoing agreement on the part of said company, and every claim and part thereof, shall become null and void, and the unpaid part of the value of the work done *shall be forfeited* by the contractor to the use of said company in the nature of liquidated damages."[1]

716. Provision that if Work does not Progress with Due Diligence Other Contractors may be Employed.

Clause: "The contractor shall commence and carry on the works with due diligence and as much expedition as the owner or city or its authorized officers may require; and in case the contractor shall fail to to do so, or shall neglect to provide proper and sufficient materials, or to employ a sufficient number of workmen to execute the works which he shall be ordered to execute, with the diligence or dispatch required, then either the said owner or city or the engineer shall be at liberty and are hereby authorized to employ other contractors or workmen, and to provide the necessary materials, and to charge the extra expenses incurred thereby to the account of the contractor, and to deduct the same from any sum or sums due or to become due to him, under this or any other contract with the said owner or city."

717. Provision that Engineer shall Render an Account between Parties, which Account shall be Final and Conclusive.

Clause: "In case the owner or city or engineer shall take the works, or any part thereof, out of the hands of the contractor as herein provided, then upon completion of the works herein provided for, the said engineer shall certify what, if anything, shall remain due to the contractor in respect of the said works, after making due allowance for all additions to be allowed to, or deductions or charges to be borne by, the contractor under the provisions of his contract, or shall certify what, if anything, shall be owing to the said corporation in respect thereof, and the contractor and the said corporation respectively shall abide by the certificate to be made by the said engineer as aforesaid, and shall forthwith pay to the other party the amount found to be owing in respect of the said works."

718. General Remarks in Regard to these Clauses Providing for the Termination of the Contract.—The necessity of reserving to the company the right and power to terminate, annul, or rescind the contract for delay, incompetence, inattention, or refusal to perform, whether arising from ignorance, incapacity, dissipation, or willfulness, or lack of means, will be appreciated by all engaged in such work except, perhaps, contractors.

Before exercising such a right the owner and engineer should consider carefully the consequences of an act of rescision, which are fully explained in succeeding sections. The consequences are so far reaching and so productive of results not anticipated nor desired that they deserve going over in detail. The termination of a construction contract should be regarded as a very serious step, and one to be taken only under the strongest provocation

[1] *See* Elizabethtown & P. R. Co. *v.* Geoghegan, 9 Bush (Ky.) 56 [1875].

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and when taken it should be executed promptly, positively, and unequivocally, and in strict accordance with the terms of the contract by which the right is reserved. Clauses providing for annulment of the contract by the owner are forfeitures imposed upon the contractor and are not in favor with courts, who construe them most strongly against the owner, company, or city. In fact, the real value of such clauses is very much overestimated as will be seen from what follows. The courts limit the power conferred as narrowly as the language used will permit.

719. Contracts may be Rescinded by Mutual Consent at Any Time.—Contracts for construction work being self-imposed obligations, requiring the joint act or consent of both parties, it follows that the burden of performing those obligations may be removed at any time by the mutual consent of both parties. If the contractor is released from his obligation to complete work by consent, he can recover for what he has performed on a *quantum meruit*.[1] The parties may also in the beginning, by express agreement, limit their obligations to a certain date or to the occurrence of some event described, or to the performance of some act, or to its nonperformance or misfeasance.[2] The parties may, by a new or supplemental agreement, rescind former agreements, or in the original contract agree that certain acts or conditions shall be taken as a determination on the part of the contractor not to perform his undertaking, which shall relieve the company from its obligations.[3]

If the contract has been executed by one party, such an agreement to rescind must be supported by some consideration, the same as any other contract.[4] * If it has not been executed, the promise or agreement upon the one side not to enforce his rights constitutes the consideration for the promise of the other side not to enforce his rights. The contract obligation once assumed cannot be revoked, and if a contract has been entered into in conformity with municipal ordinance through its proper officers, such contract remains in force with all the liabilities that the law attaches thereto, notwithstanding the passage of a subsequent ordinance altering, diminishing, or limiting the extent to which the work was authorized by the first ordinance. Until the city acts on the later ordinance, and by its proper authorities forbids the contractor going on under his contract, which may amount to a breach, he should, or has the right to, pursue his work in conformity therewith.[5] Such contracts cannot be changed without the consent of or notice

[1] B. & O. R. Co. *v.* Resley, 7 Md. 297; B. & O. R. Co. *v.* Laffertys, 2 W. Va. 104.

[2] *Cases*, 29 Amer. & Eng. Ency. Law 915, n. 3. 957, n. 3 and 958 n. 1, 979 n. 2; Bacon *v.* Proctor (Com. Pl.), 33 N. Y. Supp. 995.

[3] A valid contract is not annulled by a subsequent contract between the parties, relating to the same matter, which is void under the statute of frauds. Harvey *v.* Morey (Colo. Sup.), 45 Pac. Rep. 383.

[4] Westmoreland *v.* Porter, 75 Ala. 452 [1883].

[5] Ottendorfer *v.* Fortunato, 56 N. Y. Super. Ct. 495 [1889].

* *See* Secs. 69, 131, and 563, *supra*.

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to, the parties to be affected thereby.[1] If the city, company, or owner give due notice of its refusal to perform or execute its part of the contract, the contract is broken, and the contractor has his remedy in the courts.*

Specific performance will not be enforced nor will an injunction issue against the owner.[2]

720. Agreements that Owner may Terminate Contract are Valid and Binding.—While agreements that a contract shall upon certain conditions become inoperative and not binding have been sustained, a contract that one party can in his discretion or for certain causes, of which he himself shall be sole judge, terminate or annul a contract, would seem to be unreasonable and against public policy. Such a contract presents the one-sided spectacle of one party being bound to perform his undertakings, while the other may perform or not, at his pleasure.

Whatever doubt may have existed as to the legality of such an agreement, it is now well settled beyond dispute that an agreement of a contractor in a construction contract, such as is given in the contract clauses preceding, will be upheld and enforced by our courts.[3]† If not contrary to equity and good morals, the exercise of such a right to terminate, reserved in the instrument itself, will be enforced by the courts.[4] "The agreements of the parties are the law by which their rights are to be determined, and it is extremely doubtful if any court can legitimately interfere or upset their arrangements where an honest discretion has been exercised and neither fraud nor circumvention has been practiced.[5] It has been held that the right to rescind under such a reservation can be exercised without question by or notice to the contractor, in the manner stipulated.[6] However, as said before, stipulations for forfeitures are not in favor with the courts, and a good deal that has been said of penalties under the sections on liquidated damages will apply to forfeitures.[7] To avoid hardship and undue advantage the courts will consider all the circumstances of a case tending to show a waiver of the forfeiture.

It is most usual to leave the question of delay or incapacity to the engineer or architect in charge of the work by a clause similar to the following:

[1] Duncombe *v.* City of Ft. Dodge, 38 Iowa 281.

[2] Garrett *v.* Baustead, etc., Ry., 4 De G. J. & S. 462.

[3] Easton *v.* Penna. & O. Canal Co., 13 Ohio 79 [1844]; Randel *v.* Chesp. & Del. Canal Co., 1 Harrington (Del.) 233-322 [1833]; Grassman *v.* Bonn, 32 N. J. Eq. 43; Rector *v.* McDermott (Ark.), 18 S. W. Rep. 384 [1890]; Lara *v.* Greeley, 20 Fla. 926; Rossvally *v.* City of New Orleans, 19 La. Ann. 7 [1867]; Hammond *v.* Miller, 2 Mackey (D. C.), 145; Hewlett *v.* Alexander, 87 Ala 193; Mohan *v.* Dundalk R. Co, L. R. 6 Ir. 477; Stadhard *v.* Lee, 3 B & S. 364; Ranger *v.* Gt. Western R., 3 Rwy. Cas. 298; Davies *v.* Swansea, 8 Exch. 808; Culbertson *v.* Ellis, 6 McLean (U. S.) 248; M'Intosh *v.* Midland Co.'s Ry., 14 M & W. 548; *accord*, Schuler *v.* Eckert (Mich.), 51 N. W. Rep. 198.

[4] Morrisey *v.* Broomal (Neb.), 56 N. W. Rep. 383.

[5] Easton *v* Penn. & Ohio Canal Co., *supra ; accord* Morrisey *v.* Broomal (Neb.), *supra.*

[6] Henderson Bdge. Co. *v.* O'Connor, 88 Ky. 303.

[7] Lloyd's Law of Building, etc. 98 and 102; Hunter *v.* Hunter, 17 Barb. 26; Salters *v* Ralph, 15 Abb. Pr. 273.

* *See* Secs. 681 696 and 707-709, *supra.*

† *See* Secs. 340-345, *supra.*

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> "If the opinion of the engineer shall be at any time, that the contractor has refused or has unreasonably neglected to prosecute his contract, such engineer may certify the same opinion to the company, and on his certificate the company shall have the right and power of determining that he has abandoned it," etc.

Such an agreement has been held a covenant on the part of the contractor, and gives to the owner or company the power, upon the certificate being made, to put an end to the contract,[1] and without being liable for damages resulting.[2]

If the contract require that the structure be erected "in the best, most substantial, and workmanlike manner," and authorizes the owner to terminate it if the work is not done in accordance with its terms, the incapacity of the contractor to do the work properly, arising from his ignorance, and dissipation, and the incompetence and dissipation of his workmen, has been held to justify the owner in terminating the contract.[3] A finding by the lower court on conflicting evidence that the owner had just cause for taking possession of and completing the works will not be disturbed on appeal.[4]

Under such clauses for the termination of the contract and completion of the work by the owner, an owner cannot declare the contract forfeited and refuse to relet the work to others nor complete it himself. It was so held of a principal contractor, the court holding that the subcontractor was entitled to full pay for what he had done, including the 15 per cent. reserved for full completion of contract.[5]

721. The Acts, or Failure to Act, of Contractor does not Render Contract Void, but the Owner must Act.—The failure, neglect or refusal of the contractor does not make the contract void, but voidable only at the election of the owner. It is a power which the latter may exercise or waive in his discretion, and though the power be derived from a contract under seal, it may be waived by oral agreement or by neglect to exercise it at the time and in the manner expressed.[6]* The provision confers no such rights or privileges upon the contractor. The owner may hold fast or let go as he will, while the contractor is holden to the terms of his agreement. If the contractor has agreed that in the event of his failure to make certain progress, or to perform according to terms of contract and specifications, the owner may take the works away from him and complete them, deducting the cost from the contract price, the contractor cannot abandon the work and require the

[1] Randel *v.* Chesapeake & Del. Canal Co., 1 Har. (Del.) 233 [1833]; Roberts *v.* Bury Imp. Com'rs., L. R. 4 (Com. Pl.) 755; Ranger *v.* Gt. Western Ry., 5 H. of L. Cas. 72; Scott *v.* Liverpool, 3 De G. & J. 334; Munroe *v.* Wivenhoe, etc., R. Co., 11 Jur. (N. S.) 612; Garrett *v* Banstead, etc., R. Co., 11 Jur. (N. S.) 654.

[2] Harder *v.* Com'r., 97 Ind. 455.

[3] Rector *v.* McDermott (Ark.), 13 S. W. Rep. 384 [1890].

[4] Schuler *v.* Eckert, 51 N. W. Rep. 198 [1892]; *and see* Benson *v.* Miller (Minn.), 57 N. W. R p. 943 [1894].

[5] Winters *v.* Fleece, 14 Lea (Tenn.), 546; *see also* Maloney *v.* Malcolm, 31 Mo. 45.

[6] Randel *v.* Chesp. & Del. Canal Co., *supra.*

* *And see* Secs. 417, 701, *supra*, and 726, *infra.*

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owner to complete it and account to him for the balance of the contract price.[1] A stipulation that if the contractor fail to perform his covenant, the contract shall be void, does not permit him when he has failed to perform, to rescind the contract on that ground and thus profit by his own wrong,[2] and a stipulation for liquidated damages does not give to the contractor the option to pay the damages and break his contract.[3] The annuling of a contract, under a power reserved therein, for default of the contractor, does not release the latter and his sureties from liability for prior breaches.[4]

A notice from the owner of his election to complete work, whereupon the contractor stopped work, does not of itself show that the contractor was prevented from proceeding with his work so as to entitle him to recover on a *quantum meruit*.[5] If after the job has been taken out of contractor's hands the contractor be allowed to continue with the work, he may recover for such subsequent work on a *quantum meruit*, as it is not done under the contract.[6]

722. Unless Power or Right is Reserved, Owner Cannot Terminate Contract without Consent of Contractor.—If the power to rescind be not reserved in the contract, the owner cannot rescind when the contractor's failure to perform is only partial, leaving a distinct part subsisting and executed, and leaving the owner his action for damages for the part not performed.[7]

As to what is only a partial failure, or what is a sufficient departure from the terms of the contract to entitle the owner to declare the contract broken, is a question about which the courts are not agreed. The language of the books does not help one much, the authorities usually being content with saying that the breach must go "to the root" of the contract or to its "essence." The acts of the contractor must amount to a breach on his part, and the mere nonperformance of some condition, which does not go to the root of the contract, is not sufficient ground for a rescission by the owner.[8] When work was to be done in a workmanlike manner, it was held that the owner might terminate the contract if it were not done so and without regard to the intention of the contractor.[9] *

Under a provision that the city may enter and complete the contract if the contractor "shall fail in any part of his undertaking," a statement from the contractor that, unless his claim for extra work is allowed, he will not

[1] Bernz *v.* Marcus Sayre Co. (N. J.), 30 Atl. Rep. 21, *reversing* 26 Atl. Rep. 911; *semble*, Walker *v.* London & N. W. R. Co. (Eng.), 1 C. P. D. 518, 36 L. T. Rep. 53 [1876].

[2] 21 Amer. & Eng. Ency. Law 46, *note*.

[3] Crane *v.* Pier, 43 N. J. Eq. 553

[4] United States *v.* Maloney, 4 App. D. C. 505.

[5] Beecher *v.* Schubaek (Sup.), 37 N. Y. Supp. 325.

[6] O'Reily *v.* Kerns, 52 Pa. St. 214 [1866].

[7] Burge *v.* Cedar Rapids, etc., R. Co., 32 Iowa 101; *and see* Clark *v.* United States, 6 Wall. 543 [1867].

[8] Swobe *v.* New Omaha T. H. Elec. Lt. Co. (Neb.), 58 N. W. Rep. 181.

[9] Feinberg *v.* Weiher, 19 N. Y. Supp. 215.

* *See* Secs. 681-689 and 697-702, *supra*.

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proceed, will not justify the city in terminating the contract on disallowance of the claim, when it knows that the contractor is still prosecuting the work, and has told the city's engineer that he would not quit till he had obtained legal advice, and consulted with his bondsmen.[1]

723. Power to Terminate Contract must be Exercised in Time and Manner Required.—As explained before, the occurrence of the event described, as the certificate of the engineer that the contractor has failed, etc., does not render the contract void, but only voidable. The power is discretionary and may be waived, if it be not exercised at the proper time and in the same manner required by the contract.[2] The act is a judicial one and must be performed in good faith. If left to the judgment of two persons they must act jointly, and each must be informed independently from his own investigation.[3] If in good faith, it will be binding, even though on mistaken facts.[4] The power to establish a forfeiture or to avoid a voidable contract must be exercised within a reasonable time and in a lawful manner.[5] The question as to what is a reasonable time is usually a question for a jury, though the delay may be so long that the court will decide it.[6] To avoid a waiver of the right to rescind or determine the contract requires the highest care and descretion on the part of the engineer in the prompt performance of his duties.

724. Right must be Exercised before the Time for Completion has Elapsed.—Under stipulations that "in case it appear to the engineer that the work does not progress with sufficient speed or in a proper manner," then the company could annul the contract if it saw fit, or "should the contractor fail to proceed with the work in the manner, and at a rate of progress required by the engineer, or to so maintain the said works as hereinafter mentioned to the satisfaction of the engineer, their contract shall at the option of the company, but not otherwise, be considered void, etc.," it has been held that the company must exercise its right to terminate the contract within the time fixed for the performance of the contract, that is before *the day fixed* in the contract for full completion of the works.[7]

The courts generally hold that upon a true construction of the clause providing for a forfeiture of contractor's rights under his contract, if he did not well and truly perform his contract and make the progress necessary to complete it *within the time stipulated*, they can only be acted upon and enforced before the time for completion of the works had expired.[8]

[1] Sewer Com'rs of Amsterdam *v.* Sullivan (Sup.), 42 N. Y. Supp. 358.

[2] Randel *v.* Chesp. & Del. Canal Co., *supra.*

[3] Benson *v.* Miller (Minn.), 57 N. W. Rep. 948.

[4] Culbertson *v.* Ellis, 6 McLane 248; P. W. & B. R. Co. *v.* Howard, 13 How. 307.

[5] Randel *v.* Chesp. & Del. Canal Co., *supra.*

[6] 21 Amer. & Eng. Ency. Law 82; *but see* Bacon *v.* Green (Fla.), 18 So. Rep. 870.

[7] Henderson Bdge. Co *v.* O'Connor (Ky.), 11 S. W. R p. 18 [1889]; Walker *v.* London & N. W. R. Co, 36 L. T. Repts. 53 [1876]

[8] Walker *v* London & N.W. R Co., L. R. 1 C P. D. 518 [1876]; *Ex parte* Newitt, 16 Ch. Div. 522; Henderson Bdge. Co. *v.* O'Connor (Ky.), 11 S. W. Rep. 18 [1889]; Roberts

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The courts hold that the object of this stipulation is merely to secure a better guaranty of a seasonable performance within the time fixed, and that *time* having passed, it is no longer in force.[1]

If the date of completion has been allowed to pass without exercising that power, a later notice by the company to the contractors that it elects to annul the contract under the stipulation is not valid and will not enable it to escape its obligations.[2] The courts have distinguished between a clause conferring on the engineer the power to employ such men and teams and procure such materials as may be necessary to complete the work by the day named for completion, and a clause conferring such powers without any restriction as to time; they have held that the powers conferred could be exercised under the latter clause after the time for completion or the extension thereof had passed.[3]

The English courts hold that such a clause clearly makes time the essence of the contract, as it is only with reference to the time of completion that the rate of progress can be determined. If the time of completion has passed, there may have been a new agreement implied to complete in a reasonable time, but to give the clause in question any application to a reasonable time after the time originally fixed has expired would be to make the company a judge in its own cause of what was a reasonable time, and enable it in its own favor to avail itself of a most stringent and penal clause.[4]

What the court says may be true, but the consequences of such a rule may work equal injustice upon the company or owner who has indulged the contractor and permitted him to continue after his time was up. If advantage cannot be taken of the clauses reserving the right to annul the contract or to employ others to complete the works, it may be inquired what is the company or owner to do under such circumstances. The contractor is guilty of a breach of his covenants, but if it cannot be said to go to the essence of his contract, he may with impunity continue to delay the work to the great annoyance and expense of the company. The whole trouble, of course, may be avoided by indorsing upon the contract an extension of the time of completion and before the time for performance has expired, and expressly providing in the agreement for the extension of the time that all the conditions and stipulations of the original contract shall remain in force as before.

v. Bury Imp. Co., L. R. 4 C. P. 755, *distinguished;* Flynn *v.* Des Moines, etc., R. Co. 63 Iowa 491 [1884]; Cummings *v.* Pence (Ind. App.), 27 N. E. Rep. 631 [1891]; Linch *v.* Paris Lumb. Co., 80 Tex. 23; *semble.* Murphy *v.* Buckman, 66 N. Y. 297 [1876]; Paddock *v* Stout (Ill.), 13 N. E. Rep. 182 [1887]; *and see* Van Stone *v.* Stillwell. etc., Co., 12 Sup. Ct. Rep. 181; Jennings *v.* Brighton Bd., 4 De G. J. & S. 735, *note.*

[1] Henderson Bdge. Co. *v.* Connor (Ky.), 11 S. W. Rep. 18 [1889].

[2] Walker *v.* London & N. W. R. Co., 36 L. T Repts. 53 [1876]; *and see* Murphy *v.* Buckman, 66 N. Y. 297 [1876], *and* Fallon *v* Lawler, 102 N. Y. 228.

[3] Mangan *v.* Windsor (Ont.), 24 Ont. 675 [1894].

[4] Walker *v.* London & N. W. R. Co., 36 L. T. Repts. 53 [1876].

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If the engineer in pursuance of another clause in the contract has extended the time for completing the work, it seems that the company cannot exercise the power reserved "to take the works away from the contractor in the event of the work being delayed by him" for the reason that the works were delayed during the extended period, or on the ground that they were not finished.[1]

A stipulation in a contract that if the contractor "shall not from time to time truly perform all his obligations," one of which was to complete the work by a certain time, the engineer should have power to dismiss him, by which act the contract should become annulled and all sums due be forfeited, was held to have no reference to the obligation to complete the work by the time fixed, but to refer only to failures to perform during the progress of the work, which shows the propriety of inserting a provision for noncompletion within the time limit.[2]

These and the following case show how dangerous to the validity of the stipulation it is to permit the time for completion to pass without exercising the power to terminate the contract, or perhaps, better still, requiring the contractor to execute a new agreement extending the time for completion and preserving all the other terms of the original contract. If the contract provide that the contractor shall have ten days' notice before the contract is terminated or other men employed, it has been held that then the company or its engineer must avail themselves of the privilege ten days before the time for completion of the contract.[3]

From what precedes it must not be taken that a waiver of the provision as to time of completion is a waiver of all the other features and stipulations of the contract, for it has been held to the contrary.[4] The owner must not have accepted the work as completed.

725. Provision that Extension of Time of Completion shall not be a Waiver of Right of Owner to Terminate Contract for Cause.

> Clause: "But neither the extension of the time, for any reason, beyond the date fixed for completion of the work, nor the doing and acceptance of any part of the work called for by the terms of this contract, subsequent to the said date, shall be deemed to be a waiver by the said commissioner of the right to abrogate, annul, or terminate this contract for abandonment or delay, in the manner provided for (in the paragraph or article marked [Secs. 710–717]) in this agreement."

726. Failure to Exercise Power in Time may Amount to a Waiver of the Right to Terminate.—If no mention is made of the progress of the work or of its connection with the time of completion, but it simply provides that if the contractor shall fail to comply with the contract terms the owner may avoid the contract and sue for damages, the owner must act promptly when

[1] Mohan *v.* Dundalk, N. & G. Ry. Co., 6 L. R. Ir. 477 [1881].

[2] Cannon *v.* Wildman, 28 Conn. 490.

[3] Grant *et al. v.* Savannah Co., 51 Ga. 348 [1874].

[4] Jacksonville & A. R. Co. *v.* Woodworth (Fla.), 8 So. Rep. 177 [1890]; *and see* Hayes *v.* 2d Bap. Ch., 3 West Rep. 83.

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the cause for terminating the contract arises, for if he fail to declare it forfeited at the time, or within a reasonable time thereafter, he may be held to have waived his right to do so.[1] Acceptance of work and payment, therefore, after the expiration of the completion, has been held to amount to a waiver of the right to rescind the contract.[2]

When the owner neglects to declare the contract forfeited as authorized and permits the contractor to continue with the performance of its terms without requiring a new agreement, he is supposed to have waived the right to an absolute performance, and to have excused the contractor's failure, and to have consented to remain liable on his covenant to pay the contract price, less any damages he may have suffered by reason of the contractor's failure.[3]* If the company neglect to declare the contract forfeited and permits the surety to complete the work, the latter can recover the balance of the contract price and the costs of his action to recover it.[4] Even when the contract provided that time should be of the essence thereof and that a failure to perform all its conditions within the time limited for completion should defeat any right to recover for labor performed thereunder, and that the agreement should not be altered except by a writing signed by both parties, it was held that the provision was not a defense to an action to recover the price of the work, where the contractor had been allowed to continue after the day fixed for its completion.[5]

Subsequent agreements to complete the work or to do additional work upon the same job for extra pay, made after the time for completion has passed, may amount to a waiver of the original stipulation to complete by a certain time.[6] A letter to a contractor in which the owner declares that "whenever the rolls shall do satisfactory work I will be ready to pay for them," has been held to amount to a waiver of a full performance and to give the contractor a reasonable time to complete the work.[7]†

When the stipulation as to the time has been waived, it is eliminated from the contract and therefore relieves the contractor from stipulated liquidated damages for noncompletion within the time specified.[8]‡ The waiver estab-

[1] Linch *v.* Paris L. & G. E. Co. (Tex.), 15 S. W. Rep. 208 [1891]; Phillips, etc., Co. *v.* Seymour, 91 U. S. 646 [1875]; Randel *v.* Chesp. & Del. Canal Co., 1 Har. (Del.) 233; *and see* also Art. Drainage Co. *v.* Dist. Board, 6 L. R. Ir. 515 [1881]; Board of Ed. *v.* 1st Nat. Bk., 24 N. Y. Supp. 392.

[2] Henderson *v.* Bdge. Co. *v.* O'Connor, *supra; semble*, Paddock *v.* Stout (Ill.), 13 N. E. Rep. 182 [1887].

[3] Phillips & Colby Constn. Co. *v.* Seymour, 91 U. S. 646 [1875]; *and see* Murphy *v.* Buckman, 66 N. Y. 297 [1876]; Fowlds *v.* Evans (Minn.), 54 N. W. Rep. 743; Walker *v.* Loud & N. W. Ry. Co., L. R. 1 C. P. D. 518; Marsden *v.* Sambell, 28 W. R. 952.

[4] Bd. of Ed. *v.* 1st. Nat. Bk. (Sup.), 24 N. Y. Supp. 392; *and see* Rose *v.* Trestrail, 1 Mo. App. Rep. 540.

[5] Dunn *v.* Steubing (N. Y.), 24 N. E. Rep. 315 [1890], *affirming* 55 N. Y. Super. Ct. 533, *and citing numerous cases; and see* Hutchinson *v.* New Sharon C. V. & E. Ry. Co., 63 Iowa 727 [1884].

[6] Cornish *v.* Suydam (Ala.), 13 So. Rep. 118; *see* Fallon *v.* Lawler, 102 N. Y. 228.

[7] Van Stone *v.* Stillwell, etc., Co., 12 Sup. Ct. Rep 181.

[8] Flynn *v.* Des Moines R. Co., 63 Iowa 491 [1884].

* *See* Sec. 326, *supra.* † *See* Secs. 308–311, *supra.* ‡ *See* Secs. 323–326, *supra.*

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lished, the contractor may then have an action for the contract price, including the percentage retained as liquidated damages for nonperformance within the stated time, and the owner must show any injury he has suffered if he will retain damages out of what is due the contractor or recoup them from what he has paid.[1] The waiver does not amount to a waiver of the damages actually suffered by the owner from the contractor's failure to perform by the day specified, nor prevent the owner from recouping such damages,[2] even though he has not expressed his disapproval or dissatisfaction.[3]*

Under a contract clause providing that, "In case the said contractor shall not well and truly, from time to time, comply with, and perform, all the terms herein mentioned, or in case it shall appear to the said engineer that the work does not progress with sufficient speed, or in a proper manner, or in case of interference with said work by legal proceedings instituted against the contractor by other parties than the said company, the said engineer shall have power to annul this contract if he sees fit so to do, by giving notice, etc.," the time for completion of the work expired before the contractor had finished the work, but the company did not exercise its right to annul the contract by reason of such failure ; but about six weeks thereafter, when the contractor had abandoned the work entirely, the engineer took the necessary steps and declared the contract annulled. Under these conditions and circumstances it was held that the failure of the company to annul the contract within the prescribed time was *not* a waiver of its right to subsequently annul it when the contractor had abandoned the work altogether.[4] Whether it was the utter abandonment of the work by the contractor that distinguished it from other cases, or it is a decision in conflict with the other cases cited, cannot be gathered from the report.

The waiver of a stipulation is not to be implied from the silence of one who is under no obligation to speak. The intention to waive a right must be usually established by language or conduct, and not by mere conjecture or speculation.[5]

727. Right to Terminate Contract Reserved if Work is not Completed by Specified Time.—It is frequently agreed that the failure to complete works by a specified time shall be a reason for annulment of the contract by the owner,[6] but in every such instance the terms of the settlement or agreed liquidated damages should be expressly stated in the contract, and in no uncertain language. If the contract merely provide that it may be can-

[1] Homan *v.* Steele, 18 Nebr. 652 [1886] ; Cummings *v.* Pence (Ind. App.), 27 N. E. Rep. 631 [1891]; Aiken *v.* Bloodgood, 12 Ala. 221 [1847]; Flynn *v.* Des Moines, etc., R Co., 63 Iowa 491 [1884].

[2] Barber *v.* Rose, 5 Hill (N. Y.) 36 [1843]; Cummings *v.* Pence (Ind. App.), 27 N. E. Rep. 631 [1891]; Grannis & Co. *v.* Deeves (Sup.), 25 N. Y. Supp. 375.

[3] Oberlies *v.* Bullingen (Sup.), 27 N. Y. Supp. 19.

[4] Elizabethtown & P. R. Co. *v.* Geoghegan and others, 9 Bush (Ky.) 56 [1875]

[5] Texas & St. L. Ry. Co. *v.* Rust, 19 Fed. Rep. 239 [1883].

[6] Cunningham *v.* Illinois Cent R. Co., 77 Ill. 178 [1875].

* *See* Secs. 317 and 700–704, *supra.*

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celed, and that thereupon both parties shall be absolved from any liability thereunder to one another, it will apply only to the executory parts of the contract, and will not give to the owner any right to recover back moneys he has paid under the contract.[1] If the rescission has been effected by a subsequent agreement made while the work was in progress and after part performance, all claims in respect of work done, or of what has been paid or received under the contract must be referred to the agreement of rescission, and in general no claims can be made unless expressly or impliedly reserved in the rescission.[2] From which it will be seen the necessity of embodying every condition and every term of a settlement in the new agreement when the contract is rescinded.

When work is not going to be completed by the time required by the contract, the failure of the contractor should not be allowed to pass unnoticed, and the contractor permitted to continue his work as if nothing had happened. If the right reserved to the company to declare the contract at an end is not to be exercised, a new time limit should be agreed upon and indorsed upon the contract,* with any other conditions agreed upon, including an express agreement that each and every other condition and stipulation of the original contract shall remain in force; then and only then does the owner reserve to himself the rights and protection which the original contract afforded him.

An extension of time for doing a public work, granted *after* the expiration of the time for its completion, has been held invalid;[3] but it seems that it need not be *indorsed upon the contract* before the expiration of the time originally fixed for completion of the work.[4]

728. Measure of Recovery by Contractor when Contract has been Annulled under a Provision Reserving that Right.—As has been shown in the clauses given, it is customary to fix the damages to be assessed in case of rescission in the contract clause giving the power to terminate the contract, and the discussion of the subject under such a stipulation is postponed to a subsequent section.†

If the amount of damage be not fixed by the terms of the contract of

[1] Mengis *v.* Fifth Ave. R. Co, 30 N. Y. Supp. 999.

[2] Leake's Digest of Contracts, 788–9, *and* p. 72; De Peyster *v.* Pulver, 3 Barb. (N. Y.) 284.

[3] Wood *v.* Brady, 14 Sup. Ct. Rep. 6.

[4] Buckman *v.* Landers (Cal.), 43 Pac. Rep. 1125.

* "For and in consideration of one dollar in hand paid, by the contractor, the time for the completion of the within contract is hereby extended to the.....day of .....189.., it being expressly agreed and understood that each and every other part, provision and stipulation therein contained shall continue in force as in the original contract, except that in regard to the time for completion, which is changed as herein described."

.....

.....

Dated.....189..,

at.....

† *See* Secs. 727, *supra*, and 740, 743–745, *infra*.

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rescission, then the measure of recovery is that which gives to the contractor the reasonable value of his work and materials, less any damages or losses that the owner has suffered in consequence of the contractor's delay, incapacity, or failure to carry out his contract.[1] In Massachusetts the contractor may recover the actual benefit he has conferred independent of the terms of the contract, if the contract has been terminated in any other way than by the voluntary refusal of the contractor to perform his part.[2] Other cases hold that the contractor is entitled to recover the contract price, less what it costs the owner to complete the works.[3] If the work has been paid for by installments, and the last payment only is due and unpaid, the owner is only liable for the excess of the amount of the last payment over the cost of completion.[4] The contractor can recover this excess, without the certificate of the architect that it is due, even though the contract did provide that the last payment should be made on the certificate of the architect. The act of the owner in taking the work away from the contractor and completing it himself having the effect of preventing the contractor from executing such a condition precedent. It seems that the contractor should in his complaint aver that the engineer's certificate was unreasonably withheld.[5]* The fact that the owner, in completing the building, departed from the plans by introducing additional work makes no difference when the contract provided for alterations in the plans, and it was not shown that such changes were made in a bad manner.[6]

In fact, the same diversity of opinion is expressed and the same rules applied to cases where the owner is authorized to terminate the contract for causes agreed upon between the parties beforehand, as has been applied to cases where the parties have been guilty of an actual breach of the contract.†

If the work is to be paid for in installments at certain stages of the work, and it provides that if the contractor shall fail to furnish sufficient materials and workmen, the owner may proceed with the work and deduct the expenses from the contract price, the fact that the contractor is dilatory from the beginning does not prevent him from recovering the installments fully earned. If the owner has acquiesced in the delay up to the time the installment became due, he cannot then get rid of paying by terminating the contract, as for breach thereof.[7] Prospective profits may

[1] Lyman *v.* City of Lincoln (Neb.), 57 N. W. Rep. 531; *and see* Hewlett *v.* Alexander (Ala.), 6 So. Rep. 49 [1889].

[2] Fitzgerald *v.* Allen, 128 Mass. 232 [1880]; *but see an earlier case*, Hennesey *v.* Farrell, 4 Cush. 268 [1849].

[3] Wells *v.* Board of Ed. (Mich.), 44 N. W. Rep. 267; Hampson *v.* Lewis, 49 Md. 178; Murphy *v.* Buckman, 66 N. Y. 297; *but see* Hammond *v.* Miller, 2 Mackey 145; Blythe *v.* Poultney, 31 Cal. 233.

[4] Beardsley *v.* Cook (N. Y. App.), 38 N. E Rep. 109; Weeks *v.* O'Brien (N. Y. App.) 36 N. E. Rep. 185.

[5] Weeks *v.* O'Brien (N. Y. App.), 36 N. E Rep. 185.

[6] Zimmerman *v.* Jourgensen (Sup.), 24 N. Y. Supp. 170.

[7] Smith *v.* Corn (Com. Pl.), 23 N. Y Supp. 326.

* *See* Sec. 397, *et seq.*, *supra*, and Sec. 745, *infra.* † *See* Secs. 681–696, *supra.*

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be recovered by the contractor if the power to annul is used to oppress the contractor and defeat his rights under the contract.[1]

729. Damages Fixed in the Clause Giving Power to Avoid Contract.—In the same clause that gives the company or owner or its [his] engineer authority to terminate the contract or to employ others to hasten the completion of the work, it is usual to provide for the forfeiture to the company of any balance due and unpaid to the contractor as liquidated damages.

The following language is frequently employed:

> "And in the event of any such determination by the engineer or owner, it is further expressly agreed that this agreement in its entirety shall become null and void, and any balance due to the contractor in any form whatever shall be forfeited to the owner as liquidated damages."

Or

> "In which case the unpaid part of the value of the work done shall be forfeited to the company in the nature of liquidated damages."*

Such provisions are required to secure to the owner or company protection and the means to make good the deficiencies and omissions of the contractor, and to compensate in a degree for the delay and trouble occasioned by his neglect or failure to live up to his agreements. It has been shown that without such a provision the owner will be confined to the actual damages visible and that he can account to a court. Without it the contractor can recover not only the percentage reserved to complete the work which may grow more difficult as it advances, but he may also recover any penalty or forfeiture named in the contract which he can show the owner has not actually suffered.†

730. Contract should be Interpreted by a Study of All the Clauses of the Contract—These clauses are construed according to the evident intention of the parties, and will include only such sums or balances as the parties manifestly intended. This intention will not be determined from this clause alone, but reference will be had to other clauses, and the intention of the parties will be ascertained from their situation and the whole scope of the contract.[2] Therefore, when it is stipulated in one part of the contract that the engineer "shall make monthly estimates of the work done and materials delivered, and shall give a certificate of the same, upon the presentation of which, monthly payments of 90 per cent. of the certificate shall be made," and in another part of the contract it provides that "if the contractor shall not on his part well and truly perform all the covenants therein contained that the engineer may dismiss him from the work, in which event

[1] Phila., etc., R Co. *v.* Howard, 13 How. 307.

[2] Ricker *v.* Fairbanks, 40 Me. 43 [1855].

* For other stipulations *see* Secs. 290, 311–314*a*, and 710–717, *supra*, and 740–741 and 743–744, *infra*.

† *See* Secs. 317–320, *supra*.

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the contract shall become null and void, and any balance for work done on said works which would have been due the said contractor shall be forfeited and become the right and property of the corporation," it was held that the termination of the contract by the engineer did not relieve the company from the payment of the 90 per cent. fund to be due from it prior to such determination by the engineer.[1]

Under similar circumstances and under a contract stipulation that "the unpaid part of the value of the work done shall be forfeited by the contractor to the use of the company in the nature of liquidated damages," it was held that the company could withhold only the per centage reserved from the monthly estimates, and it did not authorize it to retain the entire value of work done since the last estimate.[2] The company was required to account for the actual value of the work done, less the per centage reserved, not alone upon the phraseology of the stipulation, but because it would permit the company under the guise of withholding liquidating damages to inflict a penalty.

The court said:

"It is obvious from the situation of the parties, as well as from the whole scope of the contract itself, that it was intended that the 90 per cent. stipulated to be paid monthly should be so applied as to enable the contractor to prosecute and complete the work for which he had contracted. The construction contended for would put it in the power of the company to embarrass the contractor by withholding his monthly payments, and then, in case he, by reason of such embarrassment, should fail to progress with the work with sufficient rapidity, by their engineer to determine that the work had been abandoned, and any balance due the contractor, however large, forfeited. A construction which should offer so large a premium for wrong-doing should not be adopted unless the language used will admit of no other reasonable explanation. Such explanation *may* be had by excluding the monthly estimates after they become due from the operation of that provision." This was held to be a fair construction of the contract when all its provisions were considered.[3] This construction has not been applied universally to this clause. An early Massachusetts case is quite to the contrary. Under a clause which recited that "If at any time it should appear to the engineer that the work was not carried on with sufficient rapidity, and is not likely to be completed within the time specified, the company may employ other help, at the expense of the contractor, and in the event of any such determination the agreement between the parties shall become null and void, and any balance due the contractor shall be forfeited to the

[1] Ricker *v.* Fairbanks, 40 Me. 43 [1855]; Williams *v.* Androscoggin & K. R Co., 36 Me. 201; Smith *v.* Corn, 23 N. Y. Supp. 326; Phila. etc., R. Co. *v.* Howard, 13 How. 307.

[2] Elizabethtown & P R Co. *v.* Geoghegan, 9 Bush (Ky.). 56 [1875]; Geiger *v.* The W. Md. Ry Co., 41 Md. 4 [1874]; *and see* King *v.* Mahaska Co. (Ia.), 39 N. W. Rep. 636 [1888].

[3] Ricker *v.* Fairbanks, 40 Me. 43 [1855].

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company;" the contractor having worked a part of a month after the last estimate, it was held that the value of this work done was forfeited, as well as the percentage reserved, and that the contractor could recover neither of them; that by the terms of the agreement it was entire for each month, and that unless the work was continued to the end of the month he was not entitled to have an estimate by the engineer; that nothing had been earned as to the part of the month's work not completed.[1]

If the covenant to finish the work by a certain day by the contractor and the covenant to pay money by the company are distinct and independent, the right to annul the contract at any time is held not to include a right to forfeit the earnings of the contractor for work done prior to the time the contract was annulled.[2]

If the percentage retained be not designated as liquidated damages, or the court does not regard it as such without such designation, it may be recovered by the contractor, less any actual damage shown by the owner.[3] It is therefore customary and prudent to designate the percentage reserved as liquidating damages, to forestall any claims by the contractor that it is of the nature of a penalty.[4]

731. To Retain Liquidated Damages, the Discretion to Terminate Contract Must have been Properly Exercised.†—If the engineer and company or owner have properly exercised the discretion given by the contract, it is well settled that the contractor cannot recover the percentage that has been kept back to secure the completion of the work, but it is to be regarded as liquidated damages, and if the contract has provided that it shall be forfeited to the owner, or that the act of termination shall exonerate or absolve the owner from every obligation arising out of the contract, then the contractor can have no recovery of the said percentage.[5] If the power to declare the contract terminated has not been exercised properly, the percentage may be recovered in assumpsit on the common counts for work and labor.[6]

Whether that discretion has been properly exercised is a subject for proof and inquiry.[7] If the contractors abandon the work, the percentage retained never becomes due, and there is nothing to which a materialman's lien can attach if filed after the abandonment.[8]

[1] Hennesey *v.* Farrell, 4 Cush. 268 [1849]. These cases represent opposite views of the law, and the latter one is believed to be the exception to the more general rule of the previous cases.

[2] The Phila. W. & B. R. Co. *v.* Seber Howard, 13 How. Repts. 307. Hence the necessity of making the covenant to pay subject to each and every stipulation of the contract.

[3] Easton *v.* the Penna. & Ohio Canal Co., 13 Ohio 79.

[4] E. P. R. Co. *v.* Geoghegan, 9 Bush. (Ky.) 56 [1875].

[5] Easton *v.* Penna. & Ohio Canal Co., 13 Ohio 79 [1844]; Elizabethtown & P. R. Co. *v.* Geoghegan, 9 Bush (Ky.) 56 [1875].

[6] Quinn *v.* United States, 99 U. S. 36 [1878].

[7] Easton *v.* Penna. & Ohio Canal Co., *supra*; *semble*, Jay *v.* S. E. Ry. Co., Weekly Notes, 1873, p. 4; White *v.* Harrigan, 41 Minn. 414.

[8] Kelly *v.* Bloomingdale (N. Y. App.), 34 N. E. Rep. 919.

* *See* Secs. 314–325, *supra*, Liquidated Damages. † *See* Sec. 323, *supra*.

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When the contract provides that: "If the contractor shall neglect or refuse, after notice, to proceed with the work as fast as, in the opinion of the engineer, it is necessary to secure its completion within the time specified, then the company may employ other parties to execute any part of the work and charge the cost of the same to the contractor, to be reduced out of the retained percentages, or out of any payments that shall have become due to any subsequent estimate," it is held that the company was not limited to the amount due the contractor and in their hands, for the cost of executing a part of the work, but that the contractor was liable to reimburse the company for what they spent above that amount.[1]

For the contractor to recover the balance of the contract price left after completing work by owner, it has been held that he (the contractor) must prove the cost of completion, and that the opinions of experts as to what would have been a reasonable amount to complete the work were not admissible.[2]* In another case, where the contractor had alleged or claimed to have completed the contract, but the company claimed otherwise, it having completed the work to the satisfaction of its officers with its own workmen and teams, it was held that the company must show the amount and value of work completed, and what was left incomplete by the contractor, as well as that done by the company according to the terms of the contract, in order to establish a counterclaim against the percentage reserved, and that the amount could not be based upon the opinions of engineers and experts of what it would cost to reconstruct and restore certain parts of the work, the same having been estimated and accepted as complete by the engineers in charge.[3]

The courts have sometimes held that such a provision in a building contract authorizing the owner, "after notice to the contractor, to take the work into his own hands and complete it at his own expense if the contractor failed to proceed with due diligence," is to be regarded when acted upon as a remedy agreed upon as a substitute for future damages.[4]† Other cases hold that the act of the owner in taking the work away from the contractor, under a clause authorizing him so to do, and to charge the contractor with the expense of completing it, amounts to a waiver of his right to claim damages in pursuance of another clause giving a certain sum as liquidating damages for each and every day's delay after the date fixed for completion.[5]

[1] Langdon *v.* Northfield (Minn.), 44 N. W. Rep. 984; *semble*, Yeomans *v.* Parker (Mich.), 68 N. W. Rep. 316; Jackson *v.* Cleveland, 19 Wis. 400; Hampson *v.* Lewis, 49 Md. 178.

[2] Zimmerman *v.* Jourgensen, 14 N. Y. Supp. 548 [1891]; *and see* Scammon *v.* Davis, 72 Cal. 393; Beecher *v.* Schuback (Sup.), 37 N. Y. Supp. 325. In such a case a contractor would do well to employ an engineer to estimate the quantities and keep an account of the company's force employed.—ED.

[3] Price *v.* Kearney, C.& W. S. Co. (Neb.), 45 N. W. Rep. 252 [1890].

[4] O'Connor *v.* Henderson Bdge. Co. (Ky.), 27 S. W. Rep. 251; *and see* Friedland *v.* McNeil, 33 Mich. 40 [1875].

[5] Crawford *v.* Becker, 13 Hun 375 [1878]; Murphy *v.* Buckman, 66 N. Y. 297 [1876].

* *See* Sec. 738, *infra.*

† *See* Sec. 325, *supra.*

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732. Decisions are Inconsistent.—These cases, with those that precede (Sec. 726), present the interesting aspect of the owner being held to have waived the stipulation for liquidated damages in either case whether he exercises the privilege of declaring the contract annuled or not. The latter cases hold that if he declare the contract terminated, he thereby waives his right to stipulated damages, and the cases cited in the previous section hold that if he fails to exercise that power before the time of completion has expired, he will be held to have waived his right to stipulated damages for the contractor's failure. One of the curious anomalies that occur in the law.

733. Power to Annul Contract may be Lost by Waiver or Failure to do His Part.—The right to annul a contract for nonperformance of its terms by a contractor is a right that may be lost to the owner if he is himself in default. His failure to estimate, and pay for work done, and materials furnished, as provided and required by the terms of the contract, will prevent him from taking advantage of the contractor's failure to carry out his agreements.[1]

734. Contractors Delayed by Incompetent and Delinquent Engineers.*—If, therefore, the company or their engineer have impeded the progress or regular course of construction, the contractor is not liable for a breach of his agreement to complete the works by a certain time.[2]

The right to terminate the contract may, however, be so strengthened by other provisions, and the contractor have so far forsworn his rights and the adjudication of them that the foregoing rule will have no application, as when the contract provided that "the contractor should employ such a force of workmen as the engineer might deem adequate to the completion of the work within the time fixed," and further provided, "that if he did not employ such a force as the engineer might thus deem adequate, that the engineer might employ such number of workmen as, in his judgment, would be necessary, and at such wages as he might find necessary and expedient, pay all such workmen, and charge the contractor with the amount expended as so much money paid to them on their contract"; and further provided, that the engineer should "have power to annul the contract upon written notice to the contractor if, in his judgment, the work was not prosecuted by him in a proper manner, and with sufficient speed," and still further, "that upon thirty day's notice to the contractor, the company might at any time, without cause, annul the contract," in which case they were to pay for the work done up to the time of the annulment, and the right was also reserved to the engineer "to order, in writing, any modifications or alterations in the speci-

[1] O'Connor *v.* Henderson Bdge. Co. (Ky.), 27 S W. Rep 251; *cases collected*, 21 Amer. & Eng. Ency. Law 77; Roberts *v.* Bury Com'rs, L. R. 5 C. P. 310.

[2] M'Intosh *v.* Gt. Western R. Co, 14 M. & W. 548; *and other cases cited in* Godefroi & Short's Law of Ry. Cos., p. 93.

* *See* Sec. 421, *supra*.

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fications, profiles, and plans, and in like manner to direct or order an omission of any portions of the work mentioned in the specifications, or to substitute any other work for such portions." The discretion of the engineer was practically unlimited, and the work being delayed, the company took charge of the work against the will of the contractor, and prosecuted the same to completion. The contractor brought an action to recover, for extra work, the balance due on underestimates of the engineer, damages and profits which he would have made, charging and proving that the work was greatly interfered with and delayed on account of an insufficient number, incompetence, and negligence of the company's engineers; that the prosecution and completion of the work was delayed by the failure to secure the right of way, and by failure of the engineers to furnish the proper stakes and lines, to locate bridges and culverts, and he further proved that he could and would have completed the work within the time limit, if he had not been hindered and delayed by the fault, negligence, insufficiency, and incompetence of the company's engineers. The engineers' estimate of the quality, character, and value of the work was by the contract made final and conclusive without further recourse or appeal.

Under the English law there could be but one way to decide this case, which was to hold the contractor strictly to his agreement as set forth in the contract, and by which the company had undisputed authority to terminate the contract at its pleasure, and by which the contractor was bound to abide by the decision of the engineer.[1]

An American case, the facts of which were very similar and the stipulation almost as stringent, and in which the contractor proved that the progress of the work had been delayed by failure on the part of the company to secure the right of way and by its inability to pay the monthly estimates, held that the engineer [company] had the right to annul the contract, and that the percentage reserved and the unpaid value of work was to be considered liquidated damages. The question of damages to the contractor was not decided, he having actually resumed the work subsequently. It was held that he had thereby waived any rights he may have had to damages, by reason of the company's failure to secure right of way or to pay as agreed, in the contract, and that these facts of the company's laches in no manner affected or impaired the right of the engineer to annul the contract.[2] The case further held that evidence was inadmissible to prove that after the contract had been annulled the subcontractor to whom the work was given did not proceed with any more dispatch than the work had progressed with the original contractor, and furthermore that it was immaterial that after the annulment and after the company had advertised for proposals to complete the work

[1] Scott *v.* Liverpool, 31 Law Times 147 [1858]; *accord*, E. Lancashire R. Co. *v.* Hattersley, 8 Hare 86.

[2] Geiger *v.* The W. Md. Ry. Co., 41 Md 4 [1874].

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that the original contractors offered to do the work at the original prices and to give security for its faithful performance.[1]

That the English case was decided upon the ground of the engineer's decision being final and conclusive seems clear in view of another English decision, which held that when the company had assumed the obligation to secure the right of way and to furnish plans and instructions, a failure on its part to provide the land required and the necessary drawings, thereby rendering the execution of the contract impossible, discharged the contractor from further performance and worked a waiver of the engineer's notice complaining of the delay, which was necessary before the company could take the work out of the contractor's hands.[2]* A replication by the contractor that the company did not elect to take the work away from him within a reasonable time after the expiration of seven days following the engineer's notice, but permitted and encouraged him to continue the work, which he did, was held bad.[3]

An Indiana case, decided upon very much the same facts and contract stipulations, held that the engineers had exercised almost absolute authority as the representatives of the company, and that the company should suffer the loss occasioned by their mistakes and wrong-doings, rather than the contractor.[3] It must be remembered, however, that the clauses of a construction contract giving the engineer the absolute and final determination of questions is not in favor with the Indiana courts, as has been shown herein before. On appeal the decision was sustained, but whether upon points of law or because the counsel for the appellant failed to follow the rules of the Supreme Court is difficult to determine.[4]

A discussion of these cases would carry us back to the legality and binding effect of the engineer's decision, a condition precedent to recovery, for which the reader is referred to Chapters XII. and XIII. †

735. Notices should be Given by Contractors of Neglect or Failure on Part of Owner.—Such decisions are forcible lessons to novices in construction work, but they have been drilled into contractors by sad experience. Eternal vigilance should be the watchword with them, as well as with engineers and architects. A contractor should acquaint himself with his rights, and promply recognize any hinderences or breach on the part of the company or owner, and give notice to it [him] or its [his] authorized agents in a careful yet positive manner that he is delayed and put to unnecessary trouble and expense by the company's neglect or failure to keep their agreements, and that claims will be made for the damages and loss that are certain to result. Such notices should be skillfully drafted that no offense may be given, for a

[1] Geiger *v.* The W. Md. Ry. Co., 41 Md. 4 [1874].

[2] Arterial Drainage Co. *v.* Rathangan D. Board. 6 L R. Ir. 515 [1881]

[3] Louisville, E. & St. L. Ry. Co. *v.* Donnegan (Ind.), 12 N. E Rep. 153 [1887].

[4] *See* remarks of the court in the *dictum.* Louisville, E. & St. L. Ry. Co. *v.* Donnegan, *supra.*

* *See* Secs. 326, 689, and 731, *supra.*

† Secs 335–417, *supra.*

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contractor's success on a job often depends upon the good-will of the employer and his engineers.

736. Authority to Engineer to Terminate Contract is not Always Power to Hire Men and Purchase Materials.—In connection with the termination of a construction contract and with the employment of other persons to complete the work there has often arisen complications and misunderstandings between the engineer in charge of the work and the persons employed to complete it. It is an occasion for the contractor and employee to bear in mind what has been said heretofore about the powers of the engineer to create obligations upon the company. Forgetful or ignorant as to what his real powers are, the engineer undertakes to order materials and to employ men, which he has no authority to do, and which acts may be repudiated by the owner or company, leaving the workmen or contractor without compensation. An honest engineer will not assume to exercise powers nor a prudent contractor undertake to carry out directions which are not duly and properly authorized by the parties responsible, and the engineer must derive his authority from his employer either by the terms of the contract or by an express agreement, of which the best evidence is a power of attorney, executed by the owner or company. Cases are frequent where engineers have asserted authority and pledged, in good faith, perhaps, the credit of their employer, and which, not being ratified or adopted, left the contractor without any remedy.

Whether a provision in a contract that "in case the work is not prosecuted according to the contract and the directions of the engineer, he may upon notice terminate the contract and employ others to complete it," is an authority to purchase materials and employ men on its behalf, may well be doubted in view of decisions with regard to other stipulations.*

One case in point permitted the contractor to recover where the assistant engineer upon a railroad in charge of construction of a section of the road, becoming dissatisfied with the contractor, dismissed him and assumed the work himself, agreeing with the workmen to see them paid. He was regarded, it appears from the case, by the court as the agent or representative of the company in employing the workmen, but not to charge his company with supplies furnished the contractors.[1] In another case for the construction of a section of a canal, the contract was declared forfeited by the engineer, and it was completed by other or post contractors at the request and upon the promise of payment by the engineer. The trustees of the canal denied that the canal was completed upon their request, and insisted that they were not liable to pay for the cost of completion. The court held that an express request need not be proved (for one may imply that it was not proved), but that a request was implied by the circumstances, the trustees having passed

[1] Stiles *v.* Western Ry. Co., 1 Amer. Ry. Cas. 397 [1844].

* *See* Secs. 370–380 and 553–559, *supra*.

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on order to the effect that they were anxious for the earliest possible completion after the contract had been relet and had accepted and used the section after it had been completed.[1]

737. Terminating Contract should be an Act of Last Resort.—The rescinding or annulling of a contract under any of the foregoing clauses should be the owner's or company's last resort in his [its] attempt to adjust or settle controversies with the contractor. It is a step which cannot be retraced and whose consequences cannot always be foretold. Arguments, persuasion, coaxing, and threats, and almost every expedient should be employed to bring the contractor into line with the terms of his contract before the final step is taken. Imprudent haste to annul the contract is almost certain to be regretted, and every legitimate means should be employed to keep the contract whole.

If stipulations are adopted in a contract providing for the termination of the contract or for employing other parties to complete the work, the rights and privileges of the parties should be explicitly defined. These provisions should not only define the powers of the parties to terminate the contract, but should carefully and fully describe the status of both parties after the rescission, their rights, the damages assessed, and the use and appropriation of the plant, etc., etc. If this be not done the company has no protection after the rescission from the expensive litigation and trouble which almost every clause of the contract is calculated to avoid. The situation of the parties after rescission is that of the contractor having done work for the company from which the company has derived benefit, and the law implies a contract to pay therefor what it is reasonably worth, *i.e.*, what a jury may consider it worth, which *may be* reasonable and *may be* otherwise.

If the contractor has underestimated the cost of the job or has encountered unexpected difficulties, it may be expected that he will employ every provocation to induce the company to terminate or rescind the contract. Every device will be resorted to on his part to save himself from loss, such as inferior materials, poor workmanship, delays, neglect and perhaps abandonment. If good provisions have not been adopted for rescission, abandonment by the contractor may be better for the company than for them to exercise their power of annulment.

An illustration of the effect of a rescission of a contract is found in a case in which a certain price had been agreed upon for excavations. Hardpan was met and the contractor claimed extra compensation for digging it, which was allowed on a *quantum meruit*, but distinctly on the ground that the contract having been rescinded the contractor was not limited to the price fixed therein, nor was he bound by the decision of the engineer, but allowed to recover the reasonable value of the work done.[2]

[1] Trustees of Wab. & Erie Canal *v.* Bledsoe, 5 Ind. 133 [1854].

[2] The D. & H. Canal Co. *v.* Dubois, 15 Wend. 87 [1835].

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738. Provision that Owner or Engineer may Increase Working Force to Insure Completion of Work.—So much uncertainty, trouble, and litigation comes from the termination and rescission of a construction contract under the preceding clauses that it is frequently omitted, and instead a provision is made for augmenting the contractor's force by the owner or company employing more mechanics, animals, and machinery, or by subletting parts of the work (such parts of the work as the engineer may designate), to other contractors, it being expressly provided that the cost of all labor, materials, and the expense of subcontracting shall be borne by the contractor, and may be retained and deducted from whatever may be due to the contractor; and further providing that all the stipulations of the original contract that are not clearly inconsistent with such acts shall remain in force between the owner and contractor, and, furthermore, that he will not in any way, nor permit his employees, to interfere with or molest the said subcontractors and employees of the owner in the discharge of their duties.

The author does not wish to commit himself to the recommendation of this clause to the exclusion of the other, for as every engineer knows there are many practical difficulties which it would be difficult to cover by contract clauses. With the contractor in possession of the works, there is little doubt but that he would be able to put many obstacles in the way of carrying out such a programme. A practical solution of the difficulty might be found in the incorporation of both stipulations, so that if the one for employing other mechanics or subcontractors failed, the owner would yet have, as a last resort, the annulment of the contract.

Without such a clause and when no time is fixed for the completion of work, it seems the owner is not entitled to credit for wages voluntarily paid to another to do part of the work the contractor had agreed to do.[1]

Some cases decided under the clause permitting owner to employ others to complete work may be of interest. The owner must exercise his power in good faith, and while he is allowed considerable discretion as to the manner and means employed to finish the work, yet he cannot conduct the work in an extravagant and wasteful manner. If he has been careless and reckless in completing the work he cannot deduct the actual cost of completion from what is due the contractor, but only the reasonable cost.'* It has been held that the owner could have defective work done by the contractor repaired or rebuilt, and the cost of same charged to him,[3] even though the contractor had offered to make good the defective work.[4] If the contractor has provided suitable materials which are specially prepared for the works, the owner is in duty bound to use them, to save the contractor the loss that would result if he had to sell them at a loss.[5]

[1] Wagner *v.* Jennings (Tex.), 27 S. W. Rep. 888.
[2] Tautholt *v.* Ness, 35 Minn. 370.
[3] Powers *v.* Yonkers, 114 N. Y. 145.
[4] Clifford *v.* Richardson, 18 Vt. 620.
[5] Wells *v.* Bd. of Ed., 78 Mich. 260.

* *See* Sec. 731, *supra.*

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If the contractor has abandoned the work or has led the owner to believe that he has withdrawn from his contract by renouncing it, or by continuous breaches,[1] the owner need not wait until the day of completion, but may proceed with the work, or get others to complete it, and still have his remedy against the contractor.[2]

739. (Prior) Notices of Intention to Terminate Contract or to Employ Other Means must be Given as the Contract Requires.*

Clause: "And the said company or its chief engineer shall have power to annul this contract, etc., if he shall determine so to do, by giving notice, etc."

If the contract stipulates for certain ceremonies, such as a notice of intention to terminate the contract, or to inaugurate reforms, or if the contract require a certificate by the engineer setting forth the default of the contractor, etc., they must be observed and carried out strictly, as required by the contract terms, or the attempt to annul the contract will fail, and the owner find that he himself is guilty of a breach of the contract, or has waived his right to declare the contract forfeited.

The ceremony most frequently stipulated is that of notice to the contractor of the intention to rescind some days or weeks before the act of rescission is exercised.[3] This notice may be given for one of two reasons: it may be given to afford the contractor an opportunity to redeem himself and show what he is capable of doing, or it may be given to allow him a short time in which to finish work in hand, discharge his men, and care for his plant. If the contract stipulate for a notice, it must be given, and the owner's or company's rights to proceed will depend upon his having given the required notice in the time and manner provided.[4] If notice is not required by the terms of the contract, the right or power to terminate the contract may be exercised by the company without question or notice to the contractor.[5]

A provision in the specifications that as many workmen should be employed as the architect should approve, and which also authorized the superintendent to continue the work at his option, was held to be controlled and limited by another provision in the contract empowering the owner to provide labor and materials, "after three days' notice in writing," if the contractor failed to supply them properly.[6]

A written notice of an election to terminate forthwith a contract which provided that it could be ended by the engineer giving "at least ten days'

[1] Wyckoff *v.* Taylor (Sup.), 43 N. Y. Supp. 31.
[2] Chamber of Com *v.* Sollitt, 43 Ill. 519.
[3] Rodemer *v.* Gonder, 9 Gill. (Md.) 288.
[4] Hall *v.* Bennett, 48 N. Y. Super. Ct. 302; Balt. & O. R. Co. *v.* Stewart (Md.), 29 Atl. Rep. 964; Grant *v.* Savannah Co., 51 Ga. 348 [1874]; Williams *v.* United States, 26 Ct. of Cl. 132; *and see* Selby *v.* Hutchinson, 4 Gilm. 319; Sanford *v.* Emery, 34 Ill. 458; Reynolds *v.* Nelson, 6 Wend. 20.
[5] Henderson Bdge. Co. *v.* O'Connor (Ky.), 11 S. W. Rep. 18 [1889].
[6] Hall *v.* Bennett, 48 Super. Ct. (J. & Sp.) 302 [1882].

* *See* Sec. 134, *supra*.

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notice" does not terminate the contract on the date of the notice, but ten days thereafter.[1] Therefore it was held that the engineer giving the notice had power to recall it before the expiration of the time [ten days], and that it was proper in stating the case to allege that no notice was given. But it seems that the withdrawal of the notice after the contract has ceased to be operative will not continue it.[2] The service of notice on the contractor does not of itself terminate the contract so as to relieve the contractor from responsibility for the proper execution of work already done by him,[3] and on the other hand, a failure to serve notice by the owner of his election to terminate the contract does not conclusively show that he did not so elect.[4] A surety is not released because after the contractors failed to complete the work, and the requisite notice to terminate it had been given, it was subsequently recalled, and the contractors allowed to proceed with the work, during which time the loss, for which the surety was held liable, occurred.[5]

When a subcontract stipulated, after the terms of the principal contract, that for certain causes the chief engineer of the company might, on giving written notice to the subcontractor, declare his contract forfeited, and might take possession of the works and complete them at the subcontractor's expense and for his benefit, it was held that as the engineer was a stranger to the contract he was under no obligations to give a notice, and that a written notice from the principal contractor to his subcontractor was sufficient, where the engineer had notified both that the work was not advancing satisfactorily.[6]

The question as to what constitutes a notice of the determination to annul a contract, or of the intention to employ other persons to continue the work, has come up in several cases. It has been held that service of a notice by mailing it in a post-paid envelope raises a presumption of notice of service.[7] There are numerous cases that distinguish a notice required in a contract from what is required when commercial paper has been dishonored. By the law merchant notice of a protest of a note by mail is sufficient, but where a contract provides that a party shall be notified it is has been held in several cases that it was not fulfilled by simply mailing the notice; it must be shown that it was actually received.[8] A written notice left at the contractor's house with a woman of mature years, who answered the door-bell, has been held sufficient evidence of notice.[9]*

[1] Gallo *v.* City of New York (Sup.), 44 N. Y. Supp. 143.
[2] Patrick *v.* R. & D. R. Co., 93 N. C. 442 [1885].
[3] Washburn *v.* Detinger, 76 Hun (N. Y.) 141.
[4] Ogden *v.* Alexander (N. Y. App.), 85 N. E. Rep. 638.
[5] Smith *v.* Molleson (N. Y. App.), 42 N. E. Rep. 669
[6] Hendrie *v.* Canadian B. C., 49 Mich. 401.
[7] Mayor *v.* Moore, 52 Hun 139 [1889]; 16 Amer. & Eng. Ency. Law 825.
[8] Carpenter *v.* Prov. Wast Ins. Co., 4 How. (U. S.), 185; Castner *v.* Farmers' Mut. F. Ins. Co., 50 Mich. 278.
[9] Mayor *v.* Moore, 52 Hun 139 [1889].

* *See* Sec. 95, *supra.*

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The stipulation for notice must not be taken as a necessary requisite to the dissolution of a contract. When a contract reserves the power to the owner to dissolve the contract at any time upon five days' notice, the contractor to be entitled to payment for work done and in addition thereto the sum of $3000 liquidated damages, proof that the owner directed the contractor to discontinue the work and refused to allow him to continue was held sufficient to show a dissolution of the contract without the five days' notice stipulated for.[1] Such acts on the part of the owner would justify the contractor in treating the contract dissolved without a clause to that effect.* When a building contract provided that if the contractors should fail to perform the contract in any particular and the architect should so specify, the owner might give them three days' notice to perform, and, on refusal, the owner might terminate the contract, and the architect having certified that the work was not being done according to the contract, the owner notified the contractors to remove their labor and materials, and to provide such materials as were called for in the specifications, and that he should terminate the contract, taking from them the plans and specifications, the owner was held to have abandoned the contract.[2]

The direction to discontinue the work must amount to a command, for if the contractor acquiesces in a mere request by the owner to do no more work for a time, he cannot claim a breach of the contract.[3]

If the contract provide that the owner may, "on the certificate of the engineer," etc., take the work away from the contractor and complete it at his cost, etc., the owner is not authorized to charge the contractor with the cost of completion, unless the architect has certified to the contractor's failure, refusal, or neglect, as required by the contract. The fact that the contractor did fail to complete certain work, and that the architect, on complaint of the owner's superintendent, and on information from him that he had notified the contractor to proceed with the work by a certain day, had directed the superintendent, if the contractor did not then commence the work, to put other men on to complete the work, and furthermore that the architect had written the contractor directing him to commence the work, altogether are not a compliance with the terms of the contract requiring a certificate of failure, refusal, or neglect.[4]

740. Provision that Work may be Suspended in Whole or in Part without Compensation to Contractor.

Clause: "The owner [or commissioner] reserves the right of suspending the whole or any part of the work herein contracted to be done, if

[1] Curnan *v.* Del. & O. R. Co., 17 N. Y. Supp. 714; *see* West *v.* Suda (Conn.), 36 Atl. Rep. 1015 [1897].

[2] Clar ton *v.* Scoville (Sup.), 22 N. Y. Supp. 883; *and see* Ogden *v.* Alexander (N. Y. App.), 35 N. E. Rep. 688.

[3] McGregor *v.* Ross Estate (Mich.), 60 N. W. Rep. 38.

[4] O'Keefe *v.* St. Francis' Church, 59 Conn. 551 [1891].

* *See* Secs. 681-684, *supra*.

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he shall deem it for his interests [or the interests of the company or city] so to do, without compensation to the contractor for such suspension, other than extending the time for completing the work as much as it may have been delayed by such suspension; and if the said work shall be delayed for the reason that the party of the first part does not own, or has not obtained possession of, the land on which the same is to be performed, then, and in that case, and in every such case, the party of the second part shall be entitled to so much additional time wherein to perform and complete this contract on his part, as the said engineer shall certify in writing to be just; but no allowances, by way of damages, shall be made for such delay."

741. Provision that Work may be Delayed or Suspended without Liability to Contractor for Damages.

Clause: "The contractors shall, without recompense, claim, or demand, delay or suspend the progress of the works, or any part thereof, if, and when, and so often as they shall be so required by the engineer, and for such time or times as may, in the judgment of the engineer, be necessary for the purposes or advantages of the undertaking, and shall whenever directed by the engineer, and upon all other needful occasions, at the contractors' own expense, properly cover over and secure so much of the works as may be liable to sustain injury from weather or otherwise; and shall at all times, during the continuance of this contract, and forthwith when required, properly make good any damage or injury which such works, or any part thereof, may sustain, to the full satisfaction of the engineer."

742. Reasons for Such a Clause Providing for Suspension of Works.—At times it is necessary to have clauses of suspension or revocation in which the terms of the settlement shall have been agreed upon, and the damages to the contractor or company agreed upon. The peculiar nature of the work or the unforeseen difficulties that may arise often requires that provisions be made for the abandonment of the undertaking entirely. At times difficulties arise that render the further progress of the work impracticable or unprofitable, and it is prudent for the projectors of the enterprise to have some means of escape from the many obligations they have assumed. This they may do without being involved in endless litigation by taking proper precautions and making some agreement with the contractor equitable to both parties by which the contract may be terminated. It should not be necessary to show the desirability of having this agreement incorporated in the original contract for the work. The great loss consequent to the failure of such great undertakings is enough of itself to dismay capitalists, without the prospect of long continued and ruinous litigation.

Some of the risks which are assumed in engineering operations are those of the utter failure of the undertaking, either from the impracticability of the scheme, as from obstacles to completion, whether from natural causes or from legal obstacles, failure in consequence of a change in circumstances which render the project no longer a profitable undertaking, or difficulties

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due to a failure of funds or means to carry the enterprise to a successful completion. The hold that a contractor has upon a job when such stipulations have been omitted is irresistible. He can sit still and almost entirely neglect the work and forbid the company from proceeding with the work or from in any way interfering to disturb the peaceful state of his tyranny. If the company does the work, they may be compelled to pay for it a second time in the bills of the contractor. The contractor usually has a stated time in which to complete the work, and strictly it may be said that he is guilty of no breach until the expiration of that time. Without the clauses for revocation or to take the work into its own hands, the company's undertaking is at the mercy of the contractor, for whose laches, perhaps, no money consideration can compensate, as, for example, the forfeiture of its charter or of concessions by the government.

When a contract provides that the suspension of the work by the owner shall give the contractor no claims for damages in consequence thereof, a suspension in good faith by the owner will give the contractor no claims to extra compensation.[1]

743. Provision that Engineer shall Determine what is Due Contractor for Work and on Account of Changes and Rescission of Contract.

Clause: "When the work shall have been taken out of the hands and control of the contractor, or the contract shall have been so determined, or so soon thereafter as the engineer may think convenient, the engineer shall fix and determine, either *ex parte* or by or after reference to the parties, or either of them, or after such investigation or inquiries as he may think fit to make or institute, and shall certify what amount (if any) was at the time of taking charge of the work or of the determination of the contract reasonably earned by, or would reasonably accrue to, the contractor in respect of the work actually done; and the amount thereof, after allowing for all sums then already paid to the contractor on account, shall remain in the hands of the board, without interest, until twelve months after the date of the engineer's certificate of the final completion of the works as herein provided, and the engineer shall be at liberty to authorize, by his certificate, the board to deduct the damages, losses, costs, charges, and expenses, in his opinion, incurred by them, in consequence of the premises, or to which they may be put or be liable, together with the forfeiture (if any) incurred by the contractor, from any sum or sums of money which would otherwise become due and owing to the contractor; and in case such sum or sums of money shall not be sufficient to defray such damages, losses, costs, charges, expenses, and forfeitures, then the contractor shall forthwith pay the deficiency to the board, and it shall be lawful for the board to recover the same from the contractor by action at law or otherwise; and any doubts, disputes, or differences arising or happening with respect to the determination of the contract, or in consequence thereof, shall be settled and decided as hereinbefore prescribed with respect to any other doubts, disputes, or differences arising or happening under the contract."

[1] Snell v. Brown, 71 Ill. 134.

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744. Engineer the Sole Judge of the Damage Suffered by the Contract being Rescinded by the Owner.—The above clause has been the subject of much litigation and no clause in a construction contract is more necessary to the safe and successful undertaking of a large work, nor more capable of creating hardships for the contractor. On the one side are arrayed the interests and investments of a large sum of money by the company, and on the other the value of a large manufacturing plant and, perhaps, extensive works in operation to supply the materials and manufactured parts of a structure, and the wages and sustenance of a large body of troublesome men. On the part of the company it is of the utmost importance, vital perhaps to the success of the enterprise, that the work shall progress at the rate that shall insure completion by a certain time. Franchises and grants may have been made whose validity may depend upon the completion and operation of the works within the time specified. As Chief Justice Chambers, of Pennsylvania, once said: "The failure of one or two contractors to complete their small portions of the whole structure might suspend the use of a whole line of a railroad or a canal, with all its advantages, and cause detriment to an extent that the contractor could not indemnify nor repair.

"To protect companies against such disappointments and failures of contractors, it would be necessary to require from them heavy and responsible security for the faithful and prompt performance of their contracts, in the prosecution of their work. As contractors are often strangers and men of moderate means, the requirement of such security would be an obstacle that would deprive them of becoming contractors and lessen the number of competitors for the construction of the works. This is obviated by substituting these stipulations and provisions in the place of personal security, not attainable, and which stipulations are intended to stimulate the contractor to a diligent prosecution of the work, the faithful performance of his contract, and to save the company from the evils of delay, from expensive and harrassing litigation that would retard the work and be ruinous to both parties."[1]

Mr. Wood, in his Law of Railways,[2] says: "The time within which works shall be built is often fixed in the charter, and the manner in which works shall be done is a matter of great public concern, as the safety of the traveling public who pass over them depends upon the stability and excellence of the work. For this reason the law tolerates and enforces provisions that might not be regarded as binding in the case of ordinary contracts. It is not unusual for the contract to impose penalties upon the contractor for slight deviations from the terms of the contract or to reserve to the company the right to terminate the contract for slight causes."

Some of these provisions, at first view, may seem stringent, arbitrary, and without the mutuality of obligation and remedy which usually characterize contracts, but they exist because the circumstances of the work necessitate

[1] Faunce v. Burke, 16 Pa. St. 469 [1851]. [2] 2 Wood's Law of Railroads 995, 996.

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them. The reservation of the power to annul the contract is often rendered necessary by the nature of the work to be constructed, and the relation of the parties is such that without the provision the contractor would never have obtained the contract. The stipulation is required in place of security which he probably could not procure. It cannot be supposed that the company would agree that the execution of their contracts, their construction, and any disagreements between the parties during the progress of the work should be left open to innumerable suits at law and to the determination of juries unacquainted with the work and the importance of such contracts, and to be subject to all the vexations, expense, and delay attending such litigation. Such a stipulation of forfeiture under the adjudication of a competent engineer who is supervising the work is a reasonable provision for securing the progress of the work and a limited indemnity to the company, of a reasonable percentage, may be reserved, with which to employ other contractors or laborers to complete the unfinished work according to the contract.[1]

This rule has been rigorously followed in the state of Pennsylvania. The courts say that as the contractor enters into a contract with such a stipulation, and it is in his power to be relieved from them by the due and proper performance of his work and thus entitle him on its completion to the whole sum payable under the contract, why shall the law undertake to make a new agreement for the parties which they did not intend to make themselves? They are the best judges of the amount of injury to be sustained by the interruption of the work and the failure of the contractor to perform his agreement, an injury uncertain and incapable of estimation and, therefore, a proper subject for a stipulated reparation.

An agreement that in case the contractor shall "from the default of the company be prevented from pursuing the best method of executing the contract, the pecuniary damage sustained by him in consequence thereof shall be certified by the company's engineer, and, on his certificate, which shall be final and conclusive between the parties, the company shall make the contractor such reasonable compensation as by said certificate may be fixed," was construed a covenant on the part of the company that in case of prevention, their engineer should make a certificate of damages.[2]

When a contract gives a company or its engineer the right to terminate a contract for cause, and specifies the manner of payment and expressly defines the rights of the parties on the happening of the event, the law can only enforce the rights under the contract and according to that contract.[3] The stipulation may be severe upon the contractor, but as Justice Woods, of Ohio, once said:[4] "They were by no means forced to enter into the

[1] Faunce v. Burke, 16 Pa. St. 469 [1851].
[2] Randel v. Chesp. & Del. Canal Co., 1 Harrington (Del.) 233–322 [1833].
[3] Scott v. Corp'n of Liverpool, 31 Law Times 147 [1885].
[4] Easton v. The Pa. & O. Canal Co., 13 Ohio 79.

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agreement; it was voluntary on their part, and if the company or its engineer has violated neither its letter nor its spirit, it is difficult to see what reason the contractor has for complaint. We sit here," said he, speaking of himself and associates, "to enforce the contracts made by others, but we have no authority to impose upon them obligations to which they never have assented."

That such a clause is valid and will be enforced or sustained cannot be doubted if the power has been exercised honestly and in good faith.[1]

When the contract provides that the certificate of the architect as to the cost of completing the building shall be conclusive as to the cost thereof, the certificate has been held admissible to show the cost of completing the building, as against persons seeking to enforce mechanics' liens for material furnished the contractor, the latter having defaulted and the owner having finished the building.[2]

745. Right to Determine Damages Resulting from Annulment must be Expressly Reserved to Confer Authority.—The contract must contain a reservation of express authority to the engineer to determine the damages due to breach of the company or his estimate of the damages will not hold. A general power to determine in all cases every question which could or might arise relative to the execution of the work or contract on the part of the contractor, and that his decision should be final and without appeal, does not embrace a claim by the contractor for damages resulting from his being denied permission to proceed with the execution of the work.[3] *

746. Engineer's Determination to Terminate Contract is Final if Exercised in Good Faith.—If the exercise of power be left to the judgment and discretion of the engineer by the terms of the contract, or the agreement provides that "if the works do not progress so rapidly and satisfactorily as required by the company or its engineer it or he shall have full power to enter upon and take possession of the works and pay whatever men that may be left unpaid and may set to work whatever number of men it or he may consider necessary, and that the amount so paid and the costs of the men so employed should be deducted from any moneys that might be due the contractors," the English courts hold that if the company or its engineer is dissatisfied, whether with or without sufficient reason, with the progress of the work, it or he has the absolute and unqualified power to put an end to the contract or to employ additional hands and get the work done

[1] Faunce *v.* Burke, 16 Pa. St. 469 [1851]; Easton *v.* Pa. & Ohio Canal, 13 Ohio 79 [1844]; Rossvalley *v.* City of New Orleans, 19 La. Ann. 7 [1867]; Leake's Dig. of Contracts 640, *and English cases cited;* Randel *v.* Chesapeake & Del. Canal, 1 Harrington (Del.), 233 [1833]; Geiger *v.* The W. Md. R. Co., 41 Md. 4 [1874]; Scott *v.* Corp'n of Liverpool, 31 Law Times 147 [1858]; Lantry *v.* City of New York (Sup.), 44 N. Y. Supp. 874 [1897].

[2] Malone *v.* Mayfield (Tex.), 36 S. W. Rep. 148.

[3] Launman *v.* Younge, 31 Pa. St. 306; Weeks *v.* O'Brien (N. Y. App.), 36 N. E. Rep. 185.

* *See* Sec. 397, *supra.*

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as the contract may empower and so long as the company and its engineer act in good faith and under an honest sense of dissatisfaction, although it may be ill-founded and unreasonable, they are entitled to insist on the provision. Like the many other stipulations in a construction contract by which disputes are left to the determination of the engineer, the contractor cannot escape their binding force unless he can allege and prove bad faith; it is not sufficient to charge that the company was unreasonable and capricious.

A replication by a contractor that "the works did proceed as rapidly and satisfactorily as the company reasonably and properly could require, and that the company and its engineer unreasonably, improperly, and capriciously required the works to proceed at a speed inconsistent with all reasonableness and justice," was held to be no answer to the exercise of power conferred by the contract when it stopped short of alleging bad faith.[1] On the other hand, the engineer may not act upon his mere arbitrary discretion; he must act in good faith.[2]

Under a stipulation "that it shall be lawful for the board to terminate the contract and take possession of the works in case the contractor should not, in the opinion of and according to the determination of the architect, exercise due diligence and make such progress as would enable the works to be effectually completed at the time contracted for," was held to entitle the board to terminate the contract and take possession of the works upon the certificate of the architect that the contractor had failed to exercise due diligence and make due progress, even though he had been prevented from making such progress by delay in supplying him with the necessary plans and in defining roads which had to be made. In the absence of fraud and collusion the architect's opinion was held to be binding and conclusive on the contractor.[3] *

747. Mandamus and Injunction when Owner is about to Annul Contract.— Following the same principle, a court of equity has dismissed a bill with costs which complained of undue delay on the part of the engineer in awarding the amount earned by the contractor and seeking payment for what was due, but which did not establish fraud and collusion. The construction and operation of such an agreement was held the same in a court of equity as in a court of law.[4]

An injunction has been granted to restrain a company from bringing

[1] Stadhard *v.* Lee, 3 B. & S. 364 [1863]; *and see also* Roberts *v.* Bury Comm'rs, L. R. 5 C. P. 310; P., etc., R. Co. *v.* Howard, 13 How. (U. S.) 307; Wadsworth *v.* Smith, L. R. 6 Q. B. 332; Walker *v.* London & N. W. Ry., 1 C. P. D. 518; Pawley *v.* Turnbull, 3 Giff. 70.

[2] White *v.* Harrigan, 41 Minn. 414; *accord* Anvil Min. Co. *v.* Humble, 153 U. S. 540.

[3] Roberts *v.* Bury Improvement Co., 38 L. J. C. P. 367.

[4] Scott *v.* Liverpool Corp'n, 5 Jur. (N. S.) 105 [1860]; *and see* Garrett *v.* Barnstead etc., Ry. Co., 11 Jur. (N. S.) 591; *also* Munro *v.* W. & B. Ry. Co., 11 Jur. (N. S.) 612.

* *See* Secs. 418–443, *supra.*

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suit against a contractor to recover penalties when the latter has alleged full compliance with the terms of his contract and has charged fraud to the engineer of the company.[1]

If a contract contains a provision that either party may terminate it upon proper notice, whereupon arbitrators shall be appointed to determine the terms upon which the contract shall be rescinded and the compensation to be awarded, equity will not entertain a bill to cancel the contract; such bill being in itself a violation of the provision for arbitration.[2]

An allegation by the contractor, among other things, that the works had been delayed by the company's orders; that each month's work had been underestimated by the engineer by order of the company; that a large sum was still due and unpaid; that all the sums that had been certified by the engineer had not been paid, and charged that notice of an intention to take possession of the works was given for the fraudulent purpose of avoiding the payment of sums due the contractor, and of ejecting him from the works in order to procure other persons to finish it at an earlier date than they were bound to do under the contract; all this, but especially the charge of fraud, was held sufficient to entitle the contractor to a hearing in equity on a bill praying that an account may be taken of what was due him and for an injunction to restrain the company from taking the works and contractor's plant.[3]

Under a contract clause making it lawful for the company to employ other persons or workmen, either by contract, measure, or value, or to otherwise proceed with the works, etc., and to make use of the contractor's materials, etc., the company discharged the contractor and attempted to take possession of the works and set other persons at work. The contractor and his men resisted, and collisions occurred between the workmen of the two parties, each party being charged with impeding the operations of the other, and the completion of the work was thus very much delayed. On petition of the company the court restrained the contractor from continuing on the line and from interfering with the operations of the company, directed an account to be taken of what was due the contractor for work and materials done, without regard to the certificate of the engineer, and directed an issue to try the case and ascertain whether the company at the time they proceeded to enter upon the works and remove the contractor were lawfully justified in so doing, reserving the question of the right of the contractor to compensation for loss of profits, as well as other questions until after the trial and report. This decree was calculated to protect the legal or supposed legal rights of the owner, and to preserve to the contractor the substantial benefit of a specific performance.[4]

[1] Waring *v.* Manchester Ry. Co., 7 Hare 482.

[2] Young Lock Nut Co. *v.* Brownley Manufg. Co. (N. J. Ch.), 34 Atl. Rep. 947.

[3] Waring *v.* The Manchester, etc., Ry. Co., 2 Ha l & Twells (Ch) 239 [1850].

[4] The E. Lancashire Ry. Co. *v.* Hattersley, 8 Hare 72 [1849].

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Another English case goes so far as to hold that unfair conduct proved on the part of the architect will be sufficient cause for a court of equity to give relief and even to decree payment of the balance due the contractor, to declare the decisions of the architect not binding, and to release the contractor from penalties imposed. The declaration in this case alleged that the architect exercised the powers conferred upon him in an arbitrary, capricious, and vexatious manner, so as to deprive him of completing the works according to his contract.[1] This case must be taken as out of sympathy with the other English cases cited, and more in line with the American decisions.

748. American and English Decisions Compared.—Throughout the American decisions one cannot help noticing the democratic spirit which prevails when compared with the stringent, drastic, conservative policy of the English courts. The American courts are more regardful of the interests and weaknesses of contractors. The circumstances under which a contractor enters into his contract and assumes the obligations of his contract, the arbitrary manner in which these stipulations are inserted, and the fact that the contractor usually has no voice whatever in the selection of the language of the contract, and no choice, if he will get the work, but to sign the contract as prepared for him, are deserving perhaps of some consideration, and are enough to recommend him to the merciful protection of the court. It may be even that the terms of the contract could not be changed if the contractor did urge it and the city were willing, as in the case of a contract form which has been made the basis of proposal for public works where the law requires that the contract shall be let to the lowest bidder.*

The education of contractors is usually limited, and it is a well-known fact that work is often taken by men who cannot understandingly read the contract to which they subscribe their marks or names. It is not strange, therefore, that our courts are more apprehensive of the hardships that a contractor is subject to, and more apt to entertain his cause than are the English courts. This tendency to clemency in the American jurisprudence may be found in the criminal court decisions, in cases of torts in general, and seems to pervade our whole system; it cannot be said to be from any overzealous desire to protect individual rights so much as from a desire to promote justice and relieve from hardships.

The English courts have always exercised the most zealous protection of individual rights, especially of property, while the democratic spirit of the American courts has sacrificed innumerable property rights to the convenience and comfort of the public. Easements of air and light, rights in streets and roads, and to the use of water from our streams, have in many

[1] Pawley v. Turnbull, 3 Gifford 70 [1861].

* *See* Secs. 155–159, *supra*.

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instances been sacrificed to the public without any compensation whatever. It is the practice of English courts to construe contracts strictly according to the evident intention of the parties as expressed in their agreement, and not to ascertain what is just and right. As one might expect, therefore, we find the halls of justice open to the contractor for causes that would not be listened to in an English court.

The American courts have not always followed the rigid lines laid down in the English cases cited, but have sought somewhat to relieve the apparent hardships with which the rule must sometimes burden the contractor. As in so many other cases, we find the American cases tempered with charity—Justice, as it were, with her eyes open to the misfortunes of the poor contractor. An early Ohio case [1844] held that whether or not there had been a proper exercise of the discretion conferred by the contract on the part of the company or its engineer, was a question for inquiry and proof for a court.[1] A later case held that the power to declare a forfeiture of a contract when the work shall not make such progress as shall insure completion within the time stipulated, or if the work shall be, wholly or in part, improperly constructed, is not an arbitrary one to be exercised capriciously, but can be exercised only in good faith and for a reasonable cause.[2] In an action for damages by the contractor for wrongful act of the architect in taking possession of the works, the issue whether the contractor has fulfilled his contract and if the architect was justified in taking the work from him, was held one that he was entitled to have tried, and it was further held that the decision of the building inspector under a city ordinance was not conclusive as to the rights of the contractor upon the trial of such issue.[3] It might be proper to say, however, that the clauses of the American contracts did not usually contain the stiff requirements of the English cases.

The proof of the contractor's declaration that the exercise of the engineer's power in annuling his contract was *wrong*, devolves upon the contractor who makes it.[4]

[1] Easton *v.* Pa. & Ohio Canal Co., 13 Ohio 79 [1844].

[2] City of Chicago *v.* Sexton, 115 Ill. 230 [1885].

[3] White *v.* Harrigan (Minn.), 43 N. W. Rep. 89 [1889].

[4] The State *v.* McGuiley, 4 Ind. 7 [1852].

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CHAPTER XXVII.

PAYMENT. PROGRESS AND FINAL PAYMENTS. PRELIMINARIES TO PAYMENTS.

PROOF THAT LABOR AND MATERIALS ARE PAID FOR AND NO LIENS HAVE BEEN FILED. RELEASE OF LIENS AND OF ALL CLAIMS REQUIRED BEFORE FINAL PAYMENT. MANNER OF MAKING PAYMENTS. CONTRACT SIGNED, SEALED, WITNESSED, AND DELIVERED.

750. Provision that Contractor shall Furnish Proof that all Wages, Materials, and Supplies are Paid For.

Clause: "In the event of the contractor failing or neglecting for two weeks to pay the wages of the men and teams employed on the works, whether on account of default, neglect, insolvency, or otherwise, the owner or board of public works, on the representation of the engineer, reserves to itself the right to pay all such wages ascertained to be due, and to deduct the amount of the same from any moneys due or coming due to the contractor, on this or any other contract; but it is distinctly understood and agreed that the owner or city assumes no obligation nor in any way undertakes to pay such wages out of any funds due or coming due to the contractor, or out of his [its] own funds."

751. Provision that Contractor shall Furnish Proof that All Claims for Labor and Materials are Paid.

Clause: "And the said contractor further agrees that he will furnish to the owner or company or to his [its] engineer satisfactory proof that all labor and materials employed in or upon the works have been paid for in full, before he shall demand any estimates or payments due or unpaid under this contract, and in default of such satisfactory proof he further expressly agrees that the said owner or company may retain and reserve from the amount due by the terms of this contract, a sum sufficient to pay all such claims for labor and materials until they are paid and satisfactory proof of that fact has been furnished."

752. Provision that Contractor shall Indemnify City from All Claims for Labor and Materials.

Clause: "The said contractor further agrees that he will indemnify and save harmless said owner or city from all claims against said owner or city, under Chapter ..... of the public statutes of the State of ....., and any laws passed since the public stat-

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utes with reference to liens on buildings and lands, for labor done and materials furnished under this contract, and shall furnish the said owner or board with satisfactory evidence, when called for by him [it], that all persons who have done work or furnished materials under this contract, for which the said owner or city may become liable, and all claims from the various departments of the city government or private corporations, or individuals, for damage of any kind caused by the construction of said work, have been fully paid or satisfactorily secured; and, in case such evidence is not furnished, an amount necessary and sufficient to meet the claims of the persons aforesaid shall be retained from any moneys due, or that may become due, the said contractor under this contract, until the liabilities aforesaid shall be fully discharged or satisfactorily secured."

753. Provision that Owner may Retain Moneys Due Equal to Labor and Material Claims Unpaid.

Clause: "And it is further agreed by the part .. of the second part [the said contractor] that said part .. will furnish the said owner or commissioner with satisfactory evidence that all persons who have done work, or furnished materials under this agreement, and who may have given written notice to said owner or commissioner before or within ten days after the final completion and acceptance of the whole work under this contract, that any balance for such work or materials is due and unpaid, have been fully paid or satisfactorily secured. And in case such evidence is not furnished, as aforesaid, such amount as may be necessary and sufficient to meet the claims of the persons aforesaid may be retained from any moneys due said part .. of the second part [said contractor] under this agreement; until the liabilities aforesaid shall be fully discharged or such notice withdrawn."

754. Provision that Moneys may be Retained to Meet Unsatisfied Claims for Labor and Materials.

Clause: "The said contractor further agrees that the said owner or board may, if he [they] deem it expedient to do so, retain out of any amounts due to the said contractor, sums sufficient to cover any unpaid claims of mechanics or laborers for work or labor performed under this contract; provided, that notice in writing of such claims, signed by the claimants, shall have been previously filed in the office of the engineer or clerk of the works."

755. Sometimes Provisions for Payment of Labor and Materials are Required by Law in Contracts for Public Work.—These several stipulations have been regarded with so much favor in construction work that it has been made the subject of an ordinance in New York City, which requires it to be inserted in every contract for work done for the city, the clause postponing the payment of the last installment due until satisfactory evidence is furnished "that all persons who have done work or furnished materials under the contract," to all who have given ten days' written notice that a balance is due them, or until they have been fully paid or secured. Under such an ordinance it was held that a materialman who had supplied materials for

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the work under one contract, could not obtain a lien upon a balance due the same contractor under another contract.[1]

Where a school board fails to require the contractor to give the statutory bond for the payment of laborers and materialmen, neither notice nor demand is necessary to the cause of action against the members thereof thereby accruing to the laborer or materialman for labor or material furnished in the construction of the building.[2] In this case the members of the school board became personally liable to the contractor's creditors.

A provision that, at completion of the work, the balance due shall be paid the contractor on his receipting for the same in full, and rendering clear receipts from all subcontractors, employees, and materialmen from all liability to them, was held to exempt the company from liability to the contractor for damages recoverable against him by a subcontractor for breach of the subcontract, consisting in the delay of the company to have the road surveyed.[3]

When the contractor has covenanted that he will promptly pay, or cause to be paid, all claims for materials used by him under the contract, and for all labor performed in the construction and completion of a structure, a failure on his part to promptly pay such claims, or cause them to be paid, is a breach of the covenant.[4]

A bond furnished by a contractor for the erection of works and which recites that he "shall file with the board of public works the receipts and claims from all parties furnishing them with materials and labor," is a promise by the contractor to pay for all labor and materials, and a petition of a materialman averring that the contractor owes him for lumber used in the structure, is a sufficient averment of a breach of his promise.[5] An agreement to settle with all holders of claims does not require the contractor to show that he paid all claims incurred in the construction of the works.[6] A failure to pay all claims entitles the owner to nominal damages only, unless it be shown that he is liable for the payment of the bill.[7]

When the contract provides as a condition precedent to the final payment that there shall be no legal claims against the contractor for work or materials furnished, a surety on the bond of the contractor cannot enforce a lien for work or materials.[8]

756. Validity of Clause in Public Contracts.—If the agreement to pay for the work and materials has been made subject to the conditions recited

[1] Quinlan *v.* Russell, 94 N. Y. 350 [1884].
[2] Staffon *v.* Lyon (Mich.), 68 N.W. Rep. 151.
[3] O'Connor *v.* Smith (Tex. Sup.), 19 S. W. Rep. 168.
[4] Thompson *v.* Coffman, 15 Oreg. 631 [1886].
[5] Lyman *v.* City of Lincoln (Neb.) 57 N. W. Rep. 531.
[6] Bradford *v.* Whitcomb (Tex.), 32 S. W. Rep. 571.
[7] Karr *v.* Peter, 60 Ill. App. 209.
[8] Gannon's Ex'rs *v.* Cent. Presb. Ch. (Pa. Sup.), 33 Atl. Rep 1043.

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in the stipulations given, the binding effect of the agreement cannot be doubted, when the contract is between individuals or private corporations, but when the government or a public institution, as a city, has inserted it in its contracts for public improvements, its validity *has been* questioned. It *has been* argued that a provision in a contract which makes payment for work dependent upon the nonexistence of claims against the contractor is one which a committee or board has no authority to make, and that it is, therefore, inoperative. That a public board as a *quasi*-corporation has only certain powers expressly mentioned and defined by law, and that among these there is no power to interpose between employers or purchasers and the persons with whom they deal for the purpose of compelling the performance of contract obligations which the employers and purchasers have assumed. That the contracts of a city must be within the scope of the authority conferred on it by law and for municipal purposes, and that they can take nothing from the general sovereignty except what is expressly granted;[1] that municipal bodies are not philanthropic or charitable institutions whose province it is to act as collecting agents for individuals either directly or indirectly.

These arguments have been characterized as insurmountable if the agreement had been the subject of an independent agreement, but that when incorporated in a contract for public works to prevent the attachment of liens or other claims they lost their force, and that such a stipulation in a municipal contract was not *ultra vires*.[2] In Missouri it has been held that a city may make it a requirement of the contract and a condition of the bond for faithful performance, that the contractor shall "pay to the proper parties all amounts due for material and labor" employed in the performance of the contract.[3]

757. Materialmen's and Laborers' Rights under such Stipulation.—A provision that the city may retain money due the contractor until he shall have paid his laborers gives the latter no rights against the city when the contractor has been paid in full.[4] * It seems that they may have an action against the contractor's surety on a bond that provides that the contractor shall pay all claims for labor and materials,[5] but this is under an express statute.[6] In New York they cannot unless there was an intent on the part

[1] *See* Port Huron *v.* McCall, 40 Mich. 565–574.

[2] Knapp *v.* Swaney, 56 Mich 345 [1885]; *see* Hamilton *v.* Gambell (Oreg.), 48 Pac. Rep 433 [1897]; *and* Bass Fdy. & M Wks. *v.* Bd. Com'rs Parke Co. (Ind.), 32 N. E. Rep 1125.

[3] City of St Louis *v.* Von Phul (Mo. Supp.), 34 S. W. Rep. 843, *overruling;* Pipe Co. *v.* Thompson, 120 Mo. 221.

[4] Old Dom. G Co. *v* Dist. of Columbia, 20 Ct. of Cl. 127; Ritchie *v.* Dis. of Columbia, 18 Ct. of Cl 78; *and see* Buffalo Cem. Co *v.* McNaughton (Sup.), 85 N. Y. Supp. 453; Mansfield *v.* New York (Sup.), 44 N. Y. Supp. 229.

[5] Baker & Co. *v* Bryan, 64 Iowa 561

[6] Iowa McClains Ann. Code, 1888, §§ 3757; 17 Am. & Eng. Ency. Law 527.

* *See* Sec. 17, *supra.*

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of the owner or city to take the bond for their benefit and an obligation to them which would create a privity of interest.[1]

758. Claims of Laborers and Materialmen Disputed by Contractor.—Some complicated conditions must sometimes arise under these stipulations when the claims of materialmen are disputed by the contractor. How the owner, city or company is to determine whether the claims of the laborers or materialmen are well founded or legal, and if they can determine that question on their own responsibility. One can imagine a materialman using such a clause for all it is worth to coerce the contractor and compel the payment of a disputed claim, especially where the owner and claimant were good friends, or the materialman was a favorite with the city officers.

An illustration is afforded in a case where a contractor had received money under a contract with the express understanding or agreement that it should be applied to the account purchased for that contract, and the contractor paid the money to the materialman without any particular instructions that it was to apply on that particular account. The materialman credited the contractor's account with the sum paid, which account included materials furnished upon other contracts. The court held that under these facts the law would apply the payment to the oldest items of the contractor's account, and that having been so applied by the materialman, he could not be compelled to change the application simply because he knew that the money had been received from this particular contract, that if the owner would have secured such an application to his bill of materials for his house then he should have given the materialman notice of his agreement with the contractor.[2] If the contractor have a general account with a materialman, which includes the materials used on a certain building and the contractor makes a payment "on account," stating that he received the money from the owner of said house, it seems the materialman may apply the payment to the general account or to bills or accounts of materials for other buildings, and his lien duly filed will hold against other subsequent liens.[3]

Such a clause must necessarily work a hardship upon the contractor who is required to furnish so much more capital to carry on the work, in addition to furnishing bonds and assuming all the risks of the undertaking, and it, therefore, lessens the competition for the work, limiting the number of contractors to those who have abundant means. Of course, this is only one side of the case. However, in a suit for damages in a large sum and for balance due under the contract, it has been held that an exception that

[1] Lyth *v.* Hingston (Sup.), 43 N.Y. Supp. 653; *other cases in* 17 Amer. & Eng. Ency. Law 529.

[2] Jefferson *v.* Church of St. M. (Minn.), 43 N. W. Rep. 74.

[3] Orr *v* Nagle (Sup.), 33 N. Y. Supp. 879; First Presby Ch. *v.* Santy (Kans.), 34 Pac Rep. 974; *see also* Sayre Lumb. Co. *v.* Union Bank (Colo. App.), 41 Pac. Rep. 844.

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the contractor could not demand further payment without showing that all laborers, subcontractors, and materialmen had been paid, and that no liens had been recorded against the company, was *not* well taken when the petition of the contractor alleged that what is due, if anything, is due to such laborers, etc., is due primarily from the company, and that the contractor reserves his right to sue for it, if they are compelled to pay, though the company could bring in defense any rights that they had in this regard.[1] If the owner wants proof that materials and labor are paid for as the work proceeds or when he makes progress payment, he should stipulate for them expressly.[2]

759. Provision that Contractor shall Protect Work and Premises from Liens.

Clause: "The contractor shall save and keep the buildings [or works] referred to in this contract, and the lands on which they are situated, free from any and all mechanics' liens, and other liens, by reason of his work, or of any materials or other things used therein; and if the contractor fail to do so, the owner may retain sufficient of the contract price to pay the same, and all costs by reason of or in consequence thereof, and may pay said lien or liens, if any, and costs, and deduct the amount thereof from the contract price, or any part thereof that is due and unpaid."

760. Provision that Contractor shall Furnish a Certificate from Register of Deeds that no Liens or Claims have been Filed.

Clause: "And it is further expressly agreed and understood that no payments shall be due, demanded, or claimed under this contract, until in each case that payments are provided for, the contractor shall furnish a certificate from the register of deeds where liens are recorded, signed, and sealed by said register that he has carefully examined the records in his office and finds no liens or claims filed against the said works or buildings or on account of said contractor, nor shall there be any legal or lawful claims against the contractor in any manner or from any source whatever for work or materials furnished on said work or buildings."

761. Agreements Inconsistent with Existence of Liens is a Waiver of the Right to a Lien. — Such a special agreement inconsistent with the existence of lien is a waiver of the right to a lien, and will hold against the contractor or his assignees.[3] If the contractor undertake to furnish to the owner satisfactory evidence that materials furnished are fully released from all liens before he shall receive the sums due on final payments, it is a condition precedent to a recovery under the contract.[4] In the absence of such an agreement the parties will be presumed to have contracted for work and

[1] Fletcher *v.* New Orleans & N. E. R. Co. (La.), 19 Fed. Rep. 731 [1884].

[2] *Semble.* Leavel *v.* Porter, 52 Mo. App. 632; Bradford *v.* Whitcomb (Tex.), 32 S. W. Rep. 571.

[3] Long *v.* Caffrey, 93 Pa. St. 526; Scheid *v.* Rapp, 121 Pa. St. 593 [1888]; Coulter *v.* Bd. of Ed. 63 N. Y. 365 [1875]; *and see* Erickson *v.* Brandt, 53 Minn. 10.

[4] Fogg *v.* Suburban Rapid-Transit Co., 90 Hun (N. Y.) 274.

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materials under and with reference to the protection that the lien laws afford.[1] The statutes giving mechanics and materialmen a lien for their work and labor have never been construed to forbid such any agreement, and it will be upheld if the contract is not contrary to public policy.[2]

If the surety covenants that no lien shall accrue against the works it prevents the contractor from having a lien unless the surety is discharged.[3]

Under a clause that final payment shall be made when the contractor furnished satifactory evidence that no liens or unsatisfied claims existed on the work, it has been held that such evidence was furnished if at the end of the limit for filing liens no claims were filed under the mechanics' lien law.[4] A covenant against liens cannot, it seems, be construed as a covenant to pay all claims incurred to erect the building.[5]

762. Contractor's Covenant Against Liens does not Bar Materialmen and Laborers from Filing Liens.—Under a clause which provided that the last payment shall not be due nor paid until the contractor shall have "furnished a complete release of liens, or until the contractor shall have furnished a certificate from the registry of deed that no liens have been filed," the contractor cannot recover the amount of final estimate until he has executed the release; and an attaching creditor has no greater rights.[6] A common law court has no right to make its judgment against the owner or company operate as a release under seal by the contractor.[6]

Such a clause has been held not to prevent the materialman or laborers from filing and enforcing a lien against a structure upon which they have worked or furnished stuff.[7] The fact that the contractor has covenanted that he will not suffer any lien by any person to be put upon the building, and that any such lien until it is removed shall preclude any claim for payment under the contract, and that the last installment shall not be payable till a release of all claims and liens for work and materials is furnished by the contractor, has been held not to indicate that the parties intended absolutely to prevent the filing of any lien, and that it would not therefore prevent a materialman from having a lien.[8] A waiver by the subcontractors does not affect the right of the principal contractor to a lien.[9] If the stipulation be that payment shall be made for work on final estimate and certifi-

[1] 15 Amer. & Eng. Ency. Law 104–5.

[2] 15 Amer. & Eng. Ency. Law 105, *and see* O'Connor *v.* Smith, 84 Tex. 232.

[3] 15 Amer. & Eng. Ency. Law 105; *and see* Blythe *v.* Robinson (Cal.), 37 Pac. Rep. 904.

[4] Wallis Iron Wks. *v.* M. P. Assn. (N. J.), 26 Atl. Rep. 140 [1893]; *and see* Mills *v.* Norfolk, etc., R. Co. (Va.), 19 S. E. Rep. 171 [1894]; Simonson *v.* Grant, 26 Minn. 439.

[5] Simonson *v.* Grant, *supra*.

[6] Baltimore & O. R. Co. *v.* McCullough, 12 Gratt. (Va.) 595; Baltimore & O. R. Co. *v.* Gallahue, 14 Gratt. (Va.) 563.

[7] Cresswell I. Wks. *v.* O'Brien (Pa.), 27 Atl. Rep. 131; Atl.. Coast Brew. Co. *v.* Clement (N. J.), 36 Atl. Rep. 883.

[8] Cresswell I. Wks. *v.* O'Brien, *supra*; Norton *v.* Clark, 85 Me. 357; Lloyd & Co. *v.* Krause (Pa.), 23 Atl. Rep 602; Gimbert *v.* Heinsath, 11 Ohio Cir. Ct Rep. 339, *and see* Whittier *v.* Wilbur, 48 Cal. 175; *but see also* Benedict *v.* Hood, 134 Pa. St. 289, *and* Scroeder *v.* Garland, 134 Pa. St. 277.

[9] Commonwealth Tit. Ins. Co. *v.* Ellis (Com. Pl.), 5 Pa. Dist. Rep. 33.

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cate of an engineer approving the work, and a showing that the work is free from all liens, and, after the final estimate is made and the certificate procured, the contractor, being refused payment, files his lien, the fact that subcontractors subsequently file liens for work will not defeat the contractor's lien.[1] A subcontractor, who had knowledge when he undertook the work that the contractor had waived his rights to a lien, has been held not entitled to a lien.[2]

The allowance of a lien to a subcontractor is a special privilege, and it is not unreasonable to require him to look to the principal contract to ascertain whether it is such as to justify him in becoming a contractor under it. His right to a lien depends upon the contract between the owner and the original contractor, and it is his privilege to inform himself about the terms of the original contract, and, if not satisfied with them, to refuse to deal with the contractor.[3]* His right to a lien is not, however, affected by an agreement between the owner and principal contractor subsequent to the one under which he began work, and of which he had no notice, whereby the principal contractor undertook to deliver the building to the owner free of all liens.[4] The contractor may be part owner of the property, if the contract is in good faith, and does not mislead and defraud; but if the contractor be the *sole* owner of the property, and the person with whom he contracts holds the property in her name merely as his trustee, the covenant against liens is of no effect.[5] The owner cannot, by putting himself in the position of a contractor, destroy the right of a subcontractor to a lien on the property.[6] A materialman has been held not to be a subcontractor.[7] One who supplies a contractor with brick for a public building is not a subcontractor, but a materialman, and hence is entitled to the benefit of a public act requiring a contractor on a public building to furnish a bond for payment for materials.[8] A person contracting to furnish material, such as doors, sashes, blinds, etc., for a building, which, instead of manufacturing to order, he purchased ready-made, is a materialman only.[9] One who agrees to furnish certain mantels, tiles, and grates, and the appurtenances thereof, and to deliver and set them in position, has been held a materialman, and not an original contractor.[10]

The fact that the materials are furnished upon the order and credit of

[1] Ford *v.* Springer Land Assn. (N. M.), 41 Pac. Rep. 541.

[2] Bowen *v.* Aubrey, 22 Cal. 566.

[3] Foster *v.* Swaback, 58 Ill. App. 581; Cole *v.* Shoen (Super. Ct.), 38 W. N. C. 382; Knickerbocker *v.* Murphy, 59 Ill. App. 39.

[4] Cook *v.* Williams (Pa. Sup.), 24 Atl. Rep. 746; Schroeder *v.* Galland, 134 Pa. St. 277, *distinguished;* Cook *v.* Murphy (Pa.), 24 Atl. Rep. 630, *followed.*

[5] Ballman *v.* Heron (Pa. Sup.), 28 Atl. Rep. 914.

[6] Owen *v.* Johnson (Pa.), 34 Atl. Rep. 549.

[7] People *v.* Powers (Mich.), 66 N. W. Rep. 215.

[8] Staffon *v* Lyon (Mich.), 62 N. W Rep. 354; *but see* McKee *v.* Rapp (Super.), 35 N. Y. Supp. 175.

[9] Wilson *v.* Hind (Cal.), 45 Pac. Rep. 695.

[10] Bennett *v.* Davis (Cal.), 45 Pac. Rep. 684.

* *See* Sec. 764, *infra.*

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the contractor, and not on the credit of the building in which they are used, will not defeat a lien on the building for such materials,[1] nor will the taking, by the materialman of an assignment of all the contractor's rights under the contract with the owner, and under other contracts, to hold as security until his claim was paid, destroy his lien.[2] A materialman who furnishes materials for a particular building has been held entitled to a lien, though they were not used in such building.[3] If the work has been abandoned by the contractor, and finished by the owners, an assignee of the final payment to become due the contractor cannot recover without producing such certificate.[4]

Such a stipulation requiring a certificate that no liens have been filed before payment can be demanded under the contract has been held to be for the protection of the owner and not for the persons furnishing materials to the contractor.[5] Likewise a release of liens executed by the contractor to a mortgagee of the premises, who had refused to advance more money for the building unless their lien was made prior to that of the contractors, does not inure to the benefit of the owners.[6]

763. Contractor to Execute a Release of All Claims or Demands before Final Payment.—When the contract provides that "before demanding or upon receiving the full amount of the final estimate made according to the terms of the contract, the contractor shall execute a release, under seal, from all claims or demands whatsoever growing out of said contract," the giving of such a release is a condition precedent to his recovery, if the estimate has been properly made out,[7] but not so if the final estimate by the engineer were fraudulently made. The contractor cannot recover the amount of his final estimate, or the balance due, until he has executed the release, and his attaching creditors have no greater rights. In such a case the common law court has no authority to make its judgment against the company or owner operate as a release under seal by the contractor.[8]

There must be no fraud or misrepresentation on the part of the company. A receipt in full given by a contractor upon the representations of the officers of the company that the engineer had decided that no claims for extra work were to be allowed, which representation was false, does not prevent the contractor from suing for the value of the extra work several years thereafter, the receipt showing that he had received only what he was entitled to under the contract.[9]

If the contractor has released his lien on the agreement of the owner to

[1] Clark *v.* Huey Ind. App.), 40 N. E. Rep. 152.
[2] Taliaferro *v.* Stevenson (N. J. Err. & App.), 33 Atl. Rep. 383.
[3] Jonte *v.* Gill (Tenn. Ch. App.), 39 S W. Rep. 750.
[4] Bates *v.* Trustees (Sup.), 27 N. Y. Supp. 951.
[5] Hurd *v* Johnson Co., 34 N. Y. Supp. 915.
[6] Paulsen *v.* Manske (Ill.), 18 N. E. Rep. 275 [1889].
[7] B. & O. R. Co. *v.* Polly & Co., 14 Gratt. 448.
[8] B. & O. R Co. *v.* McCullough (Va.), 12 Gratt. 595 [1855].
[9] McGrann *v.* Pittsburgh & L. E. R. Co. (Pa.), 2 Atl. Rep. 872 [1885].

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pay the claim, afterwards reinstates his lien because of the refusal of the owner to make the payment, he thereby abandons the agreement with the owner, and cannot afterwards sue on it.[1]

764. Mechanics' Liens Laws of Different States.—The subject of mechanics' liens is an important one to every contractor, builder, and owner, but being entirely the subject of statute law, and of different states, it will be impossible to properly treat it in the space available in this book. There are excellent treatise on the subject,* and the reader is referred to those books for the general and special lien laws. The subject of liens that will interest architects and engineers is treated in another chapter, under the general subject of engineers' and architects' employment.†

A subcontractor in New York can have no lien for work done under a subcontract for the contractor when nothing is due the principal contractor under the contract;[2] and if the contractor has abandoned the work before a substantial completion of the structure according to his contract, then nothing is due him, and the subcontractor can recover nothing.[3]

When the contract expressly provides that the owner may complete the work in the case of the contractor's default, and deduct the expense from the contract price, failure of the contractor to complete the work does not prevent the lien of a subcontractor from attaching to the balance due the contractor after the owner's completion of the work; and it is immaterial that the owner has seen fit not to exercise his option, and not to do what he claims the contractor refused or neglected to do, where the expense of doing the things not done can be definitely ascertained.[4] In Illinois the rights of a subcontractor to have a lien, under Chapter 82, is not dependent upon the right of the original contractor to have an architect's certificate.[5]

765. Contractor's Bond to Pay all Claims for Materials and Labor Furnished or Used.—Another means of protection employed, chiefly by municipal and quasi-public corporations, to insure the payment of claims for labor and materials employed in the construction of works, and to avoid the filing of liens against the property, is to require the contractor to furnish a bond that he will deliver the works to the owner "free from all claims and liens of whatever description," or "that the contractor shall pay all claims for materials, labor, etc., and produce proper receipts therefor to the owner or his engineer."

[1] Cassidy *v.* Aldhous, 27 N. Y. S. 267.

[2] *Semble.* McKee *v.* Rapp (Super), 35 N. Y. Supp. 175.

[3] Beecher *v.* Shuback, 23 N. Y. Supp. 604; *semble*, Sayre Lumb. Co. *v.* Union Bank (Colo. App.), 41 Pac. Rep. 844; *but see cases in* 15 Amer. & Eng. Ency. Law 126–7 *et seq.*; *and see contra*, Bates *v.* Trustees Masonic Hall (Sup.), 27 N. Y. Supp. 951; Cook *v.* Williams (Pa. Sup.), 24 Atl. Rep. 746.

[4] Blakeslee *v.* Fisher (Sup.), 21 N. Y. Supp. 217; *accord.* Ogden *v.* Alexander (N. Y. App.), 35 N. E. Rep. 638.

[5] Brin *v.* Larimer, 62 Ill. App. 657.

* Jones on Liens; Phillips on Liens; Overton on Liens; Lloyd on Building Contracts; 15 Amer. & Eng. Ency. Law, pp. 1–204; Dillon's Munic. Corp'ns.

† *See* Secs. 860–863, *infra.*

‡ *See* Sec 762, *supra.*

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A city has general power in letting contracts for public improvements, and without an express statute or ordinance, to require contractors to furnish a bond to secure the payment of materialmen and laborers.[1] Sometimes city charters require that a bond be taken for the security of laborers and materialmen when contracts are let for public improvements, but if the officers of the city neglect to take such a bond, the city is not liable to such materialmen and laborers.[2]

When such a bond has been required and it is evident that the bond was made for the direct and primary benefit of the materialmen or laborers, as when it recites that the contractor shall pay for all materials and labor furnished him in executing the contract,[3] it is held in some courts that one who has furnished labor and materials to the contractor may sue on the bond.[4] Such materialman cannot sue upon a bond given by the contractor for the faithful performance of his contract unless it was shown that it was primarily for the benefit of said materialman.[5]

The materialmen of a subcontractor cannot sue upon the contractor's bond which guaranteed the faithful performance of the work and that the contractor should pay all debts incurred by him in the prosecution thereof.[6]

Where the contract reserves the right to withhold a part of the money in case the contractor fails to pay claims for material and labor, the contractor cannot, by an assignment of moneys so withheld, give the assignee any standing to participate in the fund until labor and material claims have been paid.[7]

Subcontractors cannot obtain liens in excess of the amount which the owner has agreed to pay the original contractor;[8] and it has been held that the owner may make payments to the principal contractor according to the contract, although he knows that subcontractors have been furnishing labor and materials, and have not been paid for them, and without any liability to such subcontractors. It has been held that the owner may pay the principal contractor in advance of the engineer's estimate if he has not paid more than the contractor is entitled to by his contract.[9]

The constitutionality of lien laws has been questioned on the ground that they apply to a special class of contracts and place a burden on the owner of real estate that is not borne by the owner of any other class of property, and for the additional reason that they deny to the owner of real

[1] Lyman *v.* City of Lincoln (Neb.), 57 N. W. Rep., 531; Doll *v.* Crume (Neb.), 59 N. W. Rep. 806; St. Louis *v.* Von Phul (Mo. Sup.), 34 S. W. Rep. 843; *but see a dictum in* Knapp *v.* Swaney, 56 Mich. 345 [1885].

[2] Ink *v.* Duluth (Minn.), 59 N. W. Rep. 960. *but see* Staffon *v.* Lyon (Mich.), 68 N. W. Rep. 151.

[3] Doll *v.* Crume (Neb.), 59 N. W. Rep. 806.

[4] Doll *v.* Crume, *supra;* Baker *v.* Bryan, 64 Iowa 561.

[5] Parker *v.* Jeffry (Oreg.), 37 Pac. Rep. 712.

[6] Faurote *v.* State (Ind.), 11 N. E. Rep. 472. 790 [1887].

[7] Greenville Sav. Bank *v.* Lawrence (C. C. A.), 76 Fed. Rep. 545.

[8] Main Street Hotel Co. *v.* Horton Hardware Co. (Kan. Sup.), 48 Pac. Rep. 769.

[9] Epeneter *v.* Montgomery Co. (Iowa), 67 N. W. Rep. 93; Kauffmann *v* Cooper (Neb.), 65 N. W. Rep. 796.

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property the right to enjoy and possess property and contract in relation thereto, regardless of any police regulation.[1] The lien laws are usually upheld by the courts. Their constitutionality has not been questioned until quite recently.

766. Liens on Public Buildings.—Contractors will always do well to remember that if the statute in respect to mechanic liens does not expressly include public buildings, they can have no lien against them, and it has even been held that a grant of liens against "all buildings" did not include public buildings and grounds.[2] Public property of every description cannot be the subject of a mechanic's or builder's lien unless the statute expressly so provides. It is by implication excepted from lien statutes as much as from general tax laws, and for the same reasons.[3] Public property that has been held to be exempt from mechanic's lien includes the public buildings and lands of the state, counties, towns, and cities, such as courthouses, jails, fire-bell towers, water-works, bridges, schoolhouses, reform schools, and state universities, and even churches.[4]

In some states the structures of *quasi*-public corporations are exempt from the operation of the mechanic-lien law, such as water-works of a water company.[5]

767. Contractor's Possession of a Building for Purposes of Construction Is Not a Tenancy.—When a contractor finds to his disappointment that he is not entitled to a lien upon a building he makes a mistake in trying to hold possession of it until his work and materials are paid for. In Wisconsin a contractor, having possession of premises for the purpose of erecting and completing a structure thereon, cannot exclude the owner of the premises without being liable to be removed and fined.[6] Ordinarily when the relation of master and servant or of employer and employee exists between the owner of premises and a person who is occupying them, and the possession

[1] Palmer *v.* Tingle, 9 Ohio Cir. Ct. Rep. 708; *but see* Gimbert *v.* Heinsath, 11 Ohio Cir. Ct. Rep 339; and Blair Brick Co. *v.* Walz (Com. Pl.), 1 Ohio L. D. 193, *contra.*

[2] Atascosa Co. *v.* Angus (Tex.), 18 S. W. Rep. 562 [1892]; Leonard *v.* Broo lyn, 71 N Y. 499; Foster *v.* Fowler, 60 Pa. St. 27; Guest *v.* Water Co. (Pa. Sup.), 21 Atl. Rep. 1001; Board *v.* Gillen, 59 Miss. 199; Secrist *v.* Board, 100 Ind. 59; Fatout *v.* Board, 102 Ind. 224; Board *v.* O'Conner, 86 Ind. 531; Whiting *v.* Story Co., 54 Iowa 81; Breneman *v.* Harvey, 70 Ia. 480; Thomas *v.* School Dist., 71 Ill. 284; Hovey *v.* E. Providence (R. I.), 20 Atl. Rep. 205; Dallas *v.* Loonie (Tex.), 18 S. W Rep. 726 [1892]; Jones' Liens, § 1375; Phillips' Mech Liens § 179; 2 Dillon's Munic. Corpn's § 577; McGregor *v.* Cook (Tex. App.), 16 S. W. Rep. 936.

[3] Knapp *v.* Swaney, 56 Mich. 345 [1885]; Poillon *v.* Mayor, etc., 47 N. Y. 666; Bouton *v.* McDonough Co., 84 Ill. 384; Frank *v.* Freeholders, 39 N. J. Law 347; Bd. of Ed. *v.* Neidenberger, 78 Ill. 58; Loring *v.* Small, 50 Iowa 271; 15 Amer. & Eng. Ency. Law 29; Phillips' Mechanics' Liens [2d ed.], §§ 179 and 459; Kneeland's Mechanics' Liens, § 84.

[4] 15 Amer. & Eng. Ency. Law 29, 30; Loring *v.* Small, 50 Iowa 271, *bridges;* Board *v.* Salt Lake P. B. Co. (Utah), 44 Pac. Rep. 709, *school buildings;* Louisville *v.* Leatherman (Ky.), 35 S. W. Rep. 625.

[5] Phillips' Mechanics' Liens, § 180; Foster *v.* Fowler, 60 Pa. St. 27; Leonard *v.* City of Brooklyn, 71 N. Y. 498; Wilkinson *v.* Hoffman, 25 Fed. Rep. 175, *and note* McNeal Pipe & Foundry Co. *v.* Bullock (Ala.), 38 Fed. Rep. 565, *but contra* in Wisconsin. Oconto Water Co. *v.* Nat. Found. & Pipe Wks. (C. C. A.), 59 Fed Rep. 19.

[6] City of P. *v.* Bell, 66 Wis. 327 [1886]; *see* St. Mary's Market Co. *v.* New Orleans (La.), 16 So. Rep. 831.

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is incident to the service or employment, the relation of landlord and tenant does not exist, and whether or not the relation is that of a tenant or an employee is a question of fact.[1] *

The letting of a contract to do such shoring "as required by law" of the walls of an adjacent building is not a direction or authority to the contractor to commit a trespass on adjacent property, nor is the owner liable for injuries caused by the contractor's entry without license and against the protests of the occupants.[2] If the contractor be a servant then the owner may be held liable[3] for nominal damages and for any actual and consequential damages naturally caused by the breaking and entering, but not for larceny committed by his servants.[3]

A contractor generally has no lien on the property upon which he has worked for damages suffered from the breach of his contract. His lien is confined to the value of the work and materials he has actually furnished.[4]

768. Burdens Created upon Property by Unauthorized Agents.—In connection with mechanic's liens, owners and companies should be warned of the evil consequences of the acts of employees, servants, agents, and even of contractors. In many states the laws are such that the owner's agent, trustee, contractor, subcontractor, engineer, architect, builder, or lessee, or his wife, or her husband may render the property of their principal subject to a mechanic's lien by contract for labor and materials furnished on it.[5] By the law of contracts these parties could not bind the principal or owner by their promises or unauthorized acts, yet under the lien laws the property of the principal is made liable for the unauthorized acts of his agents and even of strangers.†

A contractor who erected a building under a contract signed by a number of individuals, each of whom signed for a specific sum, binding himself only to that extent, may, after the subscribers have organized into a corporation, which is vested with the title to the property, maintain a single action to enforce a mechanic's lien on the property for the amount of the unpaid subscription, although neither the corporation nor the stockholders who paid their subscriptions are bound for the indebtedness.[6]

769. Provision for Progress Certificates and Partial Payments.

Clause: "In order to enable the said contractor to prosecute the work advantageously, the engineer shall, once a month, on or about

[1] 12 Amer. & Eng. Ency. Law 664, *and cases collected.*

[2] Ketcham *v.* Newman (N. Y. App.), 36 N. E. Rep. 197.

[3] Searle *v.* Parke (N. H.), 34 Atl. Rep. 744.

[4] Morgan *v.* Taylor, 5 N. Y. Supp. 920 [1889]

[5] 15 Amer. & Eng. Ency. Law 69–70; *but see* People's S. L. & B. Ass'n *v.* Spears (Ind.), 17 N. E. Rep. 570 [1888]; *and see* Marshall *v.* Cohen (Com. Pl.), 32 N. Y. Supp. 283, which held that there need be no contract; *and* Hankinson *v.* Vantine (N. Y. App.), 46 N. E. Rep. 292.

[6] Davis & Rankin B'dg. & Manuf'g Co *v.* Vice (Ind. App.), 43 N. E. Rep. 889.

* *See* Secs. 466, 469–470, *supra.*

† *See* Sec. 33, 553, 372–380, *supra*

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the last day of each month, make an estimate in writing of the amount of work done and materials delivered, and of the value thereof, according to the terms of this contract. The first such estimate shall be of the amount or quantity and value of the work done and materials delivered since the part.. of the second part [contractor] commenced the performance of this contract on.....part; and every subsequent estimate (except the final one) shall be of the amount or quantity and value of the work done since the last preceding estimate was made. Such estimates of amount and quantity shall not be required to be made by strict measurement, or with exactness; but they may, at the option of said engineer, be approximate only. Upon each such estimate being made, and not until then, will the parties of the first part pay to the part.. of the second part 80 to 90 per cent. of such estimated value; and whenever, in the opinion of the engineer, the part.. of the second part shall have completely performed the contract on .....part, the said engineer shall so certify, in writing, to the owner, company, or commissioners; and in his certificate shall state, from actual measurements, the whole amount of work done by the said part.. of the second part [contractor], and also the value of such work under and according to the terms of this contract; and on the expiration of thirty days after the acceptance by said owner, company, or commissioners of the work herein agreed to be done by the part.. of the second part, the said parties of the first part will pay to the said part.. of the second part, in cash, the amount remaining after deducting from the amount or value contained and stated in the last mentioned certificate all such sums as shall theretofore have been paid to the said part.. of the second part under any of the provisions in this contract contained; and also all such sum or sums of money as by the terms hereof they are or may be authorized to reserve or retain; provided that nothing herein contained shall be construed to affect the right hereby reserved of the said owner, company, or commissioner to reject the whole or any portion of the aforesaid estimate should the certificate be found, or known to be, inconsistent with the terms of this agreement, or otherwise improperly given." *

770. Provision for Failure to Make Monthly Payments.

Clause: "It is further expressly agreed and understood that if the above payments are not made as hereinbefore provided when the same shall become due and payable, the said owner, company, or city shall be liable to the contractor for interest on the same at the legal rate so long as they shall remain unpaid, and if such default shall continue for a period of more than....., days the contractor may, by written notice delivered to the owner, company, or city, or at its usual place of business, terminate this contract. †

771. Provision that Certificate of Engineer or Architect shall Be a Condition Precedent to Partial or Final Payments.

Clause: "That the following conditions as to payments shall be specially observed and included with the several other conditions in this specification contained; that is to say, provided always that no

* *See* Secs. 447–462, *supra.*

† *See* Sec. 686, *supra.*

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sum or sums of money shall be considered to be due and owing, nor shall the contractor make or enforce any demand whatsoever upon or against the board, for, or on account of, any work executed by him, unless the contractor shall have delivered from time to time, and at all times within one week from the expiration of the month on which the amount of work then claimed for has been performed, a true and proper claim or claims in such form as the engineer may direct, nor unless the engineer shall have certified or recommended the amount to be paid as such installment or balance to the contractor, and that the contractor is reasonably entitled to such installment or balance respectively; nor shall any such sum or sums of money be considered payable to the contractor until the expiration of seven days from the date of such certificate, nor shall any omission to pay the amount of such certificate at the time the same shall be payable be held or deemed to vitiate or avoid the contract. Nor shall the three amounts herein provided to be lastly paid (that is to say, the two last advances to be made and the final balance) be considered to be due and owing at the times above stated, unless that within three months from the date of completion, delivery, and acceptance, as aforesaid, the contractor shall have delivered to the board a full account in detail of all claims he has on the board in respect of the works; and that the engineer shall have made and delivered to the contractor a certificate in writing of the correctness of such claims, and provided also that the engineer shall have certified that such works have been inspected by him since the expiration of the said period of three months, and found to be in good and substantial order; and that the contractor has duly delivered to him certificates in writing from the ....., and other proper authorities that all works or matters under their control which have been in any way interfered with have been properly reinstated and made good, and all expenses and demands in respect thereof paid by the contractor, and that he also shall have certified that all claims and demands which have been made for, or in respect to, damage or loss by, from, or in consequence of, the said works, have been satisfied agreeably to this contract, and that he has no reason to believe that any other such claim exists. Provided always that with respect to any disputed or unadjusted claim or claims the contractor shall not be entitled, before the final settlement of the contract, to any payment, on account or otherwise, unless and until the engineer shall certify the correct amount of such claim or claims, nor unless and until the contractor shall give his receipt in discharge thereof. And, provided further, that no certificate or recommendation or payment on general account shall be taken to be an admission of the due performance of the contract, or any part thereof, or of the accuracy of any claim, nor shall it conclude or prejudice the power of the engineer, or the settlement of the contract, and the determination of the sum or sums or balance of money to be paid or received from the contractor, or in any other way vary or affect the contract entered into by the contractor."

772. Engineer's Certificate should be Made a Condition Precedent to Owner's Liability.—This subject has been carefully and fully discussed in Chapters XII, XIII, Secs. 335–417, to which the reader is especially referred.

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773. Special Provisions as to Payments.

Clause: "Subject to the conditions in this contract contained the contractors shall be paid in the manner following, that is to say: From time to time until the contractors shall have executed upon the site of the works, permanent work to the full value of $100,000, the contractors shall be paid at the rate of 85 per cent. upon the value of the work so executed, after which, and from time to time, until the contractors shall have executed upon the site of the works permanent work to the full value of $250,000, the contractors shall be paid at the rate of 90 per cent. upon the value of the further work so executed. After permanent work to the full value of $250,000 has been completed, the contractors shall from time to time be paid in full upon the value of the further work executed, until the completion of the whole of the works. The above payments shall be made only upon the engineer's estimate of the approximate value of the works executed, and in respect of permanent work only, except as hereinafter mentioned. No advances shall be made upon plant, but the engineer may, if he thinks fit, certify from time to time for advances upon materials delivered on the site of the works, but not fixed, at a rate not exceeding 60 per cent. of his estimate of the value of such materials. Payments shall in no case be made at more frequent than monthly intervals. The balance of the moneys payable to the contractors under this contract shall be retained in the hands of the board of public works and paid to the contractors by installments, that is to say: When the engineer's certificate of completion shall have been given, a sum equal to 50 per cent. of the said balance shall be paid to the contractors, a further 25 per cent. of the said balance shall be paid at the expirations of three calendar months after the said certificate of completion, and the remainder of the said balance shall be paid to the contractors at the expiration of twelve calendar months after such certificate of completion as aforesaid, but only on condition that the terms of the contract have been fulfilled."

774. Provision that Engineer's Estimate and Certificate shall be a Condition Precedent to any Claim of Contractor to Payment.

Clause: "It is expressly agreed by the parties hereto that no sum or sums of money shall be considered to be due or owing, nor shall the contractor make any claim against, or demand upon, the said corporation for, or on account of, any work executed by him or any materials furnished, nor make any claims whatsoever growing out of, or resulting from, this contract, nor on account of any extra work, nor for any extra work, prospective profits, damages or losses, unless, and until, the said engineer shall have estimated and certified the amount thereof in writing, subscribed, and sworn to, and shall have certified that the work has been done according to the contract and specification, and that the contractor is reasonably entitled to such installment or balance thereof."

775. Provision that Engineer's Estimate and Certificate shall Be a Condition Precedent to Payment by Owner.

Clause: "The said part.. of the second part further agree.. not to demand or be entitled to receive payment for the aforesaid work, or materials, or any portion thereof, except in the manner set forth in this agreement; nor unless each and every one of the promises, agreements,

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stipulations, terms, and conditions herein contained to be performed, kept, observed, and fulfilled on the part of the said part.. of the second part has been so far forth performed, kept, observed, and fulfilled; and the said engineer shall have given his certificate to that effect. Whereupon the said owner, company, or city will, within thirty days after such completion and the delivery of such certificate, pay, or cause to be paid, the said contractor, in cash, the moneys then due to the said contractor under this contract, excepting such sums as may be lawfully retained under any of the provisions of this contract hereinbefore set forth."

776. Provision that Owner will Pay on Performance of Conditions and Rendering of Engineer's Certificate.

Clause: "That in consideration of the covenants and agreements herein contained to be kept and performed by the contractor, the owner, or company, hereby agrees to pay to the said contractor the sum of.....dollars ($.....), upon the written certificates issued by the engineer or architect, as the work proceeds, each payment not to exceed eighty-five per cent. (85%) of the value of the materials used and labor performed, as estimated by or for the engineer or architect, less the total amount of accrued liens as disclosed by the contractor's affidavit or other notice required by the laws of the state of.....; which said certificate shall be paid immediately upon presentation; and a final settlement as to the remainder (and all extras, if any) shall be had and paid within forty (40) days after the work shall have been completed, and provided it is shown to be free from all claims, liens, and charges whatsoever, and the engineer or architect shall have certified thereto in writing." *

777. Provision that no Payments shall be Due except upon the Engineer's Certificate.

Clause: "Provided always that no money shall be considered to be due or owing, and that the contractors shall not make any claim against, or demand upon, the company for, or on account of, any work executed or materials furnished by the contractors, unless the engineer shall certify the amount due therefor, and that the contractors are reasonably entitled to such installment and balance respectively, nor unless such certificate shall have been presented to the secretary of the company; nor shall any such sum or sums of money be considered payable to the contractors until the expiration of seven days after such certificate shall have been so presented, nor shall any omission to pay the amount of such certificate, at the time the same shall be payable, be held or deemed to vitiate or avoid this contract, but in such case the contractors shall be entitled to interest thereon at and after the day it is due, at the rate of ten (10) per cent. per annum for such time as such omission shall continue."

778. Promise to Pay Omitted.—If the promise to pay on the part of the owner has been omitted from the contract, the law will imply a promise when

* From World's Columbian Exposition Construction Contract, with slight modifications.

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the contract under seal contains mutual covenants, and imposes an obligation on one party, to pay money to the other, but contains no promise to pay it, and the contract having been performed in all other respects, the money may be recovered in an action of assumpsit.[1]

These cases should not, however, be any argument or excuse for not making the promise an express term of the contract or declaration.*

779. Provision that Progress Certificates shall not Prejudice Right of Owner or City to Require full Performance of Contract.

Clause: "Provided always, that no advance or partial payments shall be taken as an admission of the due performance of this contract or any part thereof, or of the accuracy of any claim or of any amount of work performed, or in any way limit or prejudice the power of the said engineer or board of public works under this contract, anything to the contrary notwithstanding." †

780. Provision Making Final Certificate Conclusive and Binding over Progress Certificates.

Clause: "It is further expressly understood and agreed, by and between the parties hereto, that the action of the engineer, by which the said contractor is to be bound and concluded according to the terms of this contract, shall be that evidenced by his final certificate; all prior partial payments or progress certificates being made merely upon estimates, subject to the correction of such final certificate; which final certificate may be made without notice to the contractor thereof, or of the measurements upon which the same is based." ‡

781. Provision that Architect's Certificate Given During Progress of Work shall not Prejudice Final Settlement.

Clause: "The payments made from time to time to the builders, during the progress of the work, shall be held to be payments generally on account of the contract sum, and the certificates of the architect, on which such payments are based, shall be held to have been given only for the purpose of fixing the sums to be paid, and shall not in any way prejudice the said owner in the final settlement of account, in case it should appear that too much had been paid to the builders during the progress of the work."

782. Provision for Payment at a Price per Unit Measure.

Clause: "And it is hereby further mutually agreed, that the said party of the first part will perform the work embraced in this contract, and also that the canal commissioner in charge will pay, out of the moneys appropriated therefor, in full compensation for the same, the following sums at the following rates, upon and according to the estimate of the engineer, as hereinbefore provided:

[1] Varney *v.* Bradford, 86 Me. 510; *and see* Galveston *v.* Devlin (Tex.), 19 S. W. Rep. 395 [1892], which held that a failure to allege a promise by owner to pay was not fatal to a declaration, which alleged the execution of a contract, its performance, acceptance of work, and the amount due.

* *See* Secs. 342–3 and 410–414, *supra* † *See* Secs. 442–443, 463–469, *supra.*
‡ *See* Secs. 492–498, *supra.*

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SCHEDULE OF PRICES.

.....

The prices above specified are to be in full compensation for all materials and labor required to put the same into the work herein contracted for, and complete the whole in all respects, as provided in this contract."

783. Provision Fixing Compensation at a Price per Unit of Measure.

Clause: "And the part.. of the second part hereby agree.. to receive the following prices in full compensation for furnishing all the materials and labor, and for performing and completing all the work which is necessary or proper to be furnished or performed, in order to complete the entire work in this contract described and specified, and in said specifications and plans described and shown, to wit:

SCHEDULE OF PRICES.

.....

...."[1]*

784. Provision for Payment by Schedule of Prices — Prices to Cover Everything.

Clause: "And the said contractor further agrees to receive the following prices as full compensation for furnishing all the materials, and for doing all the work contemplated and embraced in this agreement; also for all loss or damage arising out of the nature of the work aforesaid, or from the action of the elements, or from any unforseen obstruction or difficulties which may be encountered in the prosecution of the same; and for all risks of every description connected with the work; also for all expense incurred by, or in consequence of, the suspension or discontinuance of said work as herein specified, and for well and faithfully completing the work, and the whole therefor, in the manner of and according to the plans and specifications, and the requirements of the engineer under them, to wit:

SECTION A. SCHEDULE OF PRICES.

....

....."

785. Provision for Payment after Performance of All Stipulations in Manner Described—Representatives Named.

Clause: "In consideration of the full, prompt, and faithful performance and observance of the foregoing terms, agreements, and specifications, and every condition and stipulation herein contained, the party

[1] Jameson *v.* M'Innes, 15 Session Cases 17 [1887].

* By the Scotch law it has been held that terms of offer for a building contract which, with acceptances, were held to constitute a contract according to the schedule rates and not a contract for a lump sum, so that the offerer was not barred by an error in calculating the lump sum from claiming the full amount brought out by his rates.

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of the first part hereby agrees and binds himself [themselves,] his [their] heirs, executors, and assigns [or itself, its successors and assigns], to pay, and the party of the second part hereby agrees and binds himself, his heir, executors and assigns to receive in full of all demands for furnishing all the labor, tools, machinery,.....dollars in full payment for.....
.....;
in the following manner, to wit:
....."

786. Provision that All Money Due to Owner may be Recovered by Action or may be Retained out of Moneys Due to Contractor.

Clause: "All moneys payable to the owner or company by the contractor, under any stipulation herein, may be recovered by action, or may be retained out of any moneys then due or which may hereafter become due from the said owner or company to the contractor under this or any other contract, or otherwise howsoever; and the engineer shall have full power to withhold his certificate for payment of any money to the contractor after circumstances shall have arisen which may indicate to him the advisability for such retention as aforesaid, though the sum to be retained may be unascertained at the time of such withholding."

787. Provision that Final Payment shall Operate as a Release of All Claims Against the Owner.

Clause: "And the said contractor hereby further agrees that the payment of the final amount due under this contract, and the adjustment and payment of the bill rendered for work done in accordance with any alterations of the same, shall release the owner, company, or city from any and all claims or liability on account of work performed under said contract or any alteration thereof."

Where the contract provides that upon receiving the full amount of the final estimate, made out agreeably to the terms of the contract, the contractor shall give a release from all claims or demands growing out of such contract, the giving of such a release is a condition precedent to a recovery, if the final estimate is not fraudulent.[1]

788. Provision that No Payments shall be Made until Works are Complete.

Clause: "And it is further agreed that no payment for work done under any alteration of this contract, as aforesaid, shall be made until the completion of the whole contract."

789. Provision that Payments shall be Made out of Public Funds and that Public Officers Incur no Personal Liability.

Clause: "The payments to the contractor herein described to be made under this contract shall be made out of the funds specially raised, subscribed, or appropriated for the purpose, and which are under the control of the auditor, comptroller, or treasurer of the city,

[1] B. & O. R. Co. *v.* Laffertys, 13 Gratt. (Va.) 478 [1858]; B. & O. R. Co. *v.* Polly, 14 Gratt (Va.) 447.

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county, state, or association, and no officer or member of the committee, board, or commission entrusted with the direction and performance of the undertaking, project, or works, whether or not a party to this agreement, assumes to be, or is, personally liable to the contractor in regard thereto in any way whatsoever." *

When work is to be paid for out of a special fund, upon vouchers drawn by a board of public works, or committee, as of a public library of a city, the city itself is not liable on the contract made by such a committee.[1] The general fund of a city cannot be resorted to for the payment of warrants issued for public improvements, unless the right to create the special fund against which such warrants were drawn, by assessment on the property benefitted, has been lost by the negligence of the city.[2] Parties seeking payment from bugeted appropriations are restricted to such appropriations, and have no right of action against the city until there are funds to the credit of such appropriations.[3]

A contract for street improvement provided that the contractor should make no claim against the city in any event except for the collection of the special assessments, and that the city would not be liable in any event because of their invalidity, or failure to collect the same. After the work was done, the city council, by resolution, directed all proceedings for the collection of the assessment stayed, and the assessment was not collected for at least one year after it should have been collected; it was held, that the contractor was not entitled to collect from the city interest on the assessments for the time their collection was delayed, under the statute providing for interest where money is withheld by an unreasonable and vexatious delay of payment.[4] An assessment for a municipal improvement cannot be made after the city has paid for the completed work out of its general fund.[5] †

AS REGARDS PAYMENT.

The matter of payment is one that can scarcely be confined to a section or chapter. Throughout the book the discussion has been in regard to liability, recovery, and payment, the latter subject being ever recurring. To attempt to detach or isolate the subject would be to invite the reader to go over a large part of the entire book, which the author will not venture to do. Attention is invited to some sections where payments have been the special text of a section. ‡

[1] Board of Public Library *v.* Arnold, 60 Ill. App. 328.
[2] Stephens *v.* Spokane (Wash.), 45 Pac. Rep. 31.
[3] Wadsworth *v* New Orleans (La.), 19 So. Rep. 935.
[4] Vider *v.* Chicago (Ill. Sup.), 45 N. E. Rep. 720, 60 Ill. App. 595, *affirmed.*
[5] Alford *v.* City of Dallas (Tex. Civ. App.), 35 S. W. Rep. 816.

* *See* Secs. 40-42, *supra*, and 850-859, *infra.* † *See* Secs. 44-47.
‡ *See* Secs. 7-9, 16, 58, 109, 112, 330-334, 407-410, 472-476, 560, 593-602, 674-680, 686, 701, 750-768, *supra.* For provisions in regard to payments, *see* Secs. 769-789, *supra.*

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790. Provision that Notices may be Sent to Contractor's Place of Business.

Clause: "Any notice or other communication which this contract provides may be given or made to the contractor, shall be deemed to be well and sufficiently given or made if the same be served on the contractor or addressed to him at his domicile or usual place of business, or at the place where the work hereby contracted for is to be or is being carried on, or it may be left post-paid at the general post-office, in the city of ....., and any papers so addressed and left post-paid at the said post-office shall, to all intents and purposes, be considered to be and to have been legally served upon the said contractor." *

791. Contract Executed in Triplicate—What it Comprises.

Clause: "The parties hereto agree that this contract shall be in writing and executed in triplicate, one of which triplicate copies shall be kept by the said board, one be delivered to the auditor, controller, etc., of the city of ..... or state of ....., and one to the said contractor; that the contract shall include and comprise the written articles of agreement, the plans and specifications described therein and attached thereto, the proposals, estimate of the contractor, the schedule of prices and bond(s), submitted and executed ..... day of ....., 189.., in connection therewith."

792. Extent of Contract.

Clause: "This contract comprises the formation, execution, and completion of the works described in the specification in the first schedule hereto and shown and described by the plans and sections. and upon the drawings, and further set out in the proposal and bill of quantities referred to herein and hereto attached, and all extra work which may be ordered under the powers herein contained; such drawings and specification, bill of quantities, etc., are to be considered as explanatory of each other; and should anything appear in the one that is not described in the other, no advantage shall be taken of any such omission."

793. Acknowledgment by Parties that Contract has been Read before Executing it.

Clause: "It is further agreed and admitted that the parties hereto have carefully read and considered the terms, agreements, and stipulations of this contract and specifications, and have studied with care the plans and drawings referred to therein to become acquainted and familiar therewith, and have executed, signed, and delivered the same with full knowledge of their contents, import, and requirements."[1] †

794. Contract Executed without Reading It.—The law never requires a person to execute any written instrument without first becoming acquainted

[1] Ordinary construction contracts are not required to be executed in writing unless they are within the Statute of Frauds. If the compensation be an interest in lands, or the contract in any way affects or conveys an interest in land, then it must be in writing, as required by the Statute of Frauds. Construction or working contracts should invariably be executed in writing, for reason perfectly evident from what precedes.—Lloyd's Law of Building (2d ed.), § 3.

* *See* Secs. 95, 135, *supra*.

† *See* Secs. 98–111, *supra*.

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with its contents.[1] When a person has signed a written contract, the law presumes that he has read the instrument which he signed;[2] and if a contract has been voluntarily signed and executed with full means of learning its contents, there being no misrepresentation or fraud, it cannot be avoided on the ground of negligence, failure, or omission to read it.[3] This rule was applied to the terms and conditions of a telegraphic message blank.[4]

Where a person who can read signs his name to an instrument, he is presumed to know its contents, so that, if he attacks the instrument for fraud, asserting that it does not contain the whole contract, or contains more than the contract, the burden is on him to show fraud.[5] Fraud is never presumed, but must be clearly proved, in order to entitle a party to relief on the ground that it has been practiced on him.[6]

The signing must be with the intent to execute the instrument as a contract or it will not bind the parties.[7] As where a person induces another to sign a paper containing no writing, and which is to be used merely as a means of identifying the signer, who does not intend to execute a note or contract of any kind, and then the blanks are filled out so as to make the paper a note, the note will be void even in the hands of an innocent holder.[8] The person signing the contract must not be guilty of negligence or at fault, for the court will see that an innocent purchaser who has exercised every reasonable precaution shall not suffer by the fault of the maker. It has been held that the signer of a paper with unfilled blanks is not in itself negligence.[9] A contract signed and delivered leaving blanks in it makes the party receiving the contract an agent to fill in the blanks in the way contemplated by the maker.[9] The signing of a writing through mistake as to its contents imposes no obligation upon the signer.[10]

Whether a person who has signed an instrument which declares that both parties have read it, can plead that he did not read it or that he did not comprehend it, or did not understand it, is a question; there is no rule in equity that he cannot make such a defense. Certainly the defense that he did not read it nor know what it contained, would be as strong as in any case. If he has not been guilty of neglect or carelessness he should have

[1] Hazard *v.* Griswold, 21 Fed. Rep. 178; Weller's Appeal, 7 Ont. (Pa.), 594.

[2] Cawpan *v.* Lafferty, 50 Mich. 114; Foye *v.* Patch, 132 Mass 105; Smith *v.* Monroe, 84 N. Y. 354; *accord*, Penn. *v.* Brashear, 2 Mo. App. Rep. 1132; Clark *v.* Pope, 70 Ill. 128.

[3] Thompson *v.* Riggs, 6 D. C. 99; Bacon *v.* Procter (Com. Pl.), 33 N. Y. Supp. 995; Chu Pawn *v.* Irwin (Sup.), 31 N. Y. Supp. 724; Lumley *v.* Wabash Ry. Co. (C. C.), 71 Fed. Rep. 21; Kingman & Co. *v.* Reinemer (Ill.), 46 N. E. Rep. 786 [1897].

[4] Becker *v.* Western Un. Tel. Co., 11 Neb. 87 [1881]; *and cases cited.*

[5] Robinson *v.* Donahoo (Ga.), 25 S. E. Rep. 491.

[6] Davidson *v.* Crosby (Neb.), 68 N. W. Rep. 338; *and see* Dellinger *v.* Gillespie (N. C.), 24 S. E. Rep. 538; *and* Commonwealth *v.* Julius (Pa.), 24 Atl. Rep. 21.

[7] Morrill *v.* Mill Co., 10 Nev. 125; Grierson *v* Mason, 60 N. Y. 394; Armstrong *v.* McGlue, Addison 261; *but see* Chu Pawn *v.* Irwin (Sup.), 34 N. Y. Supp. 724.

[8] First Nat Bank *v.* Zeims (Iowa), 61 N. W. Rep. 483.

[9] N. E. Loan & Trust Co. *v.* Brown, 1 Mo. App. Rep. 62.

[10] Picton *v.* Graham, 2 Des. 592; Miller *v.* Gardner, 49 Iowa 234; Schaper *v.* Gradner, 84 Ill. 603.

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the same defense whatever the contract terms may be. The fact that it contains a statement that he has read the contract would have no force if he had no knowledge of such stipulation. To avoid the question, with a party who is illiterate or absent-minded, he may be asked to indorse upon the contract a declaration that he has read the contract, or that his attorney or clerk has read it to him.

In order to charge one who can neither read nor write with liability on a written instrument, it must be shown that the contents of the paper were fairly read or explained to him, after which he will be presumed to understand the import of the paper which he signs.[1] If an illiterate man have a deed falsely read to him and he then seals and delivers the instrument, it is nevertheless *not* his deed.[2] Such a case contains a declaration of fraudulent practice, but an allegation that the contract was signed "in the haste and excitement of the court-room and does not contain the agreement as made" is insufficient, as there is no allegation therein of fraud or misrepresentation, or that defendant was induced by any parol promise, which was subsequently broken, to sign.[3]

795. What Is or Is Not a Signature.—A signature consists both of the act of writing one's name and of the intention to be bound by the contents of the instrument which he signs.[4] The intention to be bound is presumed, and the signature may consist of the subscribing of the party's name, or the initials of his name, or by any mark, if made to show his intention to be bound by the terms of the written instrument. A cross or mark will hold even though the party could write.[5] The Christian name alone has been held a sufficient signature to a will.[6] The middle letter is not an essential part of a man's name, and its omission may be disregarded.[7] At common law a man may lawfully change his name, and he is bound by any contract into which he may enter by his adopted or reputed name, and by his known or recognized name he may sue or be sued.[8] So a contract entered into by a corporation under an assumed name may be enforced by either of the parties, and the identity of the company may be established by the ordinary methods of proof.[9]

The signature is sufficient if it is made by another, guiding the signer's hand, with his consent;[10] and if it is not essential to the validity of the contract that it be in writing, one of the parties may, on request, and in the

[1] Green *v.* Maloney (Del.), 7 Houst. 22.

[2] Cole *v* Williams, 12 Neb. 440; Webb *v.* Corbin, 78 Ind. 403; Suffern *v.* Butler, 36 E. Green 220; Sims *v* Bice, 67 Ill 88; Skym *v.* Weske Cons. Co. (Cal), 47 Pac. Rep. 116; Trambly *v* Richard, 130 Mass. 259; *see also* North *v.* Williams (Pa.), 13 Atl. Rep. 723 [1888]; *and* Brown *v.* Eccles, 2 Pa. Super. Ct. 192; Woodbridge *v.* De Witt (Neb.), 70 N. W. Rep. 506.

[3] Reilly *v.* Daly (Pa.), 28 Atl. Rep. 493.

[4] *See* Commonwealth *v.* Julius (Pa.), 34 Atl. Rep. 21.

[5] 22 Amer & Eng. Ency. Law 781.

[6] Knox's Estate, 131 Pa. St. 220.

[7] Jackson *v.* Bims (N. Y.), 9 The Reporter 751; Allen *v.* Taylor, 26 Vt. 599 [1854]; Riley *v.* Hicks (Ga.), 4 S. E. Rep. 173. *in an award.*

[8] Linton *v.* First Nat. Bank, 10 Fed. Rep. 894 [1882].

[9] Marmet Co. *v.* Archibald (W. Va.), 17 S. E. Rep. 299.

[10] 22 Amer. & Eng. Ency. Law 781.

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other's presence, affix the latter's signature to the instrument,[1] or it may be printed with his sanction and consent.[2]

796. Contract Signed by One Party Only.—The signatures of both of two parties to a simple contract in writing are not essential to its validity. If one of them signs and delivers it, and the other accepts it and acts according to its terms, it then becomes a binding contract on both parties.[3] The acceptance and recording of the contract by one party has been held to complete it, though he did not sign it.[4] Such a contract, though signed by but one party, has the element of mutuality; the other party simply has no corresponding evidence of the contract, which, under the law, is enforceable only when "in writing, signed by the party to be charged."[5] If there be two copies of the contract, one signed by each of the two contracting parties, it is binding upon both to the same extent as if there had been only one copy of the agreement and both had signed it.[6] If the contract be not signed there is a presumption that the contract was abandoned, to overcome which it must be shown that the owner, not signing, authorized or encouraged the contractor to undertake the work.[7]

A written contract, signed by the contractor and found in the possession of the owner, is admissible in evidence on behalf of the owner, although it has not been signed by him, since by his acceptance of it the contract has become binding on him.[8] An unsigned building contract, with a bond executed upon the back of it, has been held to be binding.[9] The fact that the contractor did not sign the bond conditioned on performance of the contract will not relieve the sureties thereon from liability.[10] Where the covenant purported to be made between two contractors by name and a company, and only one of the contractors signed the instrument, and the covenant ran between the party of the first part and the party of the second part, it was proper for the contractor who had signed on the first part to sue alone, because the covenant inured to the benefit of those who

[1] Crow *v.* Carter (Ind. App.), 34 N. E. Rep. 937; Fitzpatrick *v.* Engard (Pa.) 34 Atl. Rep. 803.

[2] 22 Amer. & Eng. Ency. Law 782; *but see* Rayner *v.* Linthorne, 2 C. & P. 124; *and* Farebrother *v.* Simmons, 5 B. & Ald. 333, which held that the owner could not subscribe for the contractor beneath his mark.

[3] Muscatine W. W. Co. *v.* Muscatine Lumb Co. (Ia.), 52 N. W. Rep. 108; Vogel *v.* Pekoc (Ill.), 42 N. E. Rep. 386; Bulwinkle *v.* Cramer (S. C.), 3 S. E. Rep. 776 [1887]; Reedy *v.* Smith, 42 Cal. 245, owner had paid installments, but had not signed; Bloom *v* Hazzard (Cal.), 37 Pac. Rep. 1037; Fairbanks *v.* Meyers, 98 Ind. 92 [1884]; Girard L Ins. Co. *v.* Cooper, 51 Fed. Rep. 332; *and see* Meth Epis. Parish *v.* Clarke, 74 Me. 110; *but see* Keller *v.* Blaisdell, 1 Nev. 491.

[4] Ind. Nat. Gas. Co. *v.* Kibby (Ind.), 35 N. E. Rep. 392; Bryson *v* Johnson Co. (Mo.), 13 S. W. Rep. 239

[5] Alabama Gold Life Ins. Co. *v.* Oliver (Ala.), 2 So. Rep.. 445 [1887]; Stone *v.* Rennock, 31 Mo App. 544; Buena Vista Co. *v.* McCandlish (Va.), 23 S. E. Rep. 781.

[6] Morris *v.* McKee (Ga.), 24 S. E. Rep. 142.

[7] Keller *v* Blaisdell, 1 Nev. 491; Burch *v.* New Lindell, 7 Mo. App. 583; Wood *v.* Silcock, 50 L. T. 251; Preston *v.* Luck L. R., 25 Ch. D. 497.

[8] Rigdon *v.* Conley (Ill.), 30 N. E. Rep. 1060; 31 Ill. App. 630, *affirmed*; Stephens *v.* Buffalo, 20 Barb. 332.

[9] Hayden *v.* Cook (Neb.), 52 N. W. Rep. 165.

[10] Eureka S. Stone Co. *v.* Long (Wash.), 39 Pac. Rep. 446.

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were parties to it.[1] Persons who are not mentioned as the party, but who subscribe their names to the contract after the signature of the party named thereby, make themselves sureties to the contractor.[2] Where one copy of a contract which is to be executed in duplicate has been signed by the parties, but is left with the attorney of one party to have a duplicate executed, there is not a sufficient delivery of the instrument to constitute a contract.[3] When one party pleads a special written contract, and the other claims to recover on a verbal contract, and the testimony is conflicting, the question as to which is the contract by which parties are bound is for the jury.[4]

797. Informal Contracts which are to be Reduced to Writing at some Future Time.—Where persons agree that a proposed contract shall be made in writing, such contract is not binding on either until reduced to writing and signed,[5] but where parties have exchanged letters and telegrams with a view to an agreement, and have arrived at a point where a clear and definite proposition is made on one side and accepted on the other, with an understanding that the agreement shall be reduced to a formal writing, the contract is complete, though no formal writing is ever executed.[6] There are cases which are seemingly to the contrary; thus it has been held that a builder is justified in suspending work on a building where the owner, in violation of their agreement, refuses to have the contract under which the work has been commenced reduced to writing.[7] Acceptance of an offer has been held not to show a meeting of the minds of the parties where the party accepting the offer, on the subsequent presentation of a written contract for him to sign, containing the terms of the offer, made certain alterations therein which the other party refused to accept.[8]

If a proposition has been made by one party and accepted by the other, the terms of the contract being in all respects definitely understood and agreed upon, the party refusing to execute the contract is responsible, it seems, on the breach of his agreement for the same damages as would be recoverable for refusal to perform the contract after its execution in writing.[9] The fact that the parties to an oral contract for furnishing building material expected that a written contract embodying the same terms would afterwards be signed does not prevent the oral contract from

[1] The Philadelphia, W., & B R. Co. *v.* Sebre Howard, 13 Howard Repts. 307 [1851].

[2] Thompson *v.* Coffman, 15 Oregon 631 [1888].

[3] Lamar Milling & Elevator Co. *v.* Craddock (Colo. App.), 37 Pac. Rep. 950; *but see* Coey *v.* Lehman, 79 Ill. 173, where the only copy signed was left with the architect.

[4] Jones *v.* Sherman (Neb.), 51 N. W. Rep. 1036 [1892].

[5] Spinney *v.* Downing (Cal.), 41 Pac. Rep. 797.

[6] Earl, Gray, and Bartlett, JJ., *dissenting*, in Sanders *v.* Pottlitzer Bros. Fruit Co. (N. Y. App.), 39 N. E. Rep. 75.

[7] Smith *v.* O'Donnell (Com. Pl.), 36 N. Y. Supp. 480.

[8] Kirwan *v.* Byrne (Com. Pl. N. Y.), 29 N. Y. Supp. 287; *but see* Bucki *v.* Seitz (Fla.), 21 So. Rep. 576.

[9] Pratt *v.* Hudson River Railroad Co., 21 N. Y. 305 [1860].

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taking effect.[1] The fact that it was agreed that the verbal contract should be reduced to writing, and that the contractor said unless this was done he would not do the work by the job, but he did go on and performed a large part of the work in accordance with the verbal contract, and as if it were reduced to writing, as agreed, does not operate as a waiver of his right to have it so written, nor prevent him from repudiating the entire contract, and charging by the day for what he had done.[2]

Courts have refused to decree specific performance of a preliminary building agreement when it was entered into with the intention of executing a more formal and complete contract, and they have refused damages for nonperformance.[3] A preliminary memorandum signed by the parties is merged in a subsequent formal contract executed by them, and therefore is not admissible in evidence to show what the agreement was. It is admissible for the purpose of showing the consideration.[4]

Where it was agreed, after arranging the terms of the proposed contract, that the contract should be reduced to writing and signed by the parties, and afterwards some of the parties refused to sign the writing on the ground that it included matters not agreed on, it shows that the minds of the parties did not meet.[5] If the agreement to be signed by several persons as parties thereto is not signed by all, it is not completely executed and does not bind any of the parties.[6] The signature and seal must correspond with parties named in body of the instrument.*

798. Execution of Contract—Signed, Sealed, Witnessed, and Delivered.

Clause: "IN WITNESS WHEREOF, the said ..... owner, commissioner, or board of public works has hereunto set his [its] hand and seal on behalf of the said parties of the first part, and the said party of the second part hath also hereunto set his hand and seal, the day and year first above written; and the said ..... owner, commissioner, or board and party hereto of the second part have executed this agreement in triplicate, one part of which is to remain with said commissioner or engineer, one other to be filed with the comptroller of the ...., and the third to be delivered to the said party hereto of the second part, the day and date herein first above written.

Signed, sealed, and delivered in presence of

.....

[SEAL.] .....

Owner, Commissioner, or Board of Public Works.

[SEAL.] .....

Contractor."

[1] Cohn *v.* Plumer (Wis.), 60 N. W. Rep. 1000.

[2] Paige *v.* The Fullerton Woolen Co., 27 Vt. 485 [1854].

[3] Wood *v.* Silcock, 32 W. R. 845 [1884], 50 L. T. 251.

[4] Wells *v.* Wells. (Sup.), 40 N. Y. Supp. 836; *see* Cable *v* Foley, 45 Minn. 421.

[5] Bryant *v.* Ondrak (Sup.), 34 N. Y. Supp. 384; *and see* Highland Co. *v.* Rhoades, 26 Ohio St. 411.

[6] Barber *v* Burrows, 51 Cal 404.

* *See* Secs. 29–32, 91, and 97, *supra.*

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799. Why Is Contract in Writing?—Why Signed, Sealed, and Witnessed?—Construction or building contracts are usually in writing, signed, sealed and witnessed. They are sometimes acknowledged and recorded, if the laws or ordinances require them to be registered.

They are in writing to comply with the Statutes of Frauds, and to make the terms of the agreement more certain and more easily proved.[1] * They are signed to evidence mutual assent and an understanding of their terms, and the signature is the overt act which signifies the undertaking of the obligations set forth in the instrument.† They are sealed to make the contract an instrument of a higher order or class than a simple agreement, or to create what is called a specialty. A sealed instrument or contract imports a consideration, and at common law it could not be modified by parol,‡ and in some places a contract under seal is given priority over a simple contract, as in the administration of the personal estates of a decedent.[2] Contracts executed by corporations or by public officers should be sealed by the corporate seal of the company, though it is frequently held in the United States that a corporation may enter into a binding contract without the use of its seal.[3] All conveyances of real estates should be by sealed instrument, as is usually required by law.

A seal may be a drop of melted wax with the impression of a carved stone or setting of a ring, or with the impression of one's thumb, or it may be a mere imitation of a seal in the shape of a piece of colored paper pasted upon the instrument and pressed into place with the thumb or finger. In some jurisdictions it may be a stamp, a scroll, or a blot of ink, made by the signer of the instrument or the one who executes it. In every case it should either be put upon the instrument before it is executed, so that the signer may be said to have adopted the seal, or it should be made by the party himself. One seal may be adopted by several signers, and it is not necessary to have as many seals as there are signers to a document.[4]

The object of having the execution of a construction contract witnessed is merely to make it more certain and easier of proof. It is not necessary unless it includes a conveyance of real property or it is necessary to have it recorded. If the parties desire the contract to possess all the qualities of a specialty or deed, the statutes of some states may require that it be witnessed.[5] The act of witnessing the execution of a contract should be at the request of the parties, and the signing should be in their presence. The subscribing witness need not know the contents of the instrument, as he attests only to the party's signature. If he cannot write he may make his

[1] It is not essential to their validity that they shall be in writing. M. & N. Sav. Bank *v.* Dashiell, 25 Gratt. 616; Holmes *v.* Shands, 26 Miss. 639.

[2] 3 Amer. & Eng. Ency Law 829.

[3] Lloyd's Law of Building & Buildings 7.

[4] *See* Amer. & Eng. Ency. Law. Seals, Vol. 21, pp. 882, 914.

[5] 1 Amer. & Eng. Ency. Law 938.

* *See* Sec. 105, *supra.* † *See* Sec. 89, *supra.* ‡ *See* Sec. 561, *supra.*

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mark, or have another sign for him, at his request and in his presence. His initials are sufficient.[1]

The words "made and executed" as used in a contract import a delivery of the contract,[2] and "signed, sealed, and delivered" have been held to be equivalent to "executed."[3]

[1] 1 Amer. & Eng. Ency. Law 941.
[2] Elbring v Mullen (Idaho), 88 Pac. Rep 464.
[3] 1 Amer. & Eng. Ency. Law 158.

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PART IV.

ENGINEER'S AND ARCHITECT'S EMPLOYMENT.

CHAPTER XXVIII.

ENGAGEMENT OR EMPLOYMENT OF ENGINEER OR ARCHITECT.

PERFORMANCE OF SERVICE, TERM OF SERVICE, DISMISSAL OR DISCHARGE, AND EXTRA WORK.

800. Contract of Employment.—A contract of employment must contain all the essentials of a contract, just the same as all other contracts. It can not be terminated, except for good cause, until the term of service has expired. If the employment be for a year, a month, or a day, it cannot be terminated before the year, month, or day has expired, without sufficient reason for the act. If no term of service has been agreed upon, the employee may be discharged at any time; or even ejected by force, if necessary.[1]

801. Term of Service.—If the service is to continue so long as the employer is satisfied, he may dismiss the employee at any time and without giving any reason,[2] and a contract for a year, unless sooner terminated, does not mean that either party can terminate the service without just cause.[3]

A contract to give an employee steady and permanent employment is not void as against public policy, in the absence of any showing that the employee is not able or competent to do such work as the employer may be in a position to give him.[4] So if an employer, in settling with an employee for injures, agree to employ him at a certain salary for life, or during his ability and disposition to perform the duties required, he will be liable for prospective damages if he discharge the employee.[5]

[1] De Briar *v.* Minturn, 1 Cal. 450; Niagara F. Ins. Co. *v.* Whittaker, 21 Wis. 329; Donaldson *v.* Williams, 1 Cr. & M. 345; Mackay *v.* Ford, 29 L. J. Ex. 404.

[2] Spring *v.* Ansonia Clock Co., 24 Hun (N. Y.) 175; Glyn *v.* Miner, 27 N. Y. Supp. 341; Evans *v.* Bennett, 7 Wis. 404; Alexis Stoneware Mfg. Co. *v.* Young, 59 Ill. App. 226; Daveny *v.* Shattuck, 9 Daly (N. Y.) 66.

[3] De Briar *v.* Minturn, *supra*; Niagara F. Ins. Co. *v.* Whittaker, *supra*.

[4] Penna. R Co. *v.* Dolan (Ind. App.), 33 N. E. Rep. 802.

[5] Brighton *v.* Lake Shore & M. S. Ry. Co. (Mich.), 61 N.W. Rep. 550; 70 N. W.

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A contract of employment for an indefinite period may be terminated any time by either party,[1] and one for not more than six months, or not to exceed six months, is for an indefinite period.[2]

An agreement to employ a person permanently is nothing more than employment to continue indefinitely, or until one or the other of the parties, for some good reason, desires to sever the relation of employer and employee.[3] An agreement "to come to the permanent service of a company" would probably receive the same construction. A contract of employment at certain wages, so long as the works of the employer are kept running or until the employee shall see fit to quit, is not void for uncertainty.[4]

The compromise of a disputed claim for personal injuries to an employee is a sufficient consideration for a railroad company's agreement to retain such employee at a specified salary during his natural life, or his ability to do the work, though the continuance of the service be optional with the employee.[5]

If the terms of employment adopt a certain length of time, as a month, or a year, for the estimation of wages, it raises a strong presumption that the term of service was for the period mentioned. Therefore a contract at $\$\ldots$. per year is presumably for a year; at a monthly rate, for a month;[6] but the presumption is not conclusive in the absence of other evidence. It alone, will not fix the period.[7] Such a contract is incomplete and ambiguous, and parol evidence of the surrounding circumstances, the situation of the parties at the time the contract was made, etc., may be admitted to assist the court in interpreting its meaning.* Contracts for a year's employment, to begin at some day in the future, which *cannot* be completed within a year are void and worthless unless they are in writing, not being made in accordance with the requirements of the Statute of Frauds.†

A contract of employment, at a salary per year and a certain share in the net profits of a firm, does not make the engineer a partner in the firm.[8]

Under an employment for an indefinite period at a specified sum per month, which service continued for a number of years without interruption, the contract is continuous, and the Statute of Limitations does not begin to run until service ends.[9] The terms of a yearly contract for services will be

Rep. 432; Penna. R. Co. *v.* Dolan, *supra; and see* Pierce *v.* Tenn. C. I. & R. Co. (Ala.), 19 So. Rep. 22.

[1] Greenburg *v.* Early, 23 N. Y. Supp. 1009.

[2] Campbell *v.* Jimenes, 27 N. Y. Supp. 351.

[3] Lord *v.* Goldberg (Cal.), 22 Pac. Rep. 1126; Caring *v.* Carr (Mass.), 46 N. E. Rep. 117.

[4] Carter White Ld. Co. *v.* Kinlin (Neb.), 66 N. W. Rep. 536.

[5] Stearns *v.* Lake Shore & M. S. Ry. Co. (Mich.), 71 N. W. Rep. 148 [1897].

[6] Kellogg *v.* Citizens' Ins. Co. (Wis.), 69 N. W. Rep. 362; 14 Amer. & Eng. Ency. Law 762.

[7] 14 Amer. & Eng. Ency. Law 762; Fuller *v.* Peninsular, etc., Wks. (Mich.), 69 N. W. Rep. 492; Haney *v.* Caldwell, 35 Ark. 156; Martin *v.* N. Y. Life Ins. Co. (App.), 42 N. E. Rep. 416.

[8] Porter *v.* Curtis (Iowa), 65 N. W. Rep. 824.

[9] Ah How *v.* Furth (Wash.), 43 Pac. Rep. 639.

* *See* Secs. 124–125, Parol Evidence, *supra*.

† *See* Statute of Frauds, Sec. 105, *supra*.

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presumed to continue from year to year, so long as the employment lasts, unless the contrary is shown; and in the absence of sufficient evidence to show a change in the terms of employment, proof of the original contract will limit the right of recovery to the yearly salary at the original rate.[1]

802. Dismissal or Discharge of an Employee.—Mr. Smith, in his work on Master and Servant, has named the following causes which may justify the discharge of a servant before his term of service has expired: (1) Willful disobedience of any lawful order of the master. (2) Gross moral misconduct, whether pecuniary or otherwise. (3) Habitual negligence in business or conduct calculated seriously to injure the master's business. (4) Incompetence or permanent disability. For convenience the author will adopt the same order of treatment.

803. Willful Disobedience of Any Lawful Order of the Employer.—It must not be taken that every breach of discipline or discourtesy can be made an excuse for discharging an employee. If the employer is unreasonable in his orders or commands, the employee is not bound to obey them, but he must be sure that they are unreasonable. A refusal to work at one's trade on Sunday,[2] or to work at unseasonable hours,[3] when the circumstances or nature of the work does not make it necessary or reasonable to so work; or disobedience of orders in matters not material to the employment,[4] or that involves no serious consequences and which is not willful, in the sense of being perverse, insubordinate, or unreasonable, which question is for a jury;[5] or slight discourtesies, hasty words, and occasional exhibitions of irritation, or even ill-temper, especially where there are many petty causes of annoyance and irritation in the business,[6] or where the employer exhibits impatience and irritation toward the employee without just cause,[7] is not sufficient cause for discharging the employee.

If the servant is disrespectful in his conduct,[8] or his deportment and disposition are such as to injure the custom and business of the employer, or he is insubordinate and ignores his employer's feelings and proper authority,[9] or he uses obscene and improper language while attending to his duties, especially when the owner does not use such language,[10] or his conduct towards agents sent by his employer to inspect his work is rude and reprehensible,[11] the employer will be justified in discharging the employee.

It is not a breach of a traveling salesman's contract for him to go to a

[1] Mears *v.* O'Donoghue. 58 Ill. App. 345.
[2] Jacquot *v.* Bourra, 7 Dowl. 348.
[3] Koplitz *v.* Powell, 56 Wis. 671.
[4] Hamilton *v.* Lowe (Ind.), 43 N. E. Rep. 873.
[5] *Cases collected*, 14 Amer. & Eng. Ency. Law 789; *see* Pape *v.* Lathrop (Ind. App.), 46 N. E. Rep. 154.
[6] Leatherby *v.* Odell (N. C.), 7 Fed. Rep. 642.
[7] Forsyth *v.* Hastings, 27 Vt. 646 [1855]; Weaver *v.* Halsey, 1 Ill. App. 558; 14 Am. & Eng. Ency. Law 789.
[8] Railey *v.* Lanahan, 34 La. Ann. 426.
[9] Leatherby *v.* Odell, 7 Fed. Rep. 642.
[10] Weaver *v.* Halsey, 1 Ill. App. 558; 14 Am. & Eng. Ency. Law 789.
[11] Lalande *v.* Aldrich (La.), 6 So. Rep. 28 [1889].

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place off his route to spend Sunday with his family, where it does not seriously interfere with his compliance with his contract.[1]

When the employer claims that the employee's misconduct has caused a diminution in his business, it may be shown that the decrease was caused in whole or in part by rumors affecting the employer's character and conduct.[2] The refusal of a traveling salesman to obey the orders of his employer requiring him to report by letter daily has been held sufficient excuse for his discharge.[3] It seems a city salesman may properly refuse to go into another state to sell goods, nothing having been said at the time of his employment as to the place he should work.[4]

804. Gross Moral Misconduct, Pecuniary or Otherwise.—In any position it is probable that a criminal act would be sufficient to warrant an employer in getting rid of a servant, and without paying him his wages, too.[5] Thieving, stealing, or embezzling the master's property has frequently been held a good cause for immediate dismissal,[6] without notice, even though notice was required by the contract of employment,[7] and without paying him any wages;[8] but in the absence of deception, concealment of facts, or fraud, by which the employee has induced the employer to hire him, it seems that dishonest and fraudulent conduct with a former employer will not be a ground for dismissal,[9] although the discovery that the employee is a drunkard will warrant the master in repudiating a contract of employment before the term of service has begun.[10] Robbing a third party,[11] fraudulent conduct towards the employer,[12] taking bribes from subordinates to obtain favors,[13] or accepting gratuities for conniving at a breach of regulations which he was to enforce;[14] or unchaste and licentious conduct in a domestic servant, or in connection with the duties of one's service in any capacity,[15] each and all have been held sufficient cause for dismissal.

The question whether a servant was rightfully discharged must depend upon the nature of the services which he was engaged to perform, and his dismissal must be in some way connected with the duties of that service.[16] Drunkenness has been held a justifiable cause for discharge,[17] if it is a habit,[18] but not unless the duties of the service are affected thereby.[19] Tat-

[1] Milligan *v.* Sligh Fur. Co. (Mich.), 70 N. W. Rep. 183.
[2] Vinson *v.* Kelly (Ga.), 25 S. E. Rep. 630.
[3] McCain *v.* Desnoyers, 2 Mo. App. Rep. 896.
[4] Berriman *v.* Marvin, 59 Ill. App. 440.
[5] 14 Amer. & Eng. Ency. Law 783.
[6] Brown *v.* Croft, 6 C. & P. 16, *note;* Libhart *v.* Wood, 1 Watts & S. 265.
[7] Smith's Master and Servant 148.
[8] Cunningham *v.* Foublanque, 6 C. & P. 49.
[9] Andrews *v.* Garstin, 31 L. J. C. P. 15.
[10] Nolan *v.* Thompson, 11 Daly (N. Y.) 314; Johnson *v.* Gorman, 30 Ga. 612.
[11] Libhart *v.* Woods, 1 Watts & S. 265; Trotman *v.* Dunn, 4 Camp. 211.
[12] Singer *v.* McCormick, 4 Watts & S. 265-266; Horton *v.* McMurtry, 5 Hurst & N. 667.
[13] Engel *v.* Schooherr, 12 Daly (N. Y.) 417.
[14] Bogg *v.* Pearse, 10 C. B. 534.
[15] Smith's Master and Servant 143, *and cases cited;* Drayton *v.* Reid, 5 Daly (N. Y.) 442.
[16] 14 Amer. & Eng. Ency. Law 789.
[17] Smith's Master and Servant 144.
[18] *Cases in* 14 Amer. & Eng. Ency. Law 788
[19] 14 Amer. & Eng. Ency. Law 788.

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tling or disclosing to others the employer's business and secrets,[1] or disclosing the accounts of one company to another,[2] or revealing professional secrets of the employer,[3] or the act of advising or inducing co-employees or apprentices to quit the master's service,[4] or the act of plundering or poaching on the premises on which a workman is at work,[5] is, each and any, a good reason for the employer to discharge the employee.

Claiming to be a partner and thus denying that one is an employee,[6] or seeking to secure the patronage of the employer's clients or patrons to himself,[7] or entering into negotiations for carrying on the same business as the employer is engaged in,[8] will justify the employer in terminating the employment forthwith. The same was held when the employee engaged in a business or calling the tendency of which was to injure the employer's business,[9] and when he dealt with certain merchants or tradesmen named by his employer.[10]

The right to discharge an employee, if at any time the employer "feel satisfied that the employee is incompetent," must be exercised in good faith.[11] His dissatisfaction must be genuine.[12] If the employer admits the contract of employment, the burden is on him to show cause for discharge.[13]

An employee may have a right of action against a third person who maliciously procures his discharge, though the employer violates no legal duty in discharging him.[14] Railway companies, combining for the purpose of preventing employment by each other of discharged employees, are liable to a discharged employee who is prevented by them from procuring employment.[15] A "boycott" by the members of trades unions or assemblies is unlawful, and may be enjoined by a court of equity.[16]

805. Habitual Negligence,[17] or Conduct Calculated to Injure Master's Business.[17]—This heading opens the broad question of "What is attention to business?" which cannot be answered generally, but must depend upon the circumstances of each case. It has been held that the *absence* of an overseer of a plantation for one day (presumably without good excuse), war-

[1] Beeston *v.* Caller, 2 C. & P. 607; Drayton *v.* Reid, 5 Daly (N. Y.) 442; Green *v.* Brooks (Cal.), 22 Pac Rep. 849; Fillieul *v.* Armstrong, 7 A. & E. 557.

[2] The East Anglian Ry. Co. *v.* Lythgoe, 2 L. M. & P. 221; *and see* Davenport *v.* Hulme (Super.), 32 N. Y. Supp. 803.

[3] Mercer *v.* Whall, 5 Q. B. 447.

[4] Turner *v* Robinson, 5 B. & Ad. 789.

[5] Read *v.* Dunsmore, 9 C. & P. 588.

[6] Amor *v.* Fearon, 9 A. & E. 548.

[7] Mercer *v.* Whall, 5 Q. B. 447.

[8] Hobson *v.* Cowley, 27 L. J Exc. 205.

[9] *Many cases*, 14 Amer. & Eng. Ency. Law 789.

[10] 14 Amer. & Eng. Ency. Law 790.

[11] Smith *v.* Robson (N. Y. App.), 42 N. E. Rep. 677.

[12] Crawford *v.* Mail and Express Pub. Co. (Sup.), 41 N. Y. Supp. 325; *but see* Alexis S. Mfg. Co. *v.* Young, 59 Ill. App. 226.

[13] Mulligan *v.* Sligh Fur. Co. (Mich.), 70 N. W. Rep. 133 [1897] As to meaning of "incompatibility" and "unsuitableness." *see* Gray *v.* Sheppard (N. Y. App.), 41 N. E. Rep. 500.

[14] Dannerberg *v.* Ashley, 10 Ohio Cir. Ct. Rep. 558.

[15] Mattison *v.* Lake Shore & M. S. Ry. Co. (Com. Pl.), 2 Ohio N. P. 276.

[16] Oxley Stave Co. *v.* Coopers' International Union of North America (C. C.), 72 Fed. Rep. 695.

[17] Newman *v.* Reagan, 63 Ga. 755; Callo *v.* Brouncker, 4 C. & P. 518.

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ranted his discharge,[1] and surely the position of an engineer as superintendent or chief inspector of large works would be regarded of equal importance.[2] The absence of a teacher for two days after vacation, no injury having been shown to result, will not justify his discharge.[3]

Illness for considerable time will release the employer from his contract of employment.[4] The sickness of a timekeeper for fifteen days, together with the fact that he did not keep the employees' time correctly, is sufficient cause for dismissal;[5] and imprisonment for two weeks was held sufficient cause.[6] Under a contract of employment for a term of ten years it was held that the employee might recover his wages for a period of six months, during which he was too ill to attend to his duties, the company not having rescinded the contract, but having allowed it to remain in force and the employee to return to his work under it when he was sufficiently recovered.[7] The same was held of a doorkeeper to the finance department of New York City, who was absent two years.[8] A public officer on a fixed salary cannot be deprived thereof when his absence on account of sickness has been permitted. Long continued sickness may be a cause for removal from office, but until removed he is entitled to his salary.[9]

When a person is employed to perform certain duties it is presumed that he will attend to them personally. If the servant delegates such duties to another without notice to his employer it will justify his discharge.[10] Such contracts include those for the services of engineers, architects, lawyers, physicians, playwrights, opera-singers, and even domestic servants. The contracts cannot be transferred nor assigned, nor can the services be delegated.[11] If a servant becomes disabled from performing the duties of his employment, the contract is thereby dissolved, and an agreement to pay the servant his wages if he would resign his employment is without consideration.[12]

806. Incompetence or Incapacity.—As described in previous sections,* an employee is responsible for any misrepresentations as to his capacity, experience, skill, or training; and having made such representations, either expressed or implied, he is responsible for any damages due to the want of such skill and capacity. So, too, such misrepresentations may be a good ground for dismissing an employee.[13] If the employee be unskillful or incompetent in the duties or work he has undertaken to perform, then he has

[1] Ford *v.* Danks, 16 La. Ann. 119; *and see* Shaver *v.* Ingraham, 58 Mich. 649; *and* Drayton *v* Reid, 5 Daly (N.Y.) 442; Shoemaker *v* Acker (Cal.), 48 Pac. Rep. 62.
[2] *See* Wehrli *v.* Rehwoldt, 107 Ill. 60.
[3] Filleul *v.* Armstrong, 7 A. & E. 557.
[4] 14 Amer. & Eng. Ency. Law 790.
[5] Miller *v.* Gidier, 36 La. Ann. 201.
[6] Leopold *v.* Salkey, 89 Ills. 413.
[7] Cuckson *v.* Stones, 28 L. J. Q. B. 25.
[8] Devlin *v.* Mayor, 41 Hun (N. Y.) 281.
[9] O'Leary *v.* Bd. of Ed., 93 N. Y. 541.
[10] Stanton *v.* Bell, 2 Hawks (N. C.) 145; Wise *v.* Wilson, 1 C. & K. 662.
[11] 14 Amer. & Eng. Ency. Law 787; Smith's Master and Servant 152.
[12] Prior *v.* Flagler (Com. Pl.), 34 N. Y. Supp. 152.
[13] Austee *v.* Ober, 26 Mo. App. 665.

* *See* Secs. 256–257, *supra.*

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not fulfilled his contract, and the employer will be justified in terminating the contract.[1] Yet unskillfulness on the part of an employee does not prevent him from recovering the real value of his services.[2]

The inability or incapacity of an engineer to conduct operations or carry the work imposed upon him may not arise alone from his want of skill or training, but from the quantity of the work or the burdens imposed upon him. It was therefore held that when an engineer of a single bureau of the department of public works of a great city had allowed himself to be loaded with all the work of the department, and in the performance of the added duties he developed a want of skill or ability as an engineer or an insufficient and slack control, it was sufficient ground for removing him from office; that while he might lawfully have declined the added duties imposed by the action of the chief of the department, yet having assented and assumed them, he could be held responsible for their proper performance.[3]

807. Condonation of Employee's Offense.—If an employee has been absent from his duties or work, or if he has been guilty of some breach of his contract,[4] or he has indulged in hasty words or exhibitions of temper, and the employer has retained the employee with knowledge of the facts, he cannot thereafter complain nor make that instance a ground for his subsequent discharge.[5] If the employee has been guilty of tortious or negligent acts, it seems that may warrant a subsequent discharge.[6] Retention of service and payment of wages without protest, after knowledge of defective work done by an employee, is *prima facie* evidence of a waiver of the right to discharge him, or deduct from his wages on that account.[7] It seems that the keeping of an employee whose skill and work was not equal to that contracted for until the busy season was over, it being very difficult to secure a competent substitute, is not of itself a condonation. What amounts to a condonation of a servant's offence is a question for a jury.[8] The keeping of an employee after his work has become unsatisfactory is not a condonation of the acts causing dissatisfaction, when the contract provides that the employee may be discharged whenever his work proves unsatisfactory.[9] A person cannot, by a decree of court, be compelled to retain another in his service.[10]

808. What Is a Discharge.—What amounts to a discharge of an employee is not always clear. It has been held that a request or demand for the employee's resignation amounts to a discharge.[11] A letter to a railroad

[1] Leatherberry *v.* Odell, 7 Fed. Rep. 641; Harmer *v.* Cornelius, 28 L. J. C. P. 85; Jenkins *v.* Betham, 15 C. B. 188.

[2] *Cases*, 14 Amer. & Eng. Ency. Law 781.

[3] People *v.* Campbell, 82 N. Y. 247 [1880].

[4] 14 Amer. & Eng. Ency. Law 778–791.

[5] Hamilton *v.* Love (Ind.), 43 N. E. Rep. 873.

[6] Stoddard *v.* Treadwell, 26 Cal. 294.

[7] Tickler *v.* Andrae Mfg. Co. (Wis.), 70 N. W. Rep. 292.

[8] McMurray *v.* Boyd (Ark.), 25 S. W. Rep. 505; Leatherberry *v.* Odell (N. C.), 7 Fed. Rep. 642.

[9] Alexis St. Mfg. Co. *v.* Young, 59 Ill. App. 226.

[10] Reid Ice Cream Co. *v.* Stephens, 62 Ill. App. 334.

[11] Jones *v.* Graham, etc., Co., 51 Mich. 539.

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superintendent informing him that another had been instructed to superintend everything, and adding, "I presume you will prefer to retire by means of resignation. It is hereby understood that the same is accepted, and you will please telegraph me of its transmission. Please confer with M., the V. P., in turning over the papers in the superintendent's office," was held to operate as a positive and preëmptory dismissal; and a letter of resignation written in obedience or at the suggestion of the employer does not change its character or construction or show that he voluntarily resigned, nor can such a letter be construed as an acquiescence in his dismissal.[1] The dismissal or discharge must be in such terms that there is no doubt in the mind of the employee as to the intention of the employer to terminate the service. When a letter asking an employee "to turn over his desk and papers to another employee," and information next day, when he offered to go to work, that there was nothing for him to do; and a subsequent offer of other and different work than was originally agreed upon; it was held a question for the jury to decide whether the employee had been discharged.[2]

An employee, in answer to a letter of his employer discharging him, first wrote that he accepted "your ultimatum," and subsequently wrote that he did not thereby mean to release his employer from liability for salary due for the unexpired term of his employment, but to merely concede the right of his employer to discharge him; it was held that the letters were insufficient to release the employer from an existing entire contract of employment.[3]

It seems that an editor performing such services as his employer directs cannot complain because a part of the paper is taken from his control;[4] and that a discharged employee who is idle may be recalled to do work which he undertook under his contract of service, and without restoring him to his former office or position.[5] He need not return at reduced wages, and his refusal to accept less pay than that agreed upon in the contract will not prejudice his right to recover, nor reduce the amount of his recovery.[6]

809. Duty of Discharged Employee to Seek Other Employment.—When an employee has been discharged the law imposes upon him the duty of making reasonable efforts to secure other employment; but extraordinary diligence is not required.[5] It is incumbent upon the employer to show that the employee could have obtained other employment or that it was offered to him; and then it is necessary for the employee to excuse himself for not accepting, by some just and proper reason for refusing the offer. If he does not, then the amount that he did earn or might have earned between his discharge and the commencement of his suit will be deducted from the wages or damages recovered.[6]

[1] The Cumberland & Pa. R. R. Co. *v.* Slack, 45 Md. 161 [1876]; *and see* Pinet *v.* Montague (Mich.), 61 N. W. Rep. 876.
[2] Klaw *v.* Ehrich, 31 N. Y. Supp. 773.
[3] Martin *v.* New York Life Ins. Co. (N. Y. App.), 42 N. E. Rep. 416.
[4] Lathrop *v.* Visitor Ptg. Co. (R. I.), 30 Atl. Rep. 964.
[5] 14 Amer. & Eng. Ency. Law 795-7.
[6] Rosenberger *v.* Pacific Coast Ry. Co. (Cal.), 43 Pac. Rep. 963; 14 Amer. & Eng. Ency. Law 795-7.

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A person who has been wrongfully discharged is bound only to seek like employment to prevent damages being reduced by his remaining idle.[1] The service offered must be of equal grade, and the fact that the pay is greater in the service that offers itself makes no difference.[2] He need not visit other communities in quest for work,[3] and if he does, it seems he is not entitled to recover his expenses in seeking other employment, though his earnings in such other employment are charged in reduction of his damage.[4] If he has failed to secure work and devotes himself in the meantime to work of his own, its value cannot be deducted from what is due him under his claim.[5] In an action for damages for wrongful discharge, the employee need show only readiness and willingness to render the services, and an honest effort to obtain other employment, an actual offer to perform being unnecessary;[6] he need not allege inability to earn anything during such time as he was idle.[6]

A servant wrongfully discharged has his option to sue at once for his damages, or to wait till the expiration of his term of employment; and the damages recoverable are the amount of his wages, at the contract price, to the date of the trial, where that takes place before the expiration of the term, less whatever sum it is shown that he has earned, or might reasonably have earned, since his discharge.[7] He is entitled to recover wages up to the time of the trial of the action only, and not to the time the contract of employment would have expired,[8] because the amount of wages agreed to be paid for the unexpired term is *prima facie* the measure of damages.[9] When a person who had contracted to do certain work for $1500 was discharged before he had completed the work, and after he had been paid $500, a verdict for $2250, in an action by him for breach of contract, is excessive.[10]

If the compensation of the employee was not agreed upon, he will be entitled to a reasonable sum for the services performed.[11] If the employment be at a stated price for a longer term than is allowed by the statute of frauds, and the employee is discharged without cause before the expiration of the period of employment, he is not limited in his recovery to the price fixed by the contract, but may recover what his services are really worth.[12] *

[1] Fuchs *v.* Koerner (N. Y.), The Reptr. Feb. 1 [1888]; Amer. & Eng. Ency. Law Vol. 5, p. 35, and Vol. 14, pp. 795–7.

[2] 14 Amer. & Eng. Ency. Law 796; Briscoe *v* Litt (Sup.), 42 N. Y. Supp. 908; Chisholm *v.* Bankers Life Assur. Co. (Mich.), 70 N. W. Rep. 415 [1897].

[3] Tickler *v.* Andrae Mfg. Co. (Wis.), 70 N. W. Rep. 292; 14 Amer. & Eng. Ency. Law 796.

[4] Stone *v.* Vimont, 7 Mo. App. 277; Harrington *v.* Gies, 45 Mich. 374; 14 Amer. & Eng. Ency. Law 796.

[5] McMullan *v.* Dickinson Co. (Minn.), 65 N. W. Rep. 661.

[6] Hamilton *v.* Love (Ind. Sup.), 43 N. E. Rep. 873; *and see* Pape *v.* Lathrop (Ind. App.), 46 N. E. Rep. 154.

[7] Hamilton *v.* Love (Ind. Sup.), 43 N. E. Rep. 873; Efron *v.* Clayton (Tex.), 35 S. W. Rep. 424.

[8] Zender *v.* Sel'ger-Toothill Co. (Sup.), 39 N. Y. Supp. 346.

[9] Hamilton *v.* Love (Ind. Sup.), 43 N. E. Rep. 873; Babcock *v.* Appleton Mfg. Co. (Wis.), 67 N. W. Rep. 33; Worthington *v.* Oak & H. P. Imp. Co. (Iowa), 69 N. W. Rep. 258.

[10] Missouri Iron Wks. *v.* Rivers Arch. Co., 59 Ill. App. 545.

[11] Howard *v.* Gobel, 62 Ill. App. 497.

[12] Schanzenbach *v.* Brough, 58 Ill. App. 526.

* *See* Sec. 90, *supra*.

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If the employee sue for damages he can recover only such damages as he has actually sustained by the discharge, and not the agreed price for full performance.[1] One properly sues on his contract of employment for his salary, rather than for damages for breach thereof, where he has not been discharged, and has held himself in readiness, though he has rendered no services, because no work has been offered him.[2]

810. No Recovery for Extra Work, Unless so Agreed.—When a person is employed as an agent at a fixed rate and additional duties are imposed and his powers enlarged without any stipulation that he is to receive additional compensation, the agent or employee cannot recover extra wages for his additional services.[3] It is a general rule that voluntary performance of extra work by a servant does not entitle him to extra pay. If he gets extra pay for his extra work it must be under an express agreement to that effect.[4]

It has been so held when the statute law makes eight hours a day's work. The fact that an employee works ten or twelve hours a day when hired by the day does not entitle him to recover for the two hours extra time each day, unless it was expressly so agreed in the contract of employment.[5] A contractor who is to complete a building according to certain specifications and a plan annexed, as explanatory thereof for a fixed amount, cannot, in the absence of an express agreement, recover for extra services in preparing the plan.[6] *

811. Employment of Engineer or Architect in a Professional Capacity.[7]—A contract of employment of an engineer or architect or a so-called engagement of his services does not differ from any other contract of employment if the contract is expressed and its terms fully understood, but this is not often the case. The whole transaction between the engineer or architect and his employer frequently is embodied in a few words, or a mere verbal instruction to "make some sketches," or "I should like to see your suggestions on paper," followed by similar directions to "go ahead" with the plans or even with the building.[7] Such contracts for services are not unlike the engagement of a physician or an attorney, with which all are familiar, and the duties that may be required under such an employment must depend largely upon the established and universal custom

[1] William Farr Co. *v.* Kimebrough (Ky.), 34 S. W. Rep. 528.

[2] Stone *v.* Bancroft (Cal.), 44 Pac. Rep. 1069.

As to Recovery for Services when term of service has not been completed, Remedies of Servants, and Breach or Abandonment by Servant, *see* 14 Amer. & Eng. Ency. Law 775, 779.

[3] Morean *v.* Dumagene, 20 La. Ann. 230 [1868]; Carrere *v.* Dun, 18 Misc. Rep. 18 [1896]; Chamberlain *v.* Kansas City (Mo.), 28 S. W. Rep. 745, *Superintendent of Buildings.*

[4] 14 Amer. & Eng. Ency. Law 772; *and see* Forster *v.* Green (Mich.), 69 N. W. Rep. 647; Voorhees *v.* Combs (N. J.), 4 Vr. 494.

[5] Averill *v.* United States, 14 Ct. of Cl. 200; *and see* People *v.* Beck (N. Y. App.), 39 N. E. Rep. 80.

[6] Maas *v.* Hernandez (La.), 19 So. Rep. 269; *but see* Dull *v.* Bramhall, 43 Ill. 364.

[7] *See* Emden's Law of Building, chap.

* *See* Secs. 559–567, *supra*, and 825, *infra*.

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and usage. Physicians are called upon or called in to advise in reference to a patient's treatment, or an attorney with respect to a point of law, and the law implies a contract on the part of the patient or client to pay what the services are reasonably worth,[1] and a contract on the part of the physician or lawyer to furnish a reasonable degree of skill and care in the administration of his duties and functions, such as is ordinarily possessed by members of his profession;[2] and to furnish the attendance and services usual in the practice of his profession.

The engagement of an engineer or architect would come under the same rule or principle if his duties were undefined. They would depend upon the practice of the profession as established by custom and good usage. The duties of an engineer or architect are largely determined by the terms of the contract for the erection of the structure and works, as well as by the contract of employment. It is there that they are set out and defined with great particularity, and when they have been so described either in the contract of employment or in the contract for the work, it is not a question of what proper skill and care he should exercise, but what amount of care and skill he has bound himself thereby to bestow upon the works.[3] The duties required are to be determined from the contract of employment and what is required by the construction contract, and if these fail to define them, by evidence of the general usage of engineer and architects. The intention of the parties as evidenced by all these will control.[4]

812. What Constitutes an Employment of an Engineer or Architect?—This is Often a Difficult Question.[5]—When they are invited to submit plans in competition with others for approval and adoption, or to contend for prizes offered for the best plans to be determined by judges, or to make bids according to plans furnished, subject to acceptance by a board or committee of public works, and plans have been accepted provisionally or in part, or special ingenious features been copied or pirated while under examination for comparison, or by permission of the examiners or board of control, then the questions of employment and remuneration arise.

When an architect prepares plans upon the terms that he shall be employed to carry them out if approved, it seems he has no claims for his services if they are disapproved.[6] When an architect prepared plans for a jail building, which plans were accepted conditionally, provided that a bid should be received from some reliable party for the building of the jail, and

viii; *English*; Roscoe's Digest of Building Cases (2d ed.) 1–10, *English;* Lloyd's Law of Building, chap. ii; Clark's Architect, etc., Before the Law, chaps. i and ii; 29 Amer. & Eng. Ency. Law 875–890. *See* Kutts *v.* Pelby, 20 Pick. (Mass.) 65; and Driscoll *v.* School Dist., 61 Iowa 426.

[1] Nourry *v.* Lord, 3 N. Y. App. 392.

[2] Utley *v.* Burns, 70 Ill. 162 [1873]; *and see* Marcotte *v.* Beaupre, 15 Minn. 152.

[3] Vigeant *v.* Scully, 20 Brad. 437 [1886].

[4] Vigeant *v.* Scully, 20 Brad. 437; *see* Gilman *v.* Stevens, 54 How. Pr. (N. Y.) 197.

[5] Kutts *v.* Pelby, 20 Pick. 65 [1838].

[6] Moffat *v.* Dickson, 13 C. B. 534 [1853]; Moffat *v.* Laurie, 15 C. B. 583; Leake's Digest of Contracts 640–641; Ada St. M. E. Ch. *v.* Garnsey, 66 Ill. 182; Addison on Contracts 678; *but see* Walsh *v.* St. Louis Exposition, 90 Mo. 459, 16 Mo. App. 502, *affirmed.*

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the board of supervisors refused to open any of the bids received, and rejected plaintiff's plans on the ground that he had been guilty of improper acts in getting his plans provisionally accepted, it was held that it was within the discretion of the board to refuse to open or accept any of the bids based upon plaintiff's plans and that, the condition upon which plaintiff was entitled to compensation never having happened, he could not recover;[1] but upon appeal it was held that the plans had been adopted within the meaning of the act, and that the plaintiff could recover.[2] The word "received" as used was held not to include the acceptance of a bid.[3] An invitation to architects to submit competitive designs of a building, giving the location of the site and a general description of the building which it proposes to erect, the designs to be passed upon by a board of expert examiners, the author of the design accepted to be employed to complete a full set of plans, gives no claim for services unless the plans are accepted;[4] and when it was further stipulated that no award need be made by the examining board if they should deem none of the designs worthy, it was held that it was in the discretion of the society whether the examiners should examine the designs each separately for himself or together as a board; and, further, that the society might, after taking the opinions of the examiners, ignore their action and erect such a building as it chose.[5]

For plans and specifications submitted with their bids for work, the engineers or architects get nothing for their plans and trouble if their bids are not accepted;[6] and the same is true if his pay depends upon the happening of an event that never comes to pass, such as "the forming of a club," or that the "plans are adopted," or that "we decide to build,"[7] or "the sale of land for building purposes," notwithstanding the contract contains a provision that "in the event of the architect's services being dispensed with at any time, he should be remunerated for the time, trouble, and expense he had been put to in making the said preparations," he not having offered to prove that his services had been dispensed with.[8] If an architect voluntarily draws plans with the hope or expectation of being employed as architect and superintendent, he cannot recover if not employed. There must be a contract of employment either expressed or implied.[9]

When a committee had been authorized by a resolution of a board of

[1] Hall *v.* County of Los Angeles (Cal.), 13 Pac. Rep. 854.

[2] Hall *v.* Los Angeles, 74 Cal. 502 [1888].

[3] Hall *v.* Los Angeles, *supra.*

[4] Moffat *v.* Dickson, 22 L. J. C. P. 265 [1853].

[5] Donaldson *v.* Detroit Museum of Art (Mich.) 40 N. W. Rep. 33 [1888]. A just rule, perhaps, in law, but it affords no protection to the architectural profession, from whom a society could secure many designs and practical hints and beautiful features for a structure for the mere nominal cost of advertising.

[6] Woods' Master and Servant (2d ed.) 103.

[7] Romeyn *v.* Sickles, 108 N. Y. 650 [1888].

[8] Moffatt *v.* Laurie, 15 C. B. 582 [1855.]

[9] Allen *v.* Bowman, 7 Mo. App. 29; Nelson *v.* Spooner, 2 F. & F. 613; Moffatt *v.* Dickson, 13 C. B. 543; Smithmeyer *v.* United States, 147 U. S. 342; Tilley *v.* Cook Co., 103 U. S. 155; *and see* Chicago *v.* Tilley, 103 U. S. 146; Dunton *v.* Chamberlain, 1 Bradw. 361.

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directors of a school district to procure plans for a school-house and present the same at the next regular meeting, and the committee called on an architect and said, "We have come to select plans for a school-house," and they selected one and gave directions to make some changes, asked the architect to meet the board, and expressed themselves suited, and that they did not care to look further; it was decided that clearly the architect was employed to prepare plans, and that his amount of recovery should be determined by the jury, that the fact that the plans were returned to the architect and not used did not alter the case; and that though it was further claimed that there existed a universal custom among architects to prepare and furnish plans for buildings and take their chances of the same being approved or adopted before they were entitled to compensation, yet the custom not being proved, the architect was allowed to recover.[1] Where plans have been submitted, by direction of a landowner, by an architect, who afterwards took them away, the taking of the plans was held not to be of itself an admission that the services were wholly voluntary and without any idea of compensation.[2] When an architect at the request of a proprietor prepared plans for a theater, drew a sketch of a front which was presented to and kept by the proprietor for a week, who, being pleased with it, directed the architect to make the plans, and the proprietor directs his master-builder to call on the architect and make an estimate of its cost, which he did, keeping the plans for a week, and afterwards the proprietor having decided not to build refused to pay for the plans, it was held that there had been a proper delivery of the plans and that the architect was entitled to compensation for his services.[3]

If one of the several plans drawn for a church building be accepted on condition that the building could be built for a certain sum, and it is ascertained that it cannot be built for such sum and the plans are rejected, there is a failure to show any promise to pay for the plans, and the architect is not entitled to recover for making the plans.[4] A propositon to certain architects which has been made for plans and specifications of a certain proposed building under the terms of which each architect shall receive a definite sum, irrespective of merit, and this further clause, "That the architect who is successful shall not receive the compensation named, but he shall be engaged as architect and superintendent and shall be paid, etc.;" the architect whose plans were accepted as the most meritorious of all has a right of action for refusal to employ him as architect and superintendent.[5]

If one proposes to erect a building and employes an architect by contract in writing to draw up plans and specifications, superintend the work

[1] Driscoll *v.* The Ind. School Dist., 64 Iowa 426 [1883].

[2] Nourry *v.* Lord, 2 Keyes 617 [1866].

[3] Kutts *v.* Pelby, 20 Pick 65 [1838]; *and see* Shipman *v.* State, 42 Wis. 377; Marcotte *v.* Beaupre, 15 Minn. 152; Nelson *v.* Spooner, 2 F. & F. 613.

[4] Ada St. M. E. Ch. *v.* Garnsey, 66 Ill. 132 [1872]; Marsh *v.* Astoria, etc., 27 Ills. 421.

[5] Walsh *v.* St. Louis Ex. & Mus. Hall Assn., 90 Mo. 459 [1886].

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and audit claims, he cannot show by parol evidence that the building was not to be erected, and the architect not to be paid unless a loan could be procured for that purpose. The fact that he was to be paid in installments, one when the drawings were made and the balance at specified stages of the work, it not appearing that the first payment was intended as the price of the drawings did not make the contract divisible, and though the employer failed to build, the contract price was held to be entire, and the value of the archtect's services constituted the measure of damages.[1] When, however, the contract was to pay two and one-half per cent. of the estimated cost for the preparation of the plans, and the payment of three per cent. and five per cent. were contingent engagements to be performed after the plans were prepared, the contract was held divisible, and the architect having been discharged after the prepartion of the plans, he was allowed to recover the two and one-half per cent. only.[2]

Under a contract to furnish the necessary drawings, specifications, and details for a certain percentage on the total cost of the structure, the architect, after furnishing the drawings, etc., is not limited, in case his employment is terminated before the building is completed, to a recovery of the percentage on the cost of the building in so far as it was at the time completed.[3]

813. What Is a Performance of a Contract of Service? — An architect was held to have complied with his contract to furnish plans and specifications for a building to cost $10,000 when he had furnished plans, etc., for a building that would cost $16,000, at the same time making proposals to reduce the cost in certain respects, making the plans to apply to a building that would not cost more than $10,000.[1] Plans and estimates of a building to cost $102,000, exclusive of architect's and superintendent's fees, the latter of which would have been five per cent. if the architect had the superintendence, was held to be a sufficient compliance with a contract to prepare plans and estimates of a building to cost about $100,000, and the opinion was further expressed that plans for a building to cost $100,000, would not satisfy a contract for a building to cost not more than $75,000, nor does it necessarily follow that it would be satisfied by plans for a building to cost any sum between $75,000 and $100,000.[4]

When a contract for the preparation of plans and specifications stipulated that the architect should have said plans and specifications drawn in a good and sufficient manner, to be altered and changed in such manner as the board of commissioners might, at any time, deem proper and best, and that the said architect should make, alter, and change the same plans until

[1] Marquis *v.* Lauretson (Ia.), 40 N. W. Rep. 73 [1888].

[2] Ebdy *v.* McGowan, Roscoe's Digest Bldg. Cases 134; *and see* Clark's Architect, etc., before the Law, chap. viii.

[3] Havens *v.* Donahue (Cal.), 43 Pac. Rep. 962; *and see* Scott *v.* Maier, 56 Mich. 514; Chicago *v.* Tilley, 13 Otto 146; Lambert *v.* Sanford, 55 Conn. 437.

[4] Smith *v.* Dickey, 74 Tex. 61 [1889]; *see* Nelson *v.* Spooner, 2 F. & F. 613.

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the said board of commissioners should be satisfied, it was held the request to make changes should come from the board acting officially and not from individual members acting in their private capacity.'*

When a premium has been offered for plans, which have been adopted and the promised compensation been paid to the architect, it was held he could collect no more, notwithstanding a usage among architects to superintend the building of their designs at five per cent.; that when there is no contract expressed or implied, usage or custon cannot make one.[2] A resolution passed by a board of public works, which has supervision of the superintendent of buildings, to the effect that C, superintendent of buildings, shall be architect of the City Hall, and shall have supervision of the construction thereof, was held not to constitute a contract of employment of C, as supervising architect, authorizing a recovery by him for his services as such in addition to his salary.[3] In a case where an architect had been regularly employed to make plans and designs for a building, evidence was received to prove a custom that the employment carried with it an engagement to superintend its construction.[4]

814. Recovery for Services Rendered.—The obligation of paying for the drawings of an architect usually rests upon the employer, and not upon the mechanic who executes the work. If an owner has requested an architect to furnish a design, and paid him for it, but did not employ him to prepare drawings and would not pay him for them, it was held that the fact that the owner was not liable was not sufficient to charge the builder. The builder not having made any prior request for plans, nor any subsequent promise to pay for them, could not be charged with the obligation of paying for them.[5] The same question of responsibility arises in the employment of engineers when called upon to stake out work. In engineering work, generally, the obligation to pay rests upon the person who requested the work to be done,[6] unless it is work that properly belongs to the engineer by his contract with company or by the contract between his company and the contractor.

Where an architect performs work and labor upon a building on the joint employment of two persons, an action will be against them jointly, although no partnership exists between them in either the land or building. Such joint employment may be inferred from circumstances, as when both the defendants have given directions as to the work, its character, and mode of execution; and when one denies his liability, his promises to pay certain bills relating to the construction of the building, the indorsements by him of notes therefor, his ownership of the land and ultimately of the building, and

[1] Board of Com'rs. *v.* Bunting (Ind.), 12 N. E. Rep. 151 [1887].

[2] Tilley *v.* Co. of Cook, 103 U. S. 955 [1880]. *Compare* First Unit. Soc. *v.* Faulkner, 91 U. S. 415.

[3] Chamberlain *v.* Kansas City (Mo.), 28 S. W. 745; *and see* Walsh *v.* St. Louis Exposition, 101 Mo. 534.

[4] Wilson *v.* Bauman, 80 Ill. 493 [1875].

[5] Webb *v.* School, 3 Phila. (Pa.) 125 [1858].

* *See* Secs. 39 and 555, *supra*.

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his uniting in the examination of accounts of the architects and in settling the balance due, are sufficient evidence to support the judgment.[1]

A custom to charge a percentage of the architect's own estimate of the cost, it seems, cannot be resorted to to determine an architect's compensation for preparing preliminary sketches not accepted. Such a custom was held unreasonable and preposterous.[2] Such services, unless volunteered, should be paid for, if at all, according to the time spent upon them, or according to such understanding as could be fairly implied from circumstances,[3] and not according to the schedule of charges of the American Institute of Architects, especially when the architect has accepted a salary.[4]

If the compensation is agreed upon as a percentage of the estimated cost of the buildings, the architect may recover on the reasonable cost, according to his plans and specifications, and bids made by third persons may be used to show what is a reasonable cost.[5] The architect is a competent witness in his own behalf upon the question of the value of his labor in drawing plans,[6] as are other architects. *

The employment of engineers is often equally perplexing. Frequently they are called upon to render advice or services by officers of corporation, whose authority is questionable, and if the advice or services turns out to be unnecessary, unprofitable, or expensive, the company sometimes seek to avoid paying for it. A letter from a secretary of a provisional committee organized for the purpose of projecting a railway and signed by him, to an engineer conveying a record of minutes of a meeting of the committee, that it was resolved that R. (the engineer) be requested to accept the office of "joint engineer to the line," was held to be inadmissible as evidence of the engineer's employment, as were the minutes themselves, not being signed by the chairman, and no proof being offered that there was a meeting on that day, or who was present.[7]

If an engineer is called and consulted with regard to works, and his plans and estimates have been adopted by the board of directors of a company, his employment may be said to have been proved, without any formal contract. The fact that he was recommended to the company, and its officers set him

[1] Beach *v.* Raymond, 2 E. D. S. (N. Y.) 496 [1854].

[2] Tilly *v.* Cook, 13 Otto 155; Lloyd's Law of Building, etc., 11, *citing* Eddy *v.* McGowan, *not reported; but see* Knight *v.* Norris, 13 Minn. 473; Irving *v.* Morrison, 37 C. P. (Upper Canada) 242; *and* Mulligan *v* Mulligan, 18 La. Ann. 20, *contra.*

[3] Scott *v.* Maier, 56 Mich. 554 [1885]; *semble*, Marcotte *v.* Beaupre, 15 Minn. 152; Dull *v.* Bramhall, 49 Ill. 364, *what is reasonable;* Lloyd's Law of Building (2d ed.), § 8.

[4] Smithmeyer *v.* United States, 147 U. S. 342; *but see* Gilman *v.* Stevens, 54 How. Pr. (N. Y.) 197.

[5] Lambert *v.* Sanford, 55 Conn. 437 [1887]; *and see* Roeder *v.* Bensberg, 6 Mo. App. 445; Shipman *v.* State, 43 Wis. 381; Irving *v.* Morrison, 27 U. C. C. P. 242; Maack *v.* Schneider, 51 Mo. App. 92. Agreements are sometimes made forbidding or preventing any extra charges. Baltimore Cem. Co. *v.* Coburn, 7 Md. 202; Abbott *v.* Gatch, 13 Md. 314.

[6] Nourry *v.* Lord, 2 Keyes R. 617 [1866].

[7] Rennie *v.* Wynn, 4 Exch. 691 [1849].

* *See* Sec. 891, *infra.*

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at work, if the company had the benefit of his services knowingly, they are liable to him for their value.[1]

So it has been held that an engineer is entitled to recover for services and advances rendered, with the knowledge and consent of the company's engineer and attorney, and which were essential in preparing to construct a railroad, and for drawings procured and paid for by him, and approved by the company's president.[2]

When an engineer was assured by a company's engineer that he would be made a subcontractor and subrogated to the rights of the contractor, and he received a notice of the approval of this arrangement by the board of directors, through the attorney of the company, it was held he was entitled to recover for his services and expenditures on the company's refusal to award him the contract. The fact that the engineer and attorney were not duly appointed by the company, until the meeting when the directors approved of the arrangement of subrogation, did not alter the case, for the engineer and attorney represented and acted with the authority of the company.[3]

Under a charge for services, an engineer may prove and recover for services whether performed by himself or an assistant, or by both, unless it appears by the nature of the terms of the employment that the personal services of that particular engineer were contracted for and no other person could under the agreement fill his place; he may under an allegation of services performed by him prove that they were performed by another person under him.[4]

The employment of an engineer to survey and establish a railroad line clothes him with authority to employ subordinates and assistants for the purpose on behalf of the railroad company, and such assistants are the servants of the company.[4]

[1] Moline W. P. & Mfg. Co. *v.* Nichols, 26 Ill. 90 [1861].

[2] Wilson *v.* Kings Co. El. R. Co., 21 N. E. Rep. 1015 [1889].

[3] Leet *v* Wilson, 24 Cal. 398 [1864].

[4] Gillis *v.* Duluth, etc., R. Co. (Minn.), 25 N. W. Rep. 603; New Orleans, etc., R. Co. *v.* Reese, 61 Miss. 581.

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CHAPTER XXIX.

PROPERTY OF ENGINEERS OR ARCHITECTS IN DESIGNS AND INVENTIONS.

OWNERSHIP OF PLANS, SPECIFICATIONS, AND DRAWINGS. CORPOREAL AND INCORPOREAL PROPERTY RIGHTS.

815. Ownership of Plans, Drawings, and Designs.*—It is customary for engineers and architects to retain the ownership of their plans by a special agreement with their employers to that effect. In the absence of such an agreement or understanding, it has been held that the employer is entitled to keep them when he has paid the architect a reasonable remuneration for his services. A custom to the contrary was adjudged "unreasonable, impossible, and suicidal." In this case the architect's services had been dispensed with before the building was completed, and the judge compared it to an attorney refusing to deliver up the papers of his case to his client because his employment was determined.[1] The French courts have also given the owner the right to the plans when he had paid for them, or had recompensed the architect or engineer.[2]

Whether the same rule would be held as to the ownership of plans after the building was completed is doubtful; and it is equally dubious that a client can demand the papers and documents prepared by an attorney in conducting his case after the trial is concluded. It is certain that it is the universal practice of architects to take or retain their plans, both in England and the United States, when the structure has been completed.

Alabama affords a case where an architect who took the plans and specifications away from an unfinished building was prosecuted by the builder for larceny [stealing]. It was held by the Supreme Court that the builder was entitled to the use and possession of the plans during the construction of the building and that he might have a special property in them, the invasion of which would be a trespass, even though under the contract the ownership of the plans was in the architect. To constitute larceny the wrongful taking must have been secret or fraudulent, and done with felonious intent to convert the property to the taker's own use and to deprive the

[1] Ebdy *v.* McGowan, Ct. of Exch., Nov. 17, 1870, *The Times;* s. c., Roscoe's Digest of Building Cases 184; *and see* Clark's Architect, etc., Before the Law 129.

[2] Dalloz 1871, 2, 83; 1849, 2, 171.

* *See* Secs. 249, 252, *supra.*

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owner of his property. If taken openly in the presence of the owner, or in the presence of other persons known to him, the taking and carrying away would be a mere civil tort. Here the architect committed a trespass when he took the plans away from the builder without his consent, after an unconditional delivery of them to him.[1]

This case further held that the architect might show the existence of a universal custom among architects and builders to the effect that the plans and specifications belonged to the architect by whom they were made.[2] When plans are submitted in competition for a cash prize, it has been held that those plans which were awarded the prize became the property of the party inviting the competition upon tendering the amount of the prize offered.[3] When competitive plans are sent by a common carrier to the parties inviting competition and their delivery is delayed until after the time specified, owing to the negligence of the carrier's employees, the damages to be assessed is the value of the architect's chances in getting the prizes, and not the value of the time and labor expended in making said plans and specifications. To recover anything more than nominal damages the architect should show that there was some probability of his plans being adopted.[4] A later Massachusetts case held that when plans, delivered to an express company, had been lost in transit, the damages were the value of the plans to the person to whom they were sent, not their immediate value, as that would include damages for the delay in building the structure, which could not be given. The fact that the plans had a special value to the architect which could not be purchased, and that he had other contracts and had undertaken other work in expectation of having these plans for immediate use, cannot be considered. The measure of damages was held to be the reasonable cost of new plans and any other expenses reasonably incurred in procuring new ones.[5]

816. Incorporeal Property in Architectural and Engineering Designs.—Copyright and Patent-right.—However doubtful the ownership of the plans themselves may be—*i. e.*, the corporeal embodyment of the design, or the paper or cloth which bears or conveys the conceptive ideas and designs of the engineer or architect—it cannot be doubted that any use of his plans without his permission, such as copying them or reproducing them, or even building from them, would be a tort to the architect's natural property in his own creations, as much as the copying of an artist's painting or the modeling of a sculptor's work of art. The one is the creation of an

[1] Lumsford *v.* Dietrich, 86 Ala. 250 [1888]; *see also* Marcotte *v.* Beaupre, 15 Minn. 152.

[2] Lumsford *v.* Dietrich, 86 Ala. 250 [1888]; *but see* Tilley *v.* Cook Co., 103 U. S. 162.

[3] Walsh *v.* St. Louis Exp'n, 101 Mo. 534.

[4] Adams Exp. Co. *v.* Egbert, 36 Pa. St. 360; *but see* Watson *v.* Ambergate, 15 Jur. 448.

[5] Mather *v.* American Exp. Co., 138 Mass. 55 [1884], *citing* Hadley *v.* Baxendale, 9 Ex. 341; Green *v.* Boston & L. R. Co., 128 Mass. 221; *and see* Clark's Architect, etc., Before the Law, 26.

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engineer's or architect's cultivated taste and training, the other perhaps of an artist's perception, taste, and genius.[1]

Both are works of art, and one should be protected as much as the other. Surely not because the one is the more vulgar, for the law protects from publication or reproduction the most insignificant sketch, picture-card, and every manuscript book or personal letter written. An architect's plans are his own creation, and one can have no better rights or claims to a property in a thing than that which owes its existence to his own creative genius.

This property, however, is vested by law in him only so long as he retains possession and control over his incorporeal creation. If the artist sell his picture or the author his book, or either makes a profitable use of it, such a use as it was designed for or intended, he may lose that inherent and exclusive right to his own creation, and it becomes the common property of a jealous and selfish public.[2] An author may give away a copy of his manuscript,[3] he may send it as a communication to another, as in the case of a letter to a friend,[4] he may permit a copy to be made,[5] he may lecture from it in public or in the class-room,[6] he may have it printed and distribute copies among his friends or an association, if it be expressly understood and agreed that their use shall be restricted and that they are not to be sold, and that the act of distribution is not a publication.[7] A consignment of a lot of books to a bookseller, with orders not to sell until a certain date, is not a publication until sold, after that date.[8] Nor is the delivery of copies of a report to the state, without any distribution thereof, a publication.[9] The sale of a book is *prima facie* a publication.[10]

The artist may exhibit his picture in a public salon[11] without losing his exclusive right to multiply copies, publish it, or his exclusive right to a copyright. If he publishes work or sells copies of it without first securing a copyright from the government, his sole right to an exclusive enjoyment of the fruits of his labors is gone. He should first secure the protection of the government in whose territory he expects to sell it.[12]

The same holds with regard to all intellectual productions which have

[1] N. E. Monumental Co. *v.* Johnson (Pa.), 22 Atl. Rep. 974.

[2] *Accord*, Holmes *v.* Donohue (C. C.), 77 Fed. Rep. 179.

[3] Queensbury *v.* Shebbare, 2 Eden 329; Blunt *v.* Patten, 2 Paine (U. S.) 393, a map.

[4] Pope *v.* Curle, 2 Atk. 342; Thompson *v.* Stanhope, Ambler 737; *American cases cited*, 4 Amer. & Eng. Ency. Law 151, *note*.

[5] Forrester *v.* Waller, 2 Eden 328; Bartlett *v.* Crittenden, 5 McLean (U. S.) 32.

[6] Caird *v.* Sime (Eng.), 12 App. Cas. 326, 3 Ry. & Corp. L. J. 343 [1887]; Miller Appeal, 107 Pa. St. 221 [1884]; Abernethy *v.* Hutchinson, 1 H. & T. 28; Nichols *v.* Pitman, L. R. 26 Ch. D. 374

[7] Jewelers' Merc. Agcy. *v.* Jewelers' Wkly. Pub. Co., 32 N. Y. Supp. 41; *but see* Rigney *v.* Dutton (C. C.), 77 Fed. Rep. 176.

[8] Wall *v.* Gordon, 12 Abb. Pr. N. S. (N. Y.) 349.

[9] Myers *v.* Callahan, 5 Fed. Rep. 726.

[10] Baker *v.* Taylor, 2 Blatchf. (U. S.) 82; Rigney *v.* Dutton, *supra*.

[11] Werckmeister *v.* Springer L. Co. (C. C.), 63 Fed. Rep. 808.

[12] Rigney *v.* Dutton, *supra*.

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been made the subject of statutory copyrights, including maps, charts,[1] musical compositions, engravings, photographs,[2] paintings, works of sculpture, etc.; in short, all productions of literature, the drama,[3] music, and art, and even the letters a man has written, are within the protection of the law, whether of literature, art, or science, if such work is unpublished, and kept for his private use or pleasure. That his rights are absolute cannot be disputed.[4] Nobody has a right to publish them, to multiply copies of them, without permission of the author or artist who first wrote, painted, draughted, modeled, or made them; in short, created them.[5] The passage by Congress of the copyright statutes has not abrogated the common-law right of an author to his unpublished manuscript.[6]

What will constitute a publication of a piece of statuary, a monumental design, a triumphal arch, or an artistic structure, as an art building, or even an apartment house, has not been decided. It has been said that any profitable use for which the work was intended would amount to a publication, and the opinion has been judicially expressed that pieces of statuary which decorated public squares and other like places are published by being so publicly exhibited.[7] A gateway, a monument, or an architectural edifice would be subject to the same line of reasoning.

It had also been intimated that the public exhibition of a picture would be a publication, but a recent case has decided that the exhibition of a painting in a public salon, or the printing in the salon catalogue of a crayon sketch of the same painting, did not amount to such a publication of it as to work a forfeiture of the right to a copyright, unless the general public was permitted to take copies of it.[8] In any case, it is a question of intention of the author whether or not he has parted with his original rights in the creation.[9]

Whether a copyright would be granted upon an architectural or engineering structure as a work of art has never, it is believed, been decided; but so far as principle is concerned, it is difficult to understand why it should not be given protection as well as a painting or a piece of statuary. Indeed, in some cases it would be difficult to draw the line between the subject of art entitled to protection and the edifice which would not be protected. That section of the English copyright act which gives protection to statuary mentions only the human body and its parts and dress, and the figures of animals, which would not include ordinary decorations of wood and stone as applied to architectural structures.

[1] Rees *v.* Pettizer, 75 Ill. 475.
[2] Falk *v.* Donaldson (C. C.), 57 Fed. Rep. 32.
[3] Aronson *v.* Baker (N. J.), 12 Atl. Rep. 177 [1888].
[4] Drone's Law of Copyright 174; Press Pub. Co. *v.* Monroe (C. C. A.), 73 Fed. Rep. 196.
[5] Amer. & Eng. Ency. Law 148-150.
[6] Press Pub. Co. *v.* Monroe (C. C. A.), 73 Fed. Rep. 196.
[7] Turner *v.* Robinson, 10 Irish Ch. 516 [1860]; Copinger's Law of Copyright 382, 383.
[8] Werckmeister *v* Springer Lithograph Co. (C. C.), 63 Fed. Rep. 808; *but see contra*, Pierce & B. Mfg. Co *v.* Werckmeister (C. C. A.), 72 Fed. Rep. 54.
[9] Prof. Langdell in his lectures at Harvard; *semble*, Pope *v.* Curle, 2 Atk 342.

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817. Rights of a Purchaser to Incorporeal Creations.—If one purchases the copyright of a picture with the picture, he holds the picture free from any interference, and with the perfect right to deal with it as he pleases. If, however, he buys the picture simply as a picture, or the author or artist has reserved the right of reproduction, the purchaser will then have the gratification and delight derived from its contemplation, but he cannot make copies or engravings from it, or use it for a different purpose from that for which the artist sold it;[1] the purchaser, in such a case, is not a proprietor within the meaning of the copyright law. The author or artist retains his right to a copyright.

An architect or engineer should have the same property in his own creations, whether they be the drawings themselves, an artistic design of a column, or a structure such as a building, an arch, or even a bridge. In America it has been held that a draughtsman or designer has such property in a model or plan of his own composition as to be entitled to maintain an action for the unauthorized use of such, although no letters patent or copyright had been secured.[2]

818. Copyright of Plans and Drawings.—Whether the plans or drawings of a building may be copyrighted does not seem to be perfectly well settled. In point of justice and sound public policy, no good reason exists why an architect's plans should not be protected by copyright. Copinger, in his work on Law of Copyright, is authority for the statement that in the English act the word drawing includes architectural design.[3] Drone, in his work on Copyright Law, passes the subject by with the simple statement that plans are not mentioned in the American statutes, while maps and charts are included.[4] The word chart has been held not to include sheets of paper exhibiting tabulated or methodically arranged information. The courts distinguished[5] between charts that convey information of a literary nature and those that impart knowledge of geography or art. These sheets could doubtless have been copyrighted as a book. A dressmaker's chart, or diagram for cutting ladies' garments, has been held to be a book,[6] and art designs are a subject of copyright.[7] The superior likeness of a dressmaker's chart to a book, when compared with a collection of plates or plans of an architectural or engineering structure (suppose them sun-printed, to escape the question of reproducing copies), will not be apparent to most people, and if the former is a subject of copyright as a book, certainly the latter should be equally so. Books of designs, simple reprints of architectural plans, with very little text or explanations accompanying them, have been copyrighted, and are in the possession of almost every architect and engi-

[1] Werckmeister *v.* Springer Lithograph Co., 63 Fed. Rep. 808; Copinger's Law of Copyright 388.

[2] N. E. Monument Co. *v.* Johnson (Pa.), 22 Atl. Rep. 974; *semble*, Blunt *v.* Patten, 2 Paines (C. C. Rep.) 397.

[3] Copinger's Law of Copyright (2d ed.) 389.

[4] Drone on Law of Copyright 174.

[5] Taylor *v.* Gilman, 24 Fed. Rep. 632.

[6] Deury *v.* Ewing, 1 Bond (U. S.) 40.

[7] Grace *v.* Newman, L. R. 19 Eq. 623.

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neer. If ordinary plans are refused, where shall the line be drawn? Will the amount of text accompanying the drawing be the test, or the character of the book, or its form, the covers, the title page, or the binding? Will the method of reproduction, whether from a printing-press or a blue-print frame, enter into the case? An unprinted book, which existed only in the manuscript, has been held the subject of copyright.[1] Finally, will it matter if the book consist of one sheet or several? It has been held not, for a book may be on one sheet.[2]

There is no just reason why an architect or engineer should not be protected by copyright as well as an artist. His property rights are certainly as well defined, and in view of other things copyrighted, it is difficult to see how it could be denied. The selfishness of the public and the fact that the progress and growth of our country may demand that the industrial and practical be not made exclusive, might be a remote reason why it should not be given the same protection; but this argument would apply as well to maps and charts, and to patentable inventions.

Under the United States copyright act of 1831, a photograph was not a subject of copyright,[3] but a later statute grants copyright protection to photographs and to the negatives thereof, and such an act has been held not unconstitutional.[4]

A photographer has no right to make copies of a customer's photograph without his permission,[5] and it may be doubted if he can copyright it. A private individual may enjoin the publication of his portrait when a public character cannot, unless the photograph has been secured by some violation of confidence or breach of agreement. A person who is one of the foremost inventors of his time has been held a public character.[6] The power of the World's Columbian Exposition to grant an exclusive privilege to make stereopticon views of objects within the exposition, and to sell such views, has been held a matter of grave doubt.[6]

819. Rights of an Author, Inventor, or Designer when in the Employ of Another.—In sympathy with and close connection to this subject of the ownership of designs and artistic features created by an architect or engineer are his rights to plans, improvements, and inventions made by him while an employee. If in his contract of employment it is agreed or understood or may be reasonably implied that the production of his every effort, mental as well as physical, should be the property of his employer, that his designs, improvements, and inventions, and all other incorporeal creations should belong to his employer, then there can be no question but that the em-

[1] Roberts *v.* Myers, 23 Law Rep. 396; *but see* Jewelers' Merc. Agcy. *v.* Jewelers' W. Pub. Co., 32 N. Y. Supp. 41.

[2] Drone on Copyright 142.

[3] Wood *v.* Abbott, 5 Blatchf. (U. S.) 325.

[4] Sarony *v.* Burrow Giles Lith. Co., 17 Fed. Rep. 591; Schreiber *v.* Thornton, 17 Fed. Rep. 693; *see cases of copyrighted photograph cited in* Springer Lith. Co. *v.* Falk (C. C. A.), 59 Fed Rep. 707.

[5] Corliss *v.* E. W. Walker Co. (C. C.), 64 Fed Rep. 280.

[6] Kilburn *v.* Ingersol (C. C.), 67 Fed. Rep. 46.

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ployer could rightfully claim them; but if no such agreement has been made or can be implied, then the employee is entitled to the uses and benefits of his creations.[1] Such an agreement has been held not against public policy.[2]

Architects are usually employed for their ability to design and create features of utility and decoration, and it is submitted that their contract of employment would generally include the right to the use, at least, of any features of design, decoration, or arrangement that they might create; but it would not include any new method of construction, or a new material, or a new process for the manufacture of it.

It has been held that if a company employ a chemist to work with its materials as a chemical expert, in order to develop new products and processes for its benefit, it acquires no right to the chemist's discoveries made during such employment, but only a license to use them;[3] but if an employee invents flavoring compounds with materials supplied by the firm, and it is the intention of all the parties that the processes by which the compounds are prepared shall belong to the firm, and be trade secrets, the firm becomes the owner of the processes, though no assignment thereof is made by the inventor to the firm.[4] If the employee has entered the receipts and processes in a book of his own he is entitled to keep it, though it seems the employer is entitled to a copy. A color-mixer in a carpet manufactory, without the knowledge of his employers, who has entered the receipts in his own instead of his employers' color-books, and, on the employee's discharge, his employers, believing the books their own, refused to let the employee take them away, it was held that the jury should be instructed, in an action by the employee for the detention, that the value of the receipts could not be considered in estimating the damages, and that, in considering violence in the detention as an element of damages, they must consider the negligent conduct of the employee, and that his employers were led thereby to believe that he was carrying away their own books.[5] The employer has a right to the continued use, in his own business, of recipes for mixing colors, prepared by an employee whose duties require him to prepare mixtures of colors which will reproduce the shades indicated by designs submitted to him, and to enter the receipes in a book furnished for that purpose, and which are necessary for the immediate manufacture of the carpet designed, and its subsequent reproduction.[6] The employer has recovered such receipt-books in trover from the employee.[6]

An owner of a process or invention for manufacturing an article, which was kept secret from all but confidential employees, may restrain former

[1] *Cases collected in* 4 Amer. & Eng. Ency. Law 178; Smith's Master and Servant 166–7, *and English cases cited; see* Pape *v.* Lathrop (Ind.), 46 N. E. Rep. 154 [1897].

[2] Hulse *v.* Machine Co. (C. C. A.), 65 Fed. Rep. 864.

[3] Clark *v.* Fernoline Chem. Co., 5 N. Y. Supp. 190.

[4] Baldwin *v.* Von Micheroux (Sup.), 25 N. Y. Supp. 857; *accord* Dempsey *v.* Dobson (Pa.), 34 Atl. Rep. 459.

[5] Dempsey *v.* Dobson (Pa. Sup.), 34 Atl. Rep. 459.

[6] Makepeace *v.* Jackson, 4 Taunt. 770.

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employees from disclosing, or using in a rival establishment, their knowledge thereof, acquired while occupying such confidential relation; and it is immaterial that there was no written contract between them, or that at the commencement of the employment the employees were minors, and performed comparatively unimportant duties.[1]

The mere fact of the employment does not give the title to a manuscript to the publisher. Whether one who is paid to write an article for a periodical, magazine, or cyclopedia can have copyright in the article so as to prevent the publisher from using it in book form or otherwise than for what it was written, depends also upon the agreement between the parties expressed or implied.[2]

820. Things Made or Created Outside of Office Hours.—What an employee writes or prepares outside of office hours or independently of the duties for which he is employed and paid, belongs to himself individually.[3] A contract to give one's whole time, as a draughtsman to the interests of his employer, an architect, has been held not to be broken by doing a little work on holidays and at night for other parties, and, it may be added, for himself, so long as such work does not result in damage to the employer.[4]

821. Creations Made from Materials Collected while in Another's Service.—A draughtsman or engraver in the government employ can have no copyright in a chart prepared for the government;[5] and it was so held of an artist that accompanied a government expedition.[6] An assistant in an engineer's office who executes and completes a map in conformity with the general design furnished by his employer, who made rough sketches and supplied newspaper maps, official reports, etc., can have no copyright in the map.[7]

If the changes and improvements in a map are material, it is a new map, and must be copyrighted before it is published, in order to protect it from piracy.[8]

822. New Creation Made from Materials Collected by Others.—It seems that in making a map an engineer may take advantage of all prior publications, but he must not make a mere copy nor a servile imitation. He must bestow mental labor upon what he takes from other maps and charts, and subject it to such revision and correction as to produce an original result. He should not deny the use made of preceding works and the changes must be material, and not merely colorable. Whether the changes are merely

[1] Little *v.* Gallus (Sup.), 38 N. Y. Supp. 487, 1014; Peabody *v.* Norfolk, 98 Mass. 452; Morrison *v.* Moat, 9 Hare 255; 10 Amer. & Eng. Ency. Law 949.

[2] Sweet *v.* Benning, 16 C. B. 459; Bishop of Hereford *v.* Griffin, 16 Sim. 190.

[3] Copinger on Copyright 127; Drone on Copyright 259; Gill *v.* United States, 16 Sup. Ct. Rep. 822; as to suggestions by employer, *see* Sheppard *v.* Conquest, 17 C. B. 427.

[4] Hermann *v.* Littlefield (Cal.), 42 Pac. Rep. 448.

[5] Copyright, 7 Opinion Att'y-Gen'l 656.

[6] Heine *v.* Appleton, 4 Blatchf. (U. S.) 125; Com. *v.* Desilver, 3 Phila. (Pa.) 31.

[7] Stannard *v.* Harrison, 24 Law Times 570; Drone on Copyright 254.

[8] Drone on Copyright 145.

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colorable, and the new work a mere servile imitation is a question for the jury in each case.[1] The change of a plain map to a mercator projection has been held not a servile imitation, but an original work. But the publication of a map at a smaller scale than the original was held a piracy.[2] A chart of township boundaries is a subject for copyright.[3]

The natural objects from which a chart is made, being open to the examination of all, a copyright cannot subsist as to the general subject. A right in such a subject is violated only when copies are made from the chart of him who has secured the copyright, and thereby avails himself of his labor and skill.[4] The results of the labor of a draughtsman while in the service of the commonwealth, working at her cost, belong to the commonwealth, and the publication of a map made from materials collected while in such service will be restrained by injunction.[5] A tradesman who employs another for pay, to complete a book of monumental designs for him is entitled to copyright in the book. The employee cannot publish designs copied from it.[6]

823. Employees Right to His Inventions.—Mechanical, civil and electrical engineers, chemists and mechanics, are inventors by trade. Poverty frequently requires them to accept employment under masters, less capable and less deserving, who profit from their labors and often appropriate the fruit of their inventive genius, sometimes rightfully, and frequently without any legal right whatever. In the absence of an express agreement that the inventions and improvements made by the employee shall belong to the employer, the latter can claim no rights to such inventions of the employee.[7]

Under Rev. St. § 4929, which authorized the issuance of a design patent to any person who, "by his own industry, genius, efforts, and expense, has invented," etc., the use of the word "expense" is not limited to mere disbursement of money, and does not prevent the granting of a patent to one who invents a design while in the employ of another, especially where it does not appear that any "expense" was necessary in producing the design.[8] It does not matter that the improvements are in machines with which he is connected in his service.[9] The employer has no right to inventions made by the employee after his term of employment has expired.[10] If an engineer has been hired expressly to invent, an equitable title to his inventions will

[1] Copinger on Copyright (1st ed.), 90; Sayre *v.* Moore, 1 East 361.

[2] 3 Amer. & Eng. Ency. Law 139–140.

[3] Farmer *v.* Calvert, etc., Co., 5 Am. L. T. Rep. 174.

[4] Blunt *v.* Patten, 2 Paine 397 [1828]; Sanborn Map & Pub. Co. *v.* Dakin Pub. Co., 39 Fed. Rep. 266.

[5] Commonwealth *v.* Desilver, 8 Philadelphia 31 [1858].

[6] Grace *v.* Newman, L. R. 19 Eq. Cas. 623 [1875].

[7] Smith's Master and Servant (4th ed.), 164; Hapgood *v.* Hewitt, 119 U. S. 226; Gill *v.* United States, 16 Sup. Ct. Rep. 322; McWilliams Mfg. Co. *v.* Blundell, 11 Fed. Rep. 419; Niagara Radiator Co. *v.* Meyers (Sup.), 40 N. Y. Supp. 572; Green *v.* Willard Barrel Co., 1 Mo. App. 202; *but see* some early English cases; Bloxam *v.* Elsee, 1 C. & P. 558, *before service began;* Hill *v.* Thompson, 8 Taunton 395; Makepeace *v.* Jackson, 4 Taunton 770, color-printers' book of receipts recovered by employer in trover from employee.

[8] Matthews Mfg. Co. *v.* Trenton Lamp Co. (C. C.), 73 Fed. Rep. 212.

[9] Gill *v.* United States, 16 Sup. Ct. Rep. 322.

[10] Appleton *v.* Bacon, 2 Black (U. S.) 699.

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vest in his employer;[1] and an employee may make an assignment of inventions that are yet in embryo in his mind, or even make a general sale of the inventive power of his mind.[2]

Of course nice questions arise when an engineer is working with or under the eye of his employer, who may constantly make suggestions, frivolous and worthless perhaps, but which, when related in court, may be made to embody the whole invention and the engineer to appear as a subordinate under the direction and supervision of a natural born genius, the employer. There have been employers who have honestly won the name of inventor, and when it is proved, they are the more deserving of the glory and reward, having made the invention without the aid of the technical training which every engineer is supposed to have had. Such cases are the exception in these days.

When it is proved that the employer has made a new discovery and has hired engineers and agents to assist him in carrying out that principle, and they, in the course of the experiments arising from that employment, have made valuable discoveries accessory to the main principle, and tending to carry it out in a better manner, such improvements are the property of the inventor of the original principle, and may be embodied in his patent.[3]

824. What is Invention, and Who is the Inventor?—"Invention is the work of the brain and not of the hands. If the conception be practically complete, the artisan who gives it reflex and embodiment in a machine is no more the inventor than the tools with which he works. Both are instruments in the hands of him who set them in motion, and prescribes the work to be done. Mere mechanical skill can never rise to the sphere of invention. The latter involves higher thought, and involves and brings into activity a different faculty. Their domains are distinct. The line which separates them is sometimes difficult to trace; nevertheless, in the eye of the law, it always subsists. The mechanic may greatly aid the inventor, but he cannot usurp his place. As long as the root of the original conception remains in its completeness, the outgrowth, whatever shape it may take, belongs to him with whom the conception originated." So where an employer had drawn a design of an engine in the sand, and directed an employee or assistant to prepare the drawings and the engine was built, it was held that the one who drew the original design in the sand was the inventor.[4] To claim the invention the employee must discover the principle of the machine or invent the important movements of it.[5]

The law has been very clearly laid down by Mr. Justice Clifford in the following words: "Persons employed, as much as employers, are entitled to their own independent inventions; but where the employer has conceived

[1] Continental Wind Mill Co. *v.* Empire Wind Mill Co., 8 Blatchf. (U. S.) 295; Joliet Mfg. Co. *v.* Dice, 109 Ill. 649.

[2] *Cases in* 18 Amer. & Eng. Ency. Law 135; Hulse *v.* Bonsack Mach. Co. (C. C A.), 65 Fed. Rep. 864.

[3] *Per* Earle, J., Allen *v.* Rawson, 1 C. B. 567 [1845].

[4] Blandy *v.* Griffith, 3 Fish. 615 [1869].

[5] Bloxam *v.* Elsee, 1 Car. & P. 567; Allen *v.* Rawson, 1 Man. G. & S. 551.

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the plan of invention, and is engaged in experiments to perfect it, no suggestions from an employee, not amounting to a new method or arrangement which in itself is a complete invention, is sufficient to deprive the employer of the exclusive property in the perfected improvement; but where the suggestions go to make up a complete and perfect machine, embracing the substance of all that is embodied in the patent subsequently issued to the party to whom the suggestions were made, the patent is invalid, because the real invention or discovery belongs to the employee. If the suggestions or improvements made by the employee are ancillary to the plan and preconceived idea of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the original improved principle and may be embodied in his patent as a part of his invention. Suggestions from an employee made during the progress of experiments, in order that they may be sufficient to defeat a patent, must have embraced the plan of the improvement and must have furnished such information to the person to whom the communication was made, that it would have enabled an ordinary mechanic, without the exercise of any ingenuity and special skill on his part, to construct and put the improvement in successful operation."[1] And by Chief Justice Tindal in the following language: "It would be difficult to define how far the suggestions of a workman [engineer] employed in the construction of a machine are to be considered as distinct inventions by him, so as to avoid a patent incorporating them, taken out by the employer. Each case must depend upon its own merits, but when the principle and object of the invention are complete without it, it is too much that a suggestion of a workman employed in the course of the experiments, of something calculated more easily to carry into effect the conception of the inventor, should render the whole patent void."[2]

It is doubtful if an employer can claim or defend an invention first conceived and designed by an employee, even though the employee does acquiesce in his employer's application and permits him to go to the expense and trouble of obtaining a patent. When it is considered that the right to the patent is vested in the inventor, who must himself take the steps requisite to the grant of the patent, and that it is made necessary to the grant of a patent to an assignee that an assignment should be *previously* recorded and that the inventor should take oath to the specification, it can scarcely be doubted that, where the real author of the invention is any other person than the patentee, it is necessary that some contract capable of operating as an assignment should precede the issuing of the patent.[3]

Such a case is to be distinguished from that of a workman who is employed and paid by one who has conceived the principle and plan of an invention, and who relies on the ingenuity of another to enable him to per-

[1] Agawam Co. v. Jordan, 7 Wall 602.
[2] Allen v. Rawson, 1 Man. G. & S. 551.
[3] *See* U. S. Rev. Stat. 4888; Hogg v. Emerson, 6 How. (U. S.) 437.

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fect the details and realize his conceptions. If under a plea of the general issue, evidence should be offered that the patentee was not, but that a workman was, the real inventor, could the action be maintained without showing a written assignment or a written contract that would operate as an assignment, even if the real inventor had acquiesced in the patentee's application.[1]

825. Instances of Invention between Employer and Employee.—A case in point was one where a husband was experimenting with turkeys' feathers, seeking to make them pliable and suitable for dusters; his wife suggested that he split them, which he did, and which was practically the solution of the whole difficulty; it was held that *he* was entitled to the patent. This case, however, has been criticised by Mr. Meriam in his book on Patentability of Inventions, p. 713, where he expresses the opinion that the wife was the true inventor, or perhaps the two were joint inventors.[2]

It has been held that an engineer may recover additional compensation for extra skill and labor bestowed in designing and making plans, if such extra work was not embraced in the original contract of employment nor in the duties thereby imposed. Thus when a contractor employs a person to superintend the construction of an engineering structure, and requests him to use certain ideas and means for its rapid and economical construction, which the employee had previously designed and planned even though at the contractor's request, the contractor is liable to the employee for the preparation of the plans and the extra time devoted during his employment to perfect and complete them.[3] *

It has been held that an employee, paid by salary or wages, who devises an improved method of doing his work, using the property or labor of his employer to put his invention into practical form, and assenting to the use of such improvements by his employer, cannot by taking a patent upon such invention recover a royalty or other compensation for such use. The fact that the employee made the invention out of working hours, and that he used neither the property of his employer, the government, nor the services of its employees in conceiving, developing, or perfecting the inventions, is immaterial, if the cost of preparing the patterns and working drawings of the machines, as well as the cost of constructing the machines that were made in putting the invention into practical use, was borne by the government, the work being also done under the immediate supervision of the employee.[4]

It is submitted that the rights of the employer in the improvements made amounts to a mere license, and that the inventor could enjoin any other party from making use of his inventions.

[1] Allen *v.* Rawson, 1 Man G. & S. 551.
[2] National Feather-Duster Co. *v.* Hibbard, 9 Fed. Rep. 558 [1881].
[3] Dull *v.* Bramhall, 49 Ill. 364 [1868].
[4] Gill *v.* United States, 16 Sup. Ct. Rep. 322.

* *See* Sec. 810, *supra*.

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CHAPTER XXX.

LIABILITY OF ENGINEER OR ARCHITECT AS A PROFESSIONAL MAN.

MUST BE COMPETENT, SKILLFUL, AND MUST EXERCISE DUE CARE.

826. Engineer's or Architect's Employment Similar to that of Other Professional Men.—An engineer's or architect's employment is one which requires care and skill, and a contract for his services includes a reasonable degree of skill and knowledge of his profession. He must practice under the same rules and principles that apply to attorneys and physicians and to other professional men. His liability must, of course, be determined by his contract of employment, which, as before stated, is seldom set forth with any degree of certainty. Notwithstanding, if a person holds himself out to the public as possessing professional, peculiar, or competent skill, or offers his services in a professional capacity, which from its nature implies the possession of such skill, he will be liable to those who employ or rely upon him in that capacity and upon that supposition for the exercise of such skill.[1] The fact that the services are gratuitous does not relieve him; he is liable to the same extent as though the services were rendered for a reward.[2]

827. Undertaking of a Person Who Offers His Services in a Professional Capacity.—Judge Cooley in his book on Torts gives the law as laid down by the New Hampshire courts, that a person who offers his services to the community generally or to an individual for employment in any professional capacity as a person of skill, contracts with his employer: (1) "That he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community and by those conversant with the employment as necessary and sufficient to qualify him to engage in such business";[3] (2) "that he will use reasonable and ordinary care and diligence in the exertion of his skill and the application of his knowledge to accomplish the purpose for which he is employed; he does not undertake for extraordinary care or extraordinary diligence any more than he does for uncommon skill";[4] (3) "in stipulating to exert their skill and apply their

[1] Harmer *v.* Cornelius, 5 C. B. (N. S.) 236 [1858].
[2] *Semble*, People *v.* Campbell, 82 N. Y. 247 [1880].
[3] Cooley on Torts 649.
[4] Leighton *v.* Sargent, 27 N. H. 460 [1853].

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diligence and care, the medical and other professional men contract to use their best judgment."[1]

This is believed to be an accurate statement of the implied promise. The practitioner must possess at least the average degree of learning and skill in his profession prevailing in the part of the country in which his services are offered to the public, and if he exercises that learning and skill with reasonable care and fidelity, he discharges his legal duty.[2]

828. That the Employee Possesses Skill is Implied from the Undertaking to Act.—The same rule applies to any other case requiring special or peculiar skill. If an agent undertakes, for a reward, the performance of such a duty, without possessing a reasonable and competent degree of skill, in which fact the principal is ignorant, he will be liable to the principal for the loss or injury resulting therefrom.[3] If, however, the principal had notice or knowledge of the agent's incapacity at the time of the employment, the agent will not be liable.[4] No warranty of skill will be implied when the principal knows that no such skill is possessed. If he sees fit to employ an unskilled person he must be content with unskilled work; and the same is true where the agent is employed out of the line of his employment. If the principal sees fit to employ an auctioneer to conduct his case in court, or a surveyor to do his engineering, he cannot complain of his attorney's want of skill, unless the latter expressly warranted that he possessed it.[5]

829. Absolute Accuracy or Success Not a Test of Skill or Capacity of a Man in His Professional Capacity.—Absolute correctness in performing engineering operations cannot be made the test of the amount of skill required.[6] Without a special contract, an architect or engineer does not warrant the perfection of his plans nor of the structure, nor its safety, nor its durability, any more than a physician or surgeon warrants a cure, or a lawyer guarantees the winning of a case.[7] One who undertakes to make a map of a certain locality must furnish a map of substantial accuracy, but in the absence of a guaranty, it need not, it seems, be absolutely accurate.[8]

In the absence of an express agreement a physician does not even insure

[1] Cooley on Torts 649; Leighton *v.* Sargent, 27 N. H. 460 [1853]; Peck *v.* Hutchinson (Iowa), 55 N. W. Rep. 511; Hewitt *v.* Eisenbart (Neb.), 55 N. W. Rep. 252.

[2] Wilson *v.* Brett, 11 M. & W. 113; Stanton *v.* Bell, 2 Hawks (N. C.) 145; Varnum *v.* Martin, 15 Pick. (Mass.) 440; Stimpson *v.* Sprague, 6 Greenl. (Me.) 470; Crooker *v.* Hutchinson, 1 Vt. 73; Holmes *v.* Peck, 1 R. I. 242; Grannis *v.* Branden, 5 Day (Conn.) 260; Howard *v.* Grover, 28 Me. 97; Ayers *v.* Russell, 50 Hun 283 [1888], where a patient was adjudged insane; *and see also* Lange *v.* Benedict, 73 N. Y. 35, *and cases cited.*

[3] Kirtland *v.* Montgomery, 1 Swan. (Tenn.) 452; McDonald *v.* Simpson, 4 Ark. 23; Wilson *v.* Brett, 11 M. & W. 113; Shipman *v.* State, 43 Wis. 381; Moneypenny *v.* Hartland, 1. Car. & P. 352; s. c., 2 C. & P. 378; Harmer *v.* Cornelius, 5 C. B. (N. S.) 236; McFarland *v.* McClees (Penn.) 5 Atl Rep. 50.

[4] Story on Bailment, § 435; Felt *v.* School District, 24 Vt. 297.

[5] Meechem on Agency, § 496.

[6] McCarthy *v.* Bauer, 3 Kan. 237.

[7] Shipman *v.* State, 43 Wis. 381; Leighton *v.* Sargent, 27 N. H. 460 [1853]; *and see* Small *v.* Howard, 128 Mass. 131 [1880].

[8] Munsell *v.* Baldwin, 56 Conn. 529 [1888].

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that he will benefit his patient.[1] He is not responsible for want of success, unless it is proved to result from want of ordinary skill, or want of ordinary care and attention; nor is he presumed to engage for extraordinary skill or for extraordinary diligence and care; nor is he responsible for errors of judgment or mere mistakes in matters of reasonable doubt and uncertainty.[2] He is required to exercise only that degree of skill which is ordinarily possessed by members of his profession.[3] He is charged with the consequences of mere errors only when such errors could not have arisen, except from want of reasonable skill and diligence.[4] To recover for services he need not prove their value to the patient, but only the ordinary and reasonable value of like services.[5] If a man assumes an unusually difficult or hazardous undertaking he is thereby required to exercise extraordinary care, diligence, and skill. It was so held of a contractor in the performance of his work, and should apply with equal propriety to a professional man, as an engineer, or an architect.[6]

830. Determination of Skill Possessed or Want of Skill.—How this reasonable degree of skill is to be determined is a question of importance. There are cases where its presence or absence is so palpable and unquestionable that the court may so declare as a matter of law. In cases where the facts are controverted, and the existence or non-existence of certain of them may fairly be presumed to affect the mind in any given exigency, the whole question of the existence of the facts, and the conclusions to be deduced from them is to be determined by the jury or other tribunal, by reference to all the circumstances of the case, including the subject-matter and other objects of the agency, and the known character, qualifications, and relations of the parties.[6] The party asserting the negligence of the architect, or his want of skill, must prove it.[7]

831. Engineer's or Architect's Undertaking when He Accepts or Solicits an Engagement.—A professional engineer or architect undertakes and agrees then to perform several conditions when he accepts an engagement, viz.: (1) That he has the requisite skill and knowledge; (2) that he will use reasonable care and diligence in the exercise of his skill and the application of his knowledge; (3) that he will use his best judgment; (4) and, there should be added, the obligation which rests upon every person occupying a position of trust, as that of an architect or engineer, *that he will be honest.* Liability will attach for a failure to perform any one of these conditions if any injury result from such neglect or failure, and these conditions need not be the sub-

[1] Styles *v.* Tyler, 64 Conn. 432.
[2] Leighton *v.* Sargent, 27 N. H. 460 [1853].
[3] Utley *v.* Burns, 70 Ill. 162 [1873]; *in his locality*, Whitesell *v.* Hill (Iowa), 66 N.W. Rep. 894; Chapman *v.* Walton, 10 Bing. 63.
[4] Leighton *v.* Sargent, 27 N. H. 460 [1853]; Shipman *v.* State, 43 Wis. 381.
[5] Mayor *v.* Bailey, 3 Denio 433; *semble*, Judge Cooley, in 49 Mich. 153.
[6] Pennsylvania R. R. Co. *v.* Ogier, 35 Pa. St. 60; Hubert *v.* Aitken, 15 Daly 237; Gill *v.* Midleton, 105 Mass. 477; Eddy *v.* Livingston, 35 Mo. 493; Grant *v.* Ludlow, 8 Ohio St. 1; Meechem on Agency, § 500; *but see* Vigeant *v.* Scully, 20 Ill. App. 437.
[7] Gillman *v.* Stevens, 54 How. Pr. (N. Y.) 207.

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ject of a special agreement. If a person solicits employment in a particular line of work, the act of solicitation is an assertion by the person seeking employment that he is competent to discharge all its ordinary duties. The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite skill and ability.[1] If he engages in a certain business, as surveying, engineering, or architecture, the law will imply that he assumes to possess the requisite knowledge and skill, and that he undertakes to use due and ordinary care in the performance of his duty; and for a failure in either of these respects, resulting in damages to the party to whom he owes the obligations, he is liable for the injury.[2]

832. Professional Man must Possess Ordinary Skill and Exercise Ordinary Care.—He must exercise the ordinary amount of skill possessed by those of the same profession. It is immaterial how high his standing may be, if he has the skill and does not apply it, he is guilty of neglect; if he does not have it, then he is liable for the want of it. Two questions may present themselves: First, whether the practitioner possesses the ordinary skill of persons acting as engineer and architects, and, secondly, if he did, whether he was negligent in the application of his skill. Whether he possesses greater skill, or has been successful in applying it in other cases is wholly immaterial. He cannot show that he was generally reputed to possess a high degree of skill in his profession, when the employer does not allege or offer to prove that he lacked ordinary skill.[3]

If he does not adopt the established mode of treatment, and adopts one that proves to be injurious, evidence of skill or reputation for skill is immaterial, except to show what the law presumes, viz., that he possesses the ordinary degree of skill. It is of no consequence how much skill he may possess, if he has demonstrated a want of it in the case in question. The failure to use skill may be negligence, but when the methods adopted are not in accordance with the established practice of his profession, but is positively bad and injurious, the case is not one of negligence, but one of want of skill.[4]

833 Negligence or Failure to Exercise Reasonable Care and Diligence.—A failure to make a visit or inspection as promised at a certain time will sustain a finding of negligence in a physician (or engineer).[5] In such case it seems that a physician is not liable for the unskillfulness of another physician which he has sent in his stead, the substitute being regarded as an independent contractor.[6] He is not responsible for evil consequences due to his

[1] Union Pac. Ry. Co. *v.* Estes (Kan.), 16 Pac. Rep. 131 [1888].

[2] Harmer *v.* Cornelius, 5 C. B. (N. S.) 236 [1858].

[3] Chase *v.* Heaney, 70 Ill. 268 [1863]; Springfield C. A. *v.* Smith, 32 Ill. 252 [1863].

[4] Carpenter *v.* Blake, 60 Barb. 490 [1871]; 50 N. Y. 696, *explained;* Degnan *v.* Ransom (Sup.), 31 N. Y. Supp. 966; Campbell *v.* Russell, 139 Mass. 278 [1885].

[5] Carpenter *v.* Blake, 60 Barb. 488 [1871]; *semble*, Lottman *v.* Barnett, 62 Mo. 159.

[6] Boon *v.* Reed (Sup.), 23 N. Y. Supp. 421.

[7] Myers *v.* Holborn (N. J.), 33 Atl. Rep. 889.

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failure to send his patient a specialist, as he had promised to do, for a disorder other than the one which he was called to treat.[1]

A case in point arose in a barber shop, where the barber, who shaved a postman, used inferior soap and caused eczema, and it was held no recovery could be had. The barber was responsible for want of care, knowledge, or skill, but if he had used ordinary care in choosing his materials [soap] there was no liability.[2]

834. Negligence on the Part of an Agent. — An architect or engineer as between himself and his employer is, in his usual capacity, an agent or servant. The rules for the liability of agents are thus laid down by Mr. Story in his book on Agency: "Whenever an agent violates his duties or obligations to his principal, whether it be by exceeding his authority or by positive misconduct, or by negligence or omission in the proper functions of his agency, or in any other manner, and any loss or damage thereby falls on his principal, he is responsible therefor, and bound to make full indemnity. The loss or damage need not be directly or immediately caused by the act which is done or omitted to be done. It will be sufficient if it be fairly attributable to it as a natural result or just consequence."[3] "It is the primary duty of an agent, whose authority is limited by instructions, to adhere faithfully to those instructions in all cases to which they ought properly to be applied. If he unnecessarily exceeds his commission, or risks the property of his principal, he thereby renders himself responsible to his principal for all losses and damages which are a natural consequence of his act, and it will constitute no defense for him that he intended the act to be a benefit to the principal."[4] Therefore, when the principal directed his agent to send him $300 in $50 or $100 bills and the agent sent the amount in bills of $5, $10, and $20, which never reached the principal, the agent was held to have deviated from his instructions and to be liable for the loss;[5] and again, where an agent was directed to send money by express, and instead he sent a check by mail, it was held he must answer to the principal for the amount of the check which proved to be worthless.[6]

Judge Cooley says: "Negligence is the failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand."[7]

835. Negligence or Want of Care and Skill of a Professional Man. — A man who undertakes as a lawyer to conduct an action at law without possessing skill is negligent; and one who undertakes to treat a sick or

[1] Jones *v.* Vroom (Colo.), 45 Pac. Rep. 234.
[2] 36 Alb. L. J. 179.
[3] Story on Agency, § 217, p. 259.
[4] Walker *v.* Walker, 5 Heiskell (Tenn.) 428.
[5] Story on Agency, § 192, n. 3.
[6] Walker *v.* Walker, 5 Heiskell (Tenn.) 428.
[7] 49 Mich. 153; Terre Haute *v.* Hudnutt, 112 Ind. 542; Harmer *v.* Cornelius, 5 C. B. (N. S.) 236 [1858]; Somerby *v.* Tappan, 1 Wright (Ohio) 570 [1834]; Anderson *v.* Whitaker (Ala.), 11 So. Rep. 919; Springfield C. A. *v.* Smith, 32 Ill. 252 [1863]; Downer *v.* Davis, 19 Pick. 72 [1883]; Sherman *v.* Bates, 15 Neb. 18.

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wounded man as a physician or surgeon without possessing a fair degree of professional knowledge is guilty of a breach of duty.[1] A mechanic who undertakes to build a house is liable in damages if through his ignorance he does his work unskillfully.[2]*

In keeping with the foregoing principles, it has been held that a cloak-maker was responsible for lack of skill and care in cutting garments from cloth;[3] and a dyer for damages arising from his unskillfulness;[4] that a workman who recommended himself as competent, and undertook to work as a master builder, could not recover for his services when his employer suffered loss through his unskillfulness or negligence;[5] that one who represents himself as a builder, and as having a long and large experience in building, may be dismissed for incompetency, and his employer may recover from him for any damage sustained by reason of his deceit.[6] If, however, a superintendent is employed by an owner who knows the habits and ability of the person so employed, his incapacity and lack of skill need not prevent him from recovering for his services.[7]

836. Skill Required of Specialists. — The same contracts are implied and the same rules of liability are laid down in case of physicians.[8] One case held that when a patient called upon a clairvoyant physician, it was held that he should be treated with the ordinary skill and knowledge of physicians in good standing, practicing in the vicinity, and that instructions to a jury that he should be treated with the ordinary skill and knowledge of the clairvoyant system were properly refused and in error.[9] So it has been held of attorneys.[10] The right of action against an examiner of titles for negligence exists only in favor of the party to the contract. It does not inure to the widow of the employer,[11] nor to an assignee of the mortgage negotiated on the faith of such abstract.[12]

837. Skill and Care Required of Engineers and Architects—Instances.† —Architects and engineers have been held equally liable upon their implied representation that they possess the requisite skill, and upon their implied contract to exercise it. They are responsible for defective and insufficient

[1] Terre Haute *v.* Hudnutt, 112 Ind. 542.
[2] 49 Mich. 153.
[3] Parish *v.* Gilmore, 33 Wis. 608 [1873].
[4] Woodrow *v.* Hawving (Ala.), 16 So. Rep. 720.
[5] Gaslin *v.* Hudson, 24 Vt. 140 [1852].
[6] Jones *v.* Vestry of Church, 19 Fed. Rep. 59 [1883].
[7] Story on Bailments, § 435; Felt *v.* School District, 24 Vt. 297 [1852]; Jones *v.* Vestry of Church, 19 Fed. Rep. 59 [1883]
[8] Carpenter *v.* Blake, 60 Barb. (N. Y.) 488 [1871]; Robinson *v.* Campbell, 47 Iowa 625 [1878]; Cooley's Torts 649.
[9] Nelson *v.* Harrington (Wis.), 40 N. W. Rep. 228 [1889]; Pelky *v.* Palmer (Mich.), 67 N. W. Rep. 561.
[10] Bridges *v.* Paige, 18 Cal. 640 [1859]; *Mismanagement*, Drais *v.* Hogan, 50 Cal. 121 [1875]; *Examiners of titles*. Rankin *v.* Schaeffer, 4 Mo. App. 108 [1877]; Roberts *v.* The Loan & Abstract Co., 63 Iowa 76 [1884]; Chase *v.* Heaney, 70 Ill. 268 [1873]; *and see* Thomas *v.* Carson (Neb.), 65 N. W. Rep. 899.
[11] Schade *v.* Gerner (Mo. Sup.), 34 S. W. Rep. 576.
[12] Talpey *v.* Wright (Ark.), 33 S. W. Rep. 1072.

* *See* Secs. 253–9, *supra*.

† *See* Sec. 858, *infra*.

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plans;[1] and have been held liable for defective work, such as foundations. They are bound not only to furnish proper plans, but to see that the structure is at least reasonably well constructed.[2] It has been held that a duty was required of them to cause foundations to be sufficiently deep and otherwise protected to prevent settling and the cracking of the walls of a building.[3] An architect has been held liable for not having made a chimney-flue of sufficient dimensions. The fact that the chimney proved inadequate for the purposes for which it was designed was held to entitle the owner to a deduction from what was due the architect for his services.[4] A builder has likewise been held liable for building a chimney that did not carry off the smoke.[5]

838. Owner may Offset His Damages against Sum Due Engineer or Architect for Services. — The damages sustained may support a counter claim against the architect, and be deducted from the amount due him under the contract of employment for drawing the plans and superintending the construction of the house; but such defects cannot be urged to defeat all recovery on the contract, the same having been performed according to its terms, unless the damage exceeds the amount to which the architect is entitled.[6]

An architect employed by the owner for reward to superintend the construction of a house is, as between himself and employer, answerable for either negligence or unskillfulness in the performance of his duty as architect. An architect sued for the balance due to him under an agreement with the owner for commission for his services in superintending the construction of a dwelling house; his claim was resisted, and damages also demanded upon a counter claim, on the ground that by his negligence and want of care and skill in the performance of the duty he had been retained to do and had undertaken to do, the contractor's work had been done in a defective and inferior manner as regards the construction of the building and the quality of the materials.[7] In an action for his services, the architect employed to superintend the erection of a building and see that the builder properly fulfilled the conditions of his contract cannot excuse his neglect in

[1] Niver *v.* Nash (Wash.), 35 Pac. Rep. 380; Erskine *v.* Johnson, 23 Neb. 265; Lake *v.* McElfatrick (Sup.), 19 N. Y. Supp. 494. *rev'sed in* 139 N. Y. 349; Pierson *v.* Tyndall (Tex.), 28 S. W. Rep. 232.

[2] Shipman *v.* State, 43 Wis. 381; Moneypenny *v.* Hartland, 1 C. & P. 352; Gilman *v.* Stevens, 54 How Pr. (N. Y.) 197; *and see* Petersen *v* Rawson, 34 N. Y. 370; Newman *v.* Fowler, 37 N. J. Law 89.

[3] Shreiner *v.* Miller, 67 Ia. 91 [1885]; *accord*, Newman *v.* Fowler, 8 Vroom (N. J.) 87.

[4] Hubert *v.* Aitkin (N. Y.), 15 Daly 237; [1889]; *and see semble*, Brown *v.* Burr (Pa.), 3 Atl. Rep. 828.

[5] Somerby *v.* Tappan, 1 Wright (Ohio) 570 [1834]; *and see* Krebs Mfg. Co. *v.* Brown (Ala.), 18 So. Rep. 659.

[6] Shreiner *v.* Miller, *supra;* Hubert *v.* Aitkin, 15 Daly 237 [1889]; 14 Amer. & Eng. Ency. Law 781.

[7] Badgley *v.* Dickinson, 18 Ontario App. 494 [1887]; *the following authorities were cited:* Shiells *v.* Blackburne 1 H. Bl. 158; Hamilton Provident & Loan Society *v.* Bell, 29 Gr. 203; Canada Landed Credit Co. *v.* Thompson, 8 A. R. 696; Harmer *v.* Cornelius, 5 C. B. (N. S.) 236; Turner *v.* Goulden, L. R. 9 C. P. 57; *Re* Hopper, L. R. 2 Q. B. 367; Ranger *v.* Great Western Ry. Co., 5 H. L. Cas. 72.

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the performance of his duties by showing that the owner was about the premises during the progress of the work and must have seen the imperfections set up in defense of the claim.[1]

In another case the architect sued for his fees and commission for drawing plans and specifications and superintending the erection of a house. He had given certificates to the builder greatly in excess of the proportion stipulated for by the contract, and the builder having subsequently failed, the owner was compelled to have the work done by others, at a higher price. It was held that he was entitled to deduct from the amount which would have been due to the architect the loss sustained by the latter's negligence in certifying for too much. The terms of the building contract are not stated in the report, though it is probable that they were the usual ones. The case was fully argued, but it does not appear to have been suggested that the plaintiff's position as arbitrator exempted him from responsibility for negligence under his own agreement with the defendant.[2]

The same law holds when an engineer is called upon in his professional capacity to make investigations, inspections, and estimates, and either from want of skill or negligence on his part, the report or estimate is incorrect; he is liable to his employer for unnecessary expense or injury occasioned.[3] An engineer who made estimates of a bridge for a contractor without informing himself (by boring or otherwise) of the nature of the soil for the foundations, which proved to be bad, should not be allowed to recover for his services in making plans, estimates, and specifications if his employer has been damaged by a greater amount than what the services were worth. It is no excuse that he relied upon information and advice of another engineer, who had made experiments and investigated the soil; that when he was employed to estimate the expense of works he was bound to ascertain for himself by experiments the character of the soil; if he relied upon the information of others, which turned out to be false or insufficient, he was liable for the consequences; and the opinion was expressed that an engineer should not estimate work at a price at which he would not contract for it, for if he does he deceives his employer.[4]

839. Architect or Engineer must Give Such Careful Superintendence and Inspection as to Prevent the Contractor from Making Material Omissions and Variations.—When a building is to be erected according to the plans and specifications and under the superintendence of an architect, and to his satisfaction, payment to be made on the production of his certificate, the architect must bestow such care and attention that the carpenters and masons will not make any material variation from the plans and specifica-

[1] Lotholz *v.* Fiedler, 59 Ill. App. 379.

[2] Irving *v.* Morrison, 27 C. P. (Upper Canada) 242; *but see* Vigeant *v.* Scully, 20 Ill. App 437; Shipman *v.* State, 43 Wis. 381, which held that monthly estimates need not be accurate.

[3] *Mistakes in making a survey.* McCarthy *v.* Bauer, 3 Kans. 237; *but see* Halsey *v.* Hobbs (Ky.), 32 S. W. Rep. 415.

[4] Moneypenny *v.* Hartland, 1 C. & P. 352 [1824], 2 C. & P. 378 [1826]; *and see* Whlity *v.* Lord Dillon, 2 F. & F. 67.

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tions which ordinary care and attention, when bestowed by a competent architect, would detect and prevent, or detect in time to be remedied.[1] If he fail to bestow such care and attention, and damages result to his employer, he loses his claim to compensation for so much, notwithstanding the owner may have a remedy against his contractor. This is true even though the owner may have settled with the contractor in full after the architect had refused to give his certificate, which the contract required as a condition precedent to payment for the work.[2]

When the contractor, by the terms of the contract, agreed to lay out his work himself, and made a mistake in the height of certain windows above the floors, and it has been proved that the architect has diligently superintended the progress of the work, it was held that such a defect was not chargable to the architect under the circumstances of the case.[3] This judgment was reversed in the superior court, and the case was carried to the court of appeals and the decision stated sustained, but with dissenting opinion. The ground of reversal was upon the question of fact whether or not "the architect was diligent in his attendance upon the building," and if he "had bestowed as much personal attention upon the building as was necessary, and that the variations mentioned were not caused by carelessness, negligence, or inattention on his part." Considerable stress was put upon the fact that the contractor was by the terms of his contract "to lay out his own work." The majority of the appellate court agreed with the referee, who had inquired into the case, that a mistake on the part of the builder by which windows in the front of the building were 2¾ inches higher than those in the rear, was not such an error as the architect was bound to discover in his regular superintendence of the progress of the work. However, the rule laid down, that an architect is responsible for his failure to bestow such care and attention as shall detect and prevent material and important variations from his plans and specifications, remains unquestioned.[4] It is the architect's duty to discover and guard against all such defects as can be prevented by the exercise of the ordinary skill and attention of a person of his profession and in his relation.[5] The nature and extent of an architect's duties has been held to be a matter of fact, and not of law, to be determined by the jury from the evidence of the case, guided by proper instructions from the court.[6]

On the same ground, building inspectors who are required by a city ordinance to inspect buildings in the course of their erection, and to see that

[1] Peterson *v.* Rawson, 2 Bosw. (N. Y.) 234 [1857].

[2] Peterson *v.* Rawson, *supra*; *accord*, Pierson *v.* Tyndall (Tex.), 28 S. W. Rep. 232.

[3] Peterson *v.* Rawson, *supra*.

[4] Peterson *v.* Rawson, 34 N. Y. 370; Shipman *v.* State, 43 Wis. 381, is another case that would have been in point but for the impertinent answers of the commissioners. It was lost on account of the pleadings.

[5] Gilman *v.* Stevens, 54 How. Pr. (N. Y.) 197 [1877].

[6] Vigeant *v.* Scully, 20 Bradw. 437.

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the buildings are erected as provided by the ordinance, has been held liable to persons damaged by the nonperformance of a duty imposed upon them to require the building to be properly constructed.[1]

840. Engineer and Contractor or Architect and Builder Jointly and Severally Liable.—If an architect is to oversee the erection of a house, and it is badly built, being defective in workmanship and materials in consequence of the joint neglect or want of skill of the architect and the contractor, an action will lie against either the architect alone or the contractor, or both, and the one sued may be held responsible for the entire detriment or injury occasioned. Nor can the one sued claim contribution from the other, so as to divide the loss equally between them, the principle of the law being that it will not undertake to adjust the burdens of misconduct. Nor will the fact that the owner has refused to pay a part of the money due to the contractor because the house was badly built bar such a suit against the architect. It is not a necessary consequence that the architect be responsible for every part of the neglect or misconduct of the contractor. He is responsible only when the negligence of the contractor was such as to have been discoverable by the exercise of reasonable care and skill on the part of the architect, and for the effects of negligence beyond this measure the contractor would be answerable alone.[2]

An architect is bound only to exercise reasonable care, and to use reasonable means of observation and detection in the supervision of the building, and when he appears to have done so, the mere fact that inferior material has been used by the contractor in some instances, and that the plumbing had been carelessly done, does not establish as a matter of law that he has not fully performed the contract.[3] He is bound to exercise, for the protection of the employer, a reasonable degree of skill and care, and will be liable for any loss or damage occasioned by a failure so to do; yet an agent, architect, or engineer cannot be held responsible for unforeseen and unexpected losses or damage out of the ordinary course of business or of natural events, and not to be guarded against by reasonable diligence and foresight.[4]

The law presumes that an architect or engineer has done his duty, and the burden of proving to the contrary is upon the employer or person who alleges the architect's unfitness or negligence.[5]

841. Owner Not Liable for Misconduct of His Architect.—In general, no action will lie against the owner for misconduct of his architect who has been employed merely to prepare plans and specifications and to procure a builder to erect the building. In a case where an architect had made an

[1] Merritt *v.* McNally (Mont.), 36 Pac. Rep. 44.

[2] Newman *v.* Fowler, 37 N. J. Law 89 (8 Vroom) [1874].

[3] Hubert *v.* Aitkin, 5 N. Y. Supp. 839.

[4] Johnson *v.* Martin, 11 La. Ann. 27; *semble* Gilman *v.* Stevens, 54 How. Pr. 127 [1877].

[5] Gaither *v.* Myrick, 9 Mo. 118; Lampley *v.* Scott, 24 Miss. 533; *accord*, Styles *v.* Tyler, 64 Conn 433.

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estimate of the work and materials necessary, and had represented to the builder that they were correct, upon the strength of which the builder made a bid and entered into a contract, it was held he could not recover against the owner for the extra cost, the estimate having been greatly below the actual cost, that the amount of his recovery was limited to the contract price. To entitle the contractor to recover more than the contract price three things must be made out: (1) that the architect was the owner's agent; (2) that the architect was guilty of fraud or misrepresentation; (3) that the owner knew of it and sanctioned it. If these facts were not shown, and there had been misconduct on the part of the architect, the contractor's remedy must be against *him*.[1]

A dictum apparently to the contrary was expressed in a later American case, in which an engineer regularly employed by a company in charge of the company's works, under whose direction and constant supervision the works were performed, was declared a special agent of the company (not the agent of the contractor) as to measurements and calculations made by him and his assistants, and if they were not correct, and extra and unnecessary work and expenditure should result, the loss ought not to fall on the contractor, but upon the company. The facts of the cases differ materially. In the latter case the contract expressly states the engineer to be the engineer of the company, although by its terms nothing could be done contrary to the stipulations of the contract without the written consent of the company; yet also by its terms the contractor was entitled to rely on the actual instructions and directions of the engineer within the scope of his authority.[2]* These powers would make him an agent; but the cases may be distinguished further in that in the former case the estimates were made and submitted to the contractor before the contract was made, and the builder accepted them on faith, while in the latter case the estimates were a part of the contract and necessary to its performance.

A contractor who performs extra work upon the assurance of an engineer of the company that it will be paid for or allowed by the company without the authority of the company or the requisite formality prescribed by his contract cannot recover from the company; he must look to the engineer for compensation, if he recovers at all, which will depend upon what personal liability the engineer assumed in ordering work.[3] There is, moreover, an element of negligence on the part of the builder in accepting the estimate of the architect, and in not making an estimate himself or having it made by the engineer of his own selection. Another case illustrates the element of negligence more strikingly, in which a builder had agreed to sign a contract to execute for a definite sum certain works described in some rough

[1] Scrivner *v.* Pask, L. R 1 Com. Pleas Cas. 715 [1866].

[2] Seymour *v.* Long Dock Co., 20 N. J. Eq. 396 [1869].

[3] Woodruff *v.* R & P. Ry. Co., 108 N. Y. 39 [1888].

* *See* Sec. 421, *supra*.

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sketches and verbal explanations of an architect. The architect subsequently sent to the builder a contract to perform, for the sum previously agreed upon, the works delineated and described in certain plans and specifications thereto annexed, and which differed materially from the works described in the rough sketches and verbal explanations on which the builder had made his tender. Having signed the contract and proceeded with the work, it was held that he was not entitled to any relief, that the mistake under which he had signed the contract was due to his own negligence.[1]

842. Engineer and Architect are Liable to their Employer and to Nobody Else.—An agent is liable to no one except his principal (his employer) for damage resulting from an omission or neglect of duty, or want of skill or attention, even though such omissions be with a malicious intent to injure a third person and have that effect.[2] An architect or builder of a public work even is answerable only to his employer for any want of care or skill in the execution thereof. He is not liable to third persons for accidents or injuries which may occur after the completion of such work.[3]*

A manufacturer is liable only to the purchaser of his goods for defective materials and for want of skill and care in the construction of the article sold. A third party injured may not sue the manufacturer[4] unless the negligence is imminently dangerous to others, as when a druggist makes a mistake in labeling or compounding a medicine.[5]

A distinction has been made in law between a tort to a third person due to the omission of some act or obligation to the public, and the commission of some act amounting to a tort. When he omits to do some duty or obligation which he owes to his employer and which is a tort to a third person, he is *not* liable; but when he commits a tort which is an injury to any one, there is no reason why he should not be liable for his acts, as any one else. Therefore, when an architect having the general charge and superintendence of work adopted a certain method and means of construction and repair, and the plan was a bad one, or the supports were inadequate, and a disaster resulted which was attributable to misfeasance or negligence in a work which the architect undertook, and in which he failed to exercise the care and skill which the law imposed upon him, he was held responsible not only to his employer, but to workmen who were injured in consequence.[6]

When the superintendent of a plantation neglected and deliberately refused to keep a drain open on the premises of his employer, by reason of which neglect and refusal [omission] a neighbor's lands were flooded and great

[1] Kimberly *v.* Dick, 41 L. J. Ch. 38 [1871].
[2] Feltus *v.* Swan, 62 Miss. 415 [1884]; Downer *v.* Davis, 19 Pick. 72.
[3] Mayor *v.* Cunliff, 2 N. Y. 165.
[4] Winterbottom *v.* Wright, 10 M. & W. 109; Losee *v.* Clute, 51 N. Y. 494.
[5] Thomas *v.* Winchester, 16 N. Y. 397.
[6] Lottman *v.* Barnett, 62 Mo. 159; *and see* Trustees *v.* Bradfield, 30 Ga. 1.

* *See* Secs. 275, 515, 553, *supra*.

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damage done, it was held that the superintendent was not liable to the neighbor, and no action could be maintained against him;[1] but when an engineer in the act of running a railway line through a village drove a stake in one of its streets, over which a citizen fell and broke his leg, it was held that the tort was the personal act of the engineer in running the line, and in law it was the act of the company by whose authority and in whose service the work was done, and that the citizen had his election to seek his remedy against one party or against both parties jointly.[2]

843. Liability for Acts of Assistants.—The question frequently arises as to who is liable for the acts of assistants, sub-agents, or servants. It is a question of who employs or has the control of the person who commits the act.* If an engineer selects an assistant on behalf of the company and with its authority, and as an employee of the company, the assistant is an employee of the company, even though he receives his instructions and is subject to the control of the engineer; but if the engineer has undertaken to do business or accomplish some task or undertaking for his employer, and he employs assistants on his own account to assist him in what he has undertaken, then the assistants are the representatives of the engineer only, and are responsible to him for their conduct, and the engineer is responsible to the company for the manner in which the work or business is done, whether by himself or his assistants. In the latter case, the engineer is in a position of an independent contractor, at liberty to perform the undertaking by the agencies of his own selection, and is responsible to his own principal for the due execution of the enterprise by the means he has selected.

The authority of the engineer to employ assistants on account of the company is frequently implied by the circumstances of the case, as when the chief engineer of a railroad company has been employed "to survey and establish" its line, it was held that he was authorized to employ the necessary subordinates and assistants on behalf of the company, and that they became by such act of hiring the servants of the company.[3]

It may be a matter of custom or precedence. Thus if the engineer's contract of service does not prohibit him from selecting or employing his assistants, he may show that it was the custom for engineers to hire their own assistants, in order to establish the relation of master and servant between the company and his subordinates.[4] †

[1] Feltus *v.* Swan, 62 Miss. 415 [1884].
[2] Grudger *v.* Western N. C. R. Co., 87 N. C. 525 [1832].
[3] New Orleans, etc., R. Co. *v.* Reese, 61 Miss. 581; Gillis *v.* Duluth, etc., R. Co. (Minn.), 25 N. W. Rep. 603.
[4] White *v.* San Antonio W. W. Co. (Tex.), 29 S. W. Rep. 252.

* *See* Secs. 653–669, *supra.*
† *See* Custom and Usage, Chap. XXI, Secs. 603–628, *supra.*

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CHAPTER XXXI.

LIABILITY OF ENGINEER OR ARCHITECT WHEN HIS FUNCTIONS ARE JUDICIAL OR DISCRETIONARY.

844. Not Liable for Many Acts or Omissions when His Functions Are Judicial.*—What has been said thus far in the preceding chapter of the liability of engineers or architects has been with reference to them strictly in their professional capacity or when employed as agents or servants. In other capacities and for many acts or omissions, they may be relieved entirely from responsibility.

There are certain conditions and circumstances under which the law and the public good require that a man should be relieved from the consequences of his acts, within certain limits, and it happens that two of these conditions belong particularly to engineering and architectural practice. Either conditions may exist when he is a servant or employed professionally, so that what has been said in the early part of this chapter must be tempered and modified when such conditions exist. One of the conditions and circumstances mentioned is that surrounding a judge, in his judicial capacity. To administer justice with freedom and security a judge must be free to discharge his functions after the dictates of his own conscience, unaffected by fears of prosecutions by persons who may have been dissatisfied with his decisions. This has always been the established law, that a judge was shielded from all liability in the exercise of his judicial duties so long as he exercised them honestly. The justice and necessity of such a rule cannot be questioned, but this immunity from action is not confined to those only who sit as judges in court. It extends for the protection of every officer who is called upon to exercise duties which are in their nature judicial, or which are to be performed according to the dictates of his judgment.[1] †

Such duties when exercised by other than judges of the courts have been termed *quasi-judicial* or discretionary, but if they be judicial in their nature, the officer may be said to act judicially and he is exempt from liability for his own acts. What are judicial powers has been defined as authority to hear and determine questions in which the rights of persons or property or the propriety of doing an act are the subject matters of an adjudication. Official actions which are the result of judgment or discretion are judicial acts.[2]

[1] Meechem's Public Officers, § 588.

[2] Grider *v.* Tally, 77 Ala. 422; Meechem's Public Officers, § 588; Edwards *v.* Ferguson, 73 Mo. 686 [1881], *many cases*

* *See* Secs. 179, 180, *supra*.

† *See* Secs. 172–180, 246–248, and 430–434, *supra*.

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The fact that the person often or usually acts ministerially is immaterial; he is equally exempt from liability in those cases in which he acts judicially.[1] The principle embraces the actions of arbitrators in their decisions upon the controversies submitted to them;[2] of jurors in their deliberations and verdicts; of aldermen in determining who shall be given a contract for work.[3]

845. Attempts have been Made to Discriminate between Judges in Court and Judicial Officers.—"An attempt," says Dillon in his Municipal Corporations, "has been made in some cases to make a distinction between those officers whose duties lie outside the domain of courts—the so-called *quasi-judicial* officers—and the judges of courts, to the effect that while the latter are exempt, the former may be made liable if their motives were corrupt or malicious."[4] This distinction however he believes not to be well founded. If the action is really judicial, the immunity which adheres to judicial action should be applied whether the officer sits upon the bench of a regular established court or not. If the action can be maintained by the allegation of improper motives, no litigant would fail to allege them, and the public officer might be constantly called upon to defend himself from actions brought with motives fully as malicious as those which are alleged to have inspired him. Public policy requires that all judicial action shall be exempt from question in private suits, and the best considered cases so declare the rule.[5] The reasons given apply with equal force to all judicial action, to arbitrators,[6] to *quasi-judicial* officers,[7] and to members of a common council who have willfully and corruptly refused to accept a bidder's proposal for doing certain public work. It is said "to be the well-settled rule of law that no public officer is responsible in a civil suit for a judicial determination, however erroneous or wrong it may be, or however malicious even the motive which produced it."[8] In another case the rule was said to extend to judges from the highest to the lowest; to jurors and to all public officers whatever name they bear in the exercise of judicial power.[9]

846. Engineer's or Architect's Judicial Status.—It is a universal custom in construction contracts to constitute the engineer or architect a referee, umpire or arbitrator for the determination of questions in dispute, or of matters of facts necessary to be determined in order to complete the works or to pay for them. In determining such questions the engineer or architect acts judicially. He is in much the same position as a judge, and should

cited by Attorneys for Apellants; *Board of Regents in erecting school buildings*, Wall v. Trumball, 16 Mich. 228; *Assessor*, Siebe v. San Francisco (Cal.), 46 Pac. Rep. 456.

[1] Meechem's Public Officers, § 588.

[2] Jones v. Brown, 54 Iowa 74; Pappa v. Rose, L. R. 7 C. P. 525.

[3] East River Gas L. Co. v. Donnelly, 25 Hun 614; *see* Dillon's Municipal Corp'ns.

[4] Hoggatt v. Bigley, 6 Humph. (Tenn.) 236; Baker v. State, 27 Ind. 485; Chickering v. Robinson, 3 Cush. 543; Gregory v. Brooks, 37 Conn. 365.

[5] Meechem's Public Officers, § 588; Bradley v. Fisher, 13 Wall. (U. S.) 335.

[6] Jones v. Brown, 54 Iowa 74.

[7] Chamberlain v. Clayton, 56 Iowa 331.

[8] East River Gas L. Co. v. Donnelly, 93 N. Y. 557; *semble*, Jones v. Brown, 54 Iowa 74.

[9] Weaver v. Devendorf, 3 Den. (N. Y.) 117; Turpen v. Booth, 56 Cal. 65.

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have the same protection. His judgment should be rendered free from the dictations of other judges; it should be a result of his own honest convictions and studied conclusions; he should act without fear of subsequent penalty, and should be exempt from annoying litigation before other tribunals on account of his decisions. Such is the established law. The engineer or architect need not be an arbitrator in the strictest sense, it is enough if he be in the position of an arbitrator; if he be a person by whose decisions two parties, having a difference, have agreed to be bound. If he undertakes to give a decision between two parties as to any matter, though he may not be an arbitrator in a strict sense of the word and is not bound to exercise all the judicial functions that an arbitrator would have to exercise, nevertheless he is not liable to an action for want of skill.[1]

In such cases it was found so difficult to discriminate between want of skill and negligence that it was later held that the engineer or architect, when acting judically as a referree, is not liable for want of care or negligence; that the parties having submitted questions for his determination and having agreed to be bound by his decisions, must abide by it.[2] It has been intimated by excellent authority that an arbitrator would not be liable to an action even for misconduct, and he sustained the proposition by the statement that he could find no case in which such an action had been brought.[3] Justice Brett, in regard to the referee being a professional man, said: "I apprehend that the principle of law which forbids an action for want of skill or care against an arbitrator or a *quasi*-arbitrator is just as applicable to a skilled or professional arbitrator as to one that is unskilled and unprofessional, and that the fact of its being his business makes no difference. This case must occur constantly. It must constantly happen that parties are dissatisfied with the decision of an arbitrator or *quasi*-arbitrator, and yet we find, notwithstanding the facility with which speculative actions for negligence are brought on the slenderest grounds, that there is no precedent for such an action for negligence, and I am not disposed to lay it down for the first time that such an action is maintainable."[4]

No action can be brought by the contractor at law, against the engineer for not certifying, where the contractor's remuneration has been made, by his contract, contingent upon his obtaining the engineer's certificate that the work bargained for has been executed, if the engineer was not a party to the contract, even though the engineer's refusal to certify has been the result of fraud or even of collusion with his employers. The proper course for the contractor to adopt is to proceed against both the engineer and company; whether in a court of equity or at law he must include the company who contracted with him.[5]

[1] Pappa *v.* Rose, L. R. 7 C. P. 32, 525.
[2] Tharsis S. & C. Co. *v.* Loftus, L. R. 8 C. P. 1 [1872].
[3] Watson on Arbitration [3d ed.], 112; Speck *v.* Phillips, 5 M. & W. 283.
[4] Tharsis Sulphur & Copper Co. *v.* Loftus, L. R. 8 C. P. Cas. 1 [1872]; Pappa *v.* Rose, L. R. 7 C. P 32, 525.
[5] Speck *v.* Phillips, 5 M. & W. 283.

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847. Engineer or Architect Must Not Act Fraudulently.—The misconduct must not amount to fraud or collusion with one of the parties against the interests of the other party. For a later English case is authority for the statement that an action of tort will lie by a contractor against an architect who fraudulently and in collusion with the owner refuses to certify that he is satisfied with the work done, whereby the contractor is unable to obtain payment for his work.[1] No such action had previously been allowed, but an action had been allowed for maliciously inducing another to break a contract,[2] and the action was permitted on that precedent. An opinion has also been expressed that an action would lie against parties who fraudulently prevented the architect from giving his certificate.[3] In the absence of fraud or collusion, the contractor has no remedy against the engineer or architect.[4]

In a comparatively recent case, in which a contractor brought suit against an architect, an allegation that the contractor had signed the contract under the belief and expectation, as the architect knew, that he, the architect, would use due care and skill in making his estimates, but that he did not use due care and skill in ascertaining the quantities, and neglected and refused to ascertain them in the manner provided, and had certified knowingly and negligently for a much less sum than was the net balance payable to the contractor, was held not a sufficient allegation of fraud to sustain the action. That the functions of the architect in ascertaining the amount due the contractor were not merely ministerial, but such as required the exercise of professional judgment, opinion and skill, and that he therefore occupied the position of arbitrator against whom the action would not lie, no fraud or collusion being charged.[5] A further allegation that the architect refused to reconsider the certificate and estimate and to allow the contractor to point out to him the errors in the bills of qantities, gave him no more rights to an action against the architect.[6] The judge said: "I do not intend to hold that to all intents and purposes the architect is an arbitrator, but I think the duties are analogous to those of an arbitrator. His duties are matters of judgment requiring the exercise of opinion and discretion; and it appears to me that the architect in this case is an arbitrator to this extent, that he is from beginning to end to keep an eye on the work, in order to exercise a judgment in the matter."[7] If fraud, collusion, or bad faith had been charged, the court expressed the opinion that an action could have been had against the architect; and it seems one could have been maintained if the architect's

[1] Ludbrook *v.* Barrett, 36 L. T. R 616 [1877], *see also* Byrne *v.* Sisters of Elizabeth, 16 Vroom 213; Chism *v.* Schipper, 51 N. J. Law 1 [1888], Atty's arguments.

[2] Lumleg *v.* Gye, 2 E. & B. 216.

[3] Milner *v.* Field, 5 Exch. 829; *accord*, Batterby *v.* Vyse, 2 H. & C. 42.

[4] Clarke *v.* Watson, 18 C. B. (N. S.) 278 [1865].

[5] Stevenson *v.* Watson, L. R. 4 C. P. D. 148 [1879].

[6] Stevenson *v.* Watson, *supra*.

[7] Pappa *v.* Rose, L. R. 7 C. P. 32, 525. The Tharsis Sulpur & Copper Co. *v.* Loftus, 42 L. J. Rep. (C. P.) 6, *and cases cited*.

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duties had been merely ministerial.[1] Russell, in his Law of Awards, lays the same law down, and says: "An action will not lie against an arbitrator for want of skill nor of negligence in making his award, nor for the like cause against an engineer or architect employed to determine matters as a *quasi*-arbitrator;[2] but an action will lie for fraudulently withholding his certificates, under which alone the contractor was entitled to payment, though no costs be prayed against the engineer."[3]

When an engineer is made a co-defendant with his company, he is not in general bound to give his reasons for making his award. An award may be a bar to such discovery in a suit in equity, but if fraud, corruption, or partiality be charged, they must support their plea by an answer showing themselves to be impartial and not corrupt, for it would be inequitable to leave them at liberty to cover their own misbehavior by their own award. So if fraud and collusion are imputed, and the certificates are declared insufficient, and certain items specified as evidence of the fraud, the engineer cannot protect himself, by his character of arbitrator, by denying the fraud in general; in his answer he should answer as to the particular items specified.[4]

848. Engineer is Liable to His Employer, when He may Not be Liable to Contractor.—A later Canadian case, after a careful review of the authorities, lays down the same law, but distinguishes between an action against the architect by a contractor and one by his employer. With the contractor there is no implied contract to exercise an ordinary degree of care and skill, while with the owner he is in the same position as any other professional or skilled person, and is responsible if he omits to perform his work with an ordinary and reasonable degree of skill and care, whether it be in the preparation of plans and specifications or in the doing of any other professional work for reward.[4] In delivering the opinion, his lordship, the justice, said: "I am prepared to rule that you cannot recover any damages from the architect for any loss you have sustained in having a poor building without fraud. The only question that you can show is that he has not done the work for which he charged; that is all. The case is exactly the same as one in which there is an arbitrator. I have always thought the position of an arbitrator a most absurd one. He has powers given to him that are given to no other being in the world, and it results in hard feeling and litigation; but the parties, if they choose to enter into such a contract, must abide by it. Having put him in the position of sole arbitrator, they have to show, if they want to hold him liable, not that he had exercised a very poor judgment, or that he is unskillful, but that he has been dishonest and fraudulent. If you can show me he did not do the work for which he has charged, he cannot recover. If you show he did it negligently, I am afraid you have

[1] Stevenson *v.* Watson, 48 L. J. (N. S.) 318 [1879].
[2] Russell Law of Awards 497.
[3] Russell Law of Awards 502.
[4] Badgley *v.* Dickson, 13 Ont. App. 494 [1887].

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no action. The present case is, in my opinion, broadly distinguished from those relied upon by the contractor in support of his claim. The principle affirmed or established by those cases is, that it is not consistent with public policy that an action should lie against an arbitrator or *quasi*-arbitrator, whose functions are of a judicial nature, for negligence or want of skill in the performance of his duty as such. The justice and expediency of such a rule is manifest. When two parties agree to be bound by the decision of a third party on a matter in dispute between them, or upon which a liability is to arise on the part of one of them, they take him, as it is said, for better or worse, and there is no implied obligation on his part to bring any particular amount of care and skill to the performance of the duty, if he undertakes it. All that is required of him is, that he shall act honestly and faithfully to the best of his judgment."

As a professional engineer, "he was bound to exercise ordinary care and skill, but when he became the person who was to determine a dispute, he was a person filling a position which brought him within an exception well known to the law of England, viz., that a person who is appointed, and is acting as an arbitrator to determine a matter in difference between two or more persons, does not enter into an implied promise to bring to the performance of the duty entrusted to him a due and reasonable amount of skill and knowledge. The question is one of implied undertaking, and the law says there is none such."[1]

The case of Stevenson *v.* Watson, 4 C. P. D. 148, was an action of a contractor, under a building contract, against the architect of the building for not using due care and skill in measuring quantities and ascertaining the amount to be paid by the owners, and for negligently certifying for a much less sum than the balance due to the plaintiff. The contract (to which the architect was not a party) substantially provided that the contractor and the owners should be bound to leave all questions or matters in dispute which might arise during the progress of the works to the architect, whose decisions would be final and binding upon all parties, and that the contractor would be paid upon the certificate of the architect. It was held that the architect was not liable, on the ground, as stated by Lord Coleridge, C. J., that it was within the authority of the cases which decide "that where the exercise of judgment or opinion on the part of the third person is necessary between two persons, such as a seller and buyer, and in the opinion of the seller that judgment has been exercised wrongly, or improperly, or negligently, or ignorantly, an action will not lie against the person in that position." It was pointed out that there was no direct contract between the contractor and the architect, and Justice Denman said that it appeared to him that the architect did not, by undertaking the office of arbitrator, undertake any duty amounting to more than that of honestly performing his functions.

[1] Brett, J., in Papa *v.* Rose, L. R. 7 C. P. 40.

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In all these cases and others which might be cited of a similar nature, it will be seen that the action was against the arbitrator, founded upon the breach of a supposed implied undertaking to perform his duty as such with an ordinary degree of care and skill, and the action failed because no such undertaking was implied by law, and there was no contract, expressed or implied, between the parties out of which any other duty or liability could arise. In this case the act and counter-claim are based upon a distinct contract, by which the architect was employed as a skilled professional person to perform certain services for reward, and he is not, in my opinion, absolved from the usual obligations attaching to such a contract between his employer and the builder. He may as arbitrator have determined between them as to the performance of that contract, in a manner which assumes that he has properly performed his own duties.[1]

849. Engineer or Architect may Owe a Double Duty to His Employer, viz., as an Arbitrator and as a Professional Man.—It is said to be an anomaly that while the plaintiff cannot be sued in his character of arbitrator or *quasi*-arbitrator, he may yet be liable for a loss occasioned by his want of skill or want of care in another form of action. The answer simply is that he has entered into a contract which makes him so. It would be an extraordinary result if we were obliged to hold that the contract which the owner makes with the architect for his own protection is neutralized by or inconsistent with a provision introduced into a different contract between the owner and the builder for the purpose of preventing or settling disputes as between themselves. As architect he is in the same position as any other professional or skilled person, and whether it be in the preparation of plans and specification, or the doing of any other professional work for reward, he is responsible if he omits to do it with an ordinary degree of care and skill.[2]

The case is authority for the statement that the owner does sacrifice other rights and privileges, and it is not clear why he might not sacrifice his contract rights as well. The architect is responsible to his owner for the defective and inferior manner in which the work had been done, and the inferior materials employed, which was the result of his negligence and want of care and skill in the performance of the duty which he had been retained to do, and which he had undertaken to do.[1]

The application of the rule seems to have been anticipated in a recent Illinois case, but it was distinctly decided that he was bound only to exercise so much care and skill as he had bound himself to bestow upon the work. That it was not a question to be left to the judgment and caprice of the jury to determine how much care and skill ought to be exer-

[1] Badgley *v.* Dickinson, 13 Ontario App. 494 [1887].

[2] Badgley *v.* Dickinson, 13 Ontario App. 494 [1887]. It is submitted that this may be true enough, but would he be responsible to his employer for want of skill or negligence in the performance of a judicial act, such as an estimate of work, by which both parties have agreed to be bound.

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cised by an architect in superintending a building, but that the jury should decide from the evidence introduced what were the duties undertaken by him in his contract of employment and required of him by the contract of construction.[1] It was therefore held wrong to instruct the jury that a duty was imposed upon the architect to make a special inspection of the work to satisfy himself that the particular work for which the certificate was asked had been done properly and according to the plans and specifications before issuing his certificate, no such specific duty being imposed by the terms of the contract.[2]

In a case where general averages were incurred in a ship's voyage, and it became necessary to adjust the losses, and it was agreed to refer the matter to an average adjuster, it was held that the adjuster was not liable for want of care in the performance of his duties, as he was acting in the capacity of an arbitrator between the parties.[3]

849A. Engineer's or Architect's Knowledge Is the Employer's Knowledge.—To be excused from negligence under Judge Cooley's definition there is another duty which an employee owes to his employer, and that is a due and proper notice of those conditions and things which precaution and vigilance would prompt him to give. Of all classes of employees there are few on whom this duty is more incumbent than upon the engineer and architect. It is one of the chief functions of his office.

It does not, it seems, matter how the engineer obtains his information, if he obtains his knowledge while acting for his employer, and afterwards, while acting further, fails to communicate it, the employer is as fully bound as if the communication had been made. The possession of knowledge, however acquired, when acting for the employer, is knowledge to the principal.[4] The agent's obligation is just as strong to disclose knowledge when derived in a transaction for his own benefit as in a transaction for the benefit of his employer. What binds the principal is the knowledge possessed by the agent when he comes to acts, and the principal is bound in such case whether it is communicated or not, and without regard to the mode in which he acquired it.[5] However, it is usually held that notice to an agent before the agency begun or after it is terminated will not affect the employer, and the notice should be within the scope of his agency or employment.[6]

"It is a neglect of duty in an employee not to give notice to the proper officers of his company of any fact affecting the performance of the duties of the company to the public occurring within the department under his supervision."[6] It was so held when a conductor failed to report the

[1] Vigeant *v.* Scully, 20 Bradwell (Ill. App.) 437 [1886].
[2] Tharsis S. & C. Co. *v.* Loftus, L. R. 8 C. P. Cas. 1 [1872]; *and see* 69 Iowa 541; 2 Dillon's Munic. Corp'ns, § 237, *note*.
[3] Union Bank *v.* Campbell, 4 Hun 394.
[4] Tagg *v* The Tenn. Nat'l Bk., 9 Heisk. 479 [1872].
[5] 1 Amer. & Eng. Ency. Law 421.
[6] Judge Cooley, in Davis *v.* Detroit & Mil. R. Co., 20 Mich. 105 [1870].

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incapacity of his engineman,[1] and when a track-repairer failed to advise his company of the condition of the road-bed. If he knows, or by the proper discharge of his duty should know, of certain defects, his knowledge, or that which he might have acquired, may be imputed to his employer, the railroad company.[2]

The same rules, without doubt, would hold with regard to an engineer's knowledge of the road and structures of a corporation. It has been held that a company was chargeable with knowledge and negligence for failing to repair, when one of its employees, whose duty it was to observe the condition of its bridges, or keep them in repair, had actual or even implied notice of defects therein, or when, by the exercise of reasonable diligence, the employee would have known of them.[3] So it has been held that a notice to an engineer appointed by a company to supervise and direct work of an alteration in the structure, supposed by the builders to be an improvement, is a notice to the company.[4]

To impute knowledge to a corporation such as would imply a ratification or an assent to the acts, admissions, or declarations of an engineer in its employ requires something more than the knowledge of the engineer that the work was being done or that it had been done by his orders.[5] *

The status of an engineer or architect and his relations to his company or employer when he is on the witness stand deserves a passing notice. The engineer or architect enjoys no such privileges in court as his brother attorneys or physicians, though he be employed in a professional capacity. Communications between him and his employer are not, it seems, privileged. He may be required to testify in regard to matters and communicatione between himself and his employer, and may be required to produce letters he has written to his employer, even though they be of a private and confidential nature.[6] The same is held of a banker[7] and of clerks and servants in general.[8] Nor is the architect or engineer regarded as a confidential agent of his employer so as to be liable for disclosures in regard to his employer's intentions to build,[9] or where he is to build,[10] if he has neither agreed nor been requested to keep such facts secret. It might be a ground for discharging him if he were a servant in the owner's regular employ.†

[1] Davis *v.* De'roit & Mill. R. Co., *supra.*
[2] Porter *v.* Han. & St. J. R. Co., 71 Mo. 66 [1879].
[3] 46 Iowa 109; *semble.* Indiana B. & W. Ry. Co. *v.* Adamson (Ind), 15 N. E. Rep. 5 [1888].
[4] Danville Bridge Co. *v.* Pomroy, 15 Pa. St. 151 [1850]; *and see* O'Brien *v* Mayor (N. Y. App.). 35 N. E. Rep 323; *and* Halsey *v.* Hobbs (Ky.), 32 S. W. Rep. 415.
[5] Many cases cited by counsel in Woodruff *v.* Rochester & P. R. Co., 108 N. Y. 39; Wolf *v.* Des Moines & Ft. D. R. Co., 64 Iowa 380; Renton *v.* Monnier. 77 Cal. 449.
[6] Page *v.* Ward, W. N. 1869–51.
[7] Lloyd *v.* Freshfield, 2 C. & P. 325.
[8] 19 Amer. & Eng. Ency. Law 155–156.
[9] Havens *v.* Donahue (Cal.), 43 Pac. Rep. 962.
[10] Green *v.* Brooks (Cal.), 22 Pac. Rep. 849; *but see* Wills *v.* Abbey, 27 Tex. 202

* *See* Sec. 555, *supra.*

† *See* Sec. 804, *supra.*

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CHAPTER XXXII.

LIABILITY OF ENGINEER OR ARCHITECT WHEN A PUBLIC OFFICER.

850. Position of a Public Officer.—Another capacity in which one is exempt from liability for the want of care (?) and skill is that of a public officer. What has been said of judicial or discretionary duties in general applies equally to public officers when their duties are judicial or discretionary, but there are further considerations in the case of public officers not present in the employment of the private individual. If public officers were liable for the want of skill and capacity, or were likely to be called upon to meet obligations which they assume on behalf of and for, the benefit of the public, it is safe to say that the full ranks of office-seekers would be greatly reduced. An officer who has been elected to his position, and who must undertake every task presented within the scope of his duties, and who has no choice as to whether he will act or decline to act, and who must serve whoever calls upon him, is in a different position from a servant or professional man who solicits employment, and can serve or not, as he will. The former is not subject to an action at law by an individual unless he has failed to perform some duty which he owes specially to that individual.*

The irresponsibility of public officers is often a source of aggravation to a private person, who may be required to stand outside of an iron partition and pay his taxes, or settle damages, while the county treasurer[1] or city engineer[2] within the cage smilingly tells him he is "very sorry, but that he can't help it, for mistakes will happen." No doubt better service would be had if public officers were responsible to individuals for their misconduct and incapacity in office, where such individual has suffered in consequence thereof; but public policy seems to require that they should be exempt from civil action, and that they be liable only through public prosecution.[3]

Officers acting in a judicial capacity are exempt from liability for their act.† They are not liable for injuries to persons when the act is purely ministerial if they act within their authority and it is done with due care. However, the general exemption of an officer from liability for negligence, want of skill or care, holds only when the officer is acting in a governmental or political capacity,[4] and there are many cases which deny the exemption alto-

[1] *See* State *v.* Harris, 89 Ind. 363.
[2] *See* McCarthy *v.* Bauer, 3 Kans. 237 [1865].
[3] 19 Amer. & Eng. Ency. Law 483.
[4] 19 Amer. & Eng. Ency. Law 484, *cases cited.*

* *See* Sec. 36, *supra.*

† *See* Secs. 844 to 849, *supra.*

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gether, except when the act complained of is a judicial act or one involving the discretion of the officer.[1]

851. County Officers and their Liability.—County officers are frequently held not liable in civil actions for injuries sustained and caused by the neglect, want of care, or lack of skill of the officer. It has been held that the judges and justices of a county court were not liable for injuries to a traveler from the falling of a bridge constituting a part of the public highway and under the control of the court, even if they were guilty of gross negligence in failing to repair the bridge or give proper notice of its condition.[2] In England no action lies against the county surveyor for damages resulting from the want of repair to a county bridge,[3] and a county treasurer in levying taxes has been held not liable for his failure to properly distribute the taxes between the real property of a mortgagor and the personal property of the mortgagee.[4]

852. County and Municipal Officers Compared.—The liability of a municipal officer as distinguished from that of a county officer, has been based upon the distinction between municipal corporation and county organizations, described as follows: "Counties are local subdivisions of a state, created by the sovereign power of the state of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to, by the people it embraces; the latter is superimposed by a sovereign and paramount authority. A municipal corporation proper is created mainly for the interest, advantage, and convenience of the special locality and its people. A county organization is created almost exclusively with a view to the policy of the state at large for purposes of political organization, and civil administration in matters of finance, of education, of provisions for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organizations have a direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy."[5] According to the principles of the common law, an action for indemnity cannot be maintained against the county court or against the judges individually for personal liability.

853. Liability of a Public Officer for the Acts of His Assistants.—Public officers of the government are not liable for acts of assistants and subordinates. Persons acting in the capacity of public agents, engaged in the public service and acting solely for the public benefit, although not strictly filling the character of officers or agents of the government, are also exempt from liability. Thus it has been held that overseers of highways intrusted

[1] 19 Amer. & Eng. Ency. Law 484.
[2] Wheatley v. Mercer, 9 Bush (Ky.), 704 [1873].
[3] M'Kinnon v. Penson, 8 Exch. 319 [1853]
[4] State v. Harris, 89 Ind. 363.
[5] Commissioners of Ham. Co. v. Mighels, 7 Ohio St. 109; Wheatley v. Mercer, 9 Bush (Ky.) 704.

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with the supervision of highways, discharging the duties gratuitously and being personally guilty of no negligence, are not responsible for an injury sustained by an individual through the negligence of workmen employed under them.[1] Trustees and commissioners acting gratuitously for the benefit of the public and intrusted with the conduct of public works are not liable for an injury occasioned by the negligence or unskillfulness of workmen and contractor necessarily employed by them in the execution of the work.[2]

In keeping with this policy, a surveyor of highways elected by the town as a public and not a municipal officer, has been held liable in damages for his wrongful acts only when they are wanton, malicious, or improper acts in making or repairing highways in his district;[3] a superintendent of streets in a city has been held liable for damages resulting from his negligence or unskillfulness in repairing a sewer, notwithstanding his official capacity;[4] and a building inspector for nonperformance of his duties, which required him to inspect the buildings and see that they were erected as provided by ordinance.[5] A clause in a contract for the construction of a sewer which guarantees the street superintendent and his sureties immunity from liability does not render the contract void, as it could not affect persons injured by the acts of the superintendent.[6]

854. State Employees Held Liable for Negligence.—A superintendent of repairs of the state canals has been held personally liable for damages sustained by an individual through the negligence of workman making repairs. To have an action for his failure to make repairs, it must be shown, however, that it was the superintendent's duty to make repairs, that he had funds to make them with, and that he was the officer to make them; but negligence and mismanagement alone need be shown for misconduct in making repairs.[7] The same has been held of an officer who was charged with the duty of keeping a street in repair.[8] So, too, when the state canal board let the repairs of the state canals by contract to a contractor invested with the powers of a non-judicial officer, the latter was held liable to one who sustained special damage from a neglect to do his duty and fix a lock-gate that was defective and out of repair.[9] So if a contractor has been employed by a board of health to do a particular act, and does it negligently, he may be held liable for the consequences.[10]

[1] Meechem on Public Officers, § 594; Holliday *v.* St. Leonard, 11 Com. B. (N. S.) 192.

[2] Hall *v.* Smith, 2 Bing. 156; Harris *v.* Baker, 4 Maule & S. 27; Sutton *v.* Clarke, 6 Taunt. 34; Holliday *v.* St. Leonard, *supra.*

[3] Rowe *v.* Addison, 34 N. H. 306, 312, and *cases cited.*

[4] Butter *v.* Ashworth (Cal.), 36 Pac. Rep. 922.

[5] Merritt *v.* McNally (Mont.), 36 Pac. Rep. 44.

[6] Rauer *v.* Lowe (Cal.), 107 Cal. 229, 40 Pac. Rep. 337 [1895].

[7] Shepherd *v.* Lincoln, 17 Wend. (N. Y.) 250.

[8] Bennett *v.* Whitney, 94 N. Y. 302; Rector *v.* Pierce, 3 Thomp. & C. (N. Y.) 416; *and a bridge,* People *v.* Adsit, 2 Hill (N. Y.) 619; *cases cited,* 19 Amer. & Eng. Ency. Law 495.

[9] Robinson *v.* Chamberlain, 34 N. Y. 389.

[10] Arthy *v.* Coleman, 8 E. & B. 1092 [1857].

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855. Public Officers and their Liability upon Contracts Executed for the State.—When a man acting in the capacity of a public officer makes contracts or signs obligations, there is a strong presumption of law that he does not intend to bind himself personally, nor that the contractor looks to him individually to be responsible. The government can act only through its officers and agents, and if they were held personally liable on the obligations they assume for the government, it might be difficult to secure the services of capable and responsible men. Public policy demands that they be exempt from liability.[1]

A public officer must disclose the fact that he acts as an officer or agent, for if it be not known to the other party he will find himself bound. What was said of agents under parties, in chapter on Contracts, will hold for public officers.[2]* Where officers of a public or municipal corporation acting officially enter into a contract under an innocent mistake of law, in which the other contracting party equally participates, with equal opportunities of knowledge, neither party at the time looking to personal liability, the officers are not personally liable; and the same rule applies to the officers of a public body which is not a corporation, such as a school district.[3]

If a person sign his own name to a note followed with "for the selectmen,"[4] he will be liable personally upon the obligation.[5]

An English case shows how strong this presumption is with some justices. It was held that a public officer is not responsible on any contract he makes in that capacity, and whenever his contract or agreement is connected with the subject fairly within the scope of his authority, it shall be intended to be made officially and in his public character, unless the contrary appears by an absolute and unqualified agreement to be personally liable. It was so held when a contractor had done extra work to preserve a public work not embraced in his contract, upon the assurance of a railway commissioner having charge of the work, that he would pay him; and afterwards on application to him for pay, he said he would see the engineer in charge and have the amount put in the estimates, to be paid for by the government; it was held that the commissioner was not personally liable, the amount never having been paid. The court was divided, one side holding that in case of contracts with public agents the presumption was that the public faith of the government was relied upon, and that the commissioner in ordering the work acted within the scope of his authority as a railway commissioner and did not incur any personal responsibility; and the other side that the contract was verbal, and it should have been left to a jury as to whether the commissioner personally contracted and agreed to pay for the work.[6]

[1] Meechem on Public Officers, § 803.
[2] Nichols *v.* Moody, 22 Barb. (N. Y.) 611.
[3] Humphrey *v.* Jones, 71 Mo. 62 [1879].
[4] Andover *v.* Grafton, 7 N. H. 298.
[5] Sumner *v.* Chandler, 2 Pugsley & B. (N. B.) 175.

* *See* Secs. 29–42, 54, 149, and 178–180, *supra*.

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As stated under the subject of Law of Contracts, if the work is done under a public statute or by virtue of a public act, and the contractor has equal means of knowledge as to the officer's authority, the officer acting in good faith will not be responsible if he has exceeded his authority. Individuals as well as courts are presumed to know and must ascertain the extent of the authority of public agents.[1]

856. Officer or Employee is Responsible for His False Representations.—If the engineer or architect make false or fraudulent representations in respect to matters or work upon which he is engaged, he will be liable to parties who are misled by such representations, and suffer in consequence thereof whether the engineer be acting in the capacity of a professional engineer[2] or a public officer.[3] It was so held when an architect ordered stones to complete a church the erection of which he was superintending. To get them, he represented or pretended that he was authorized to order the stones, and he was required to pay for them, notwithstanding the fact that they were used in the church edifice. Whether he made the representations with intent to deceive, or knowing he had no authority, or under the *bona fide* belief that he had authority, in any case he was held liable.[4]

857. Engineer's and Architect's Liability when Holding Office of Public Trust.—In the capacity of county surveyors, state or city engineers, city or government architects and commissioners, their relations to their work and to their patrons are different from those of a professional engineer or agent. When acting judicially or exercising discretionary powers, the public officer should be afforded the same protection as any other person, and he is so protected.[5] Even when his duties are purely ministerial, the requirements of a public officer are not so exacting as are those of a professional man. While the latter is responsible for an ordinary amount of skill and capacity for the work he solicits, the former, being elected or appointed, is not held upon an implied undertaking that he does possess a certain amount of skill and that he will exercise it. If it were required that such officer, elected or appointed, should be competent and that the incumbent should possess the requisite skill, many public offices would "go a begging, and the government service might be seriously crippled." Public policy *is said* to recommend that they should be exempt.

858. A City Engineer's Liability for Mistakes.—One of the most interesting and instructive cases reported in the books was one of a practical surveyor and city engineer who surveyed a lot for the owner at the latter's request, and made a mistake so that the owner's building was erected 2.2 feet upon his neighbor's lot. It was shown that the defendant was a surveyor and civil engineer, and that by ordinance of the city

[1] 19 Amer. & Eng Ency. Law 500–501.
[2] Randell *v.* Trimer, 18 C. B. 786 [1856].
[3] Culver *v.* Avery, 7 Wend. (N. Y.) 380; Newman *v.* Sylvester, 42 Ind. 106.
[4] Randell *v.* Trimen, 18 C. B. 786 [1856].
[5] East River Gas Light Co. *v.* Donnelly, 25 Hun 614; 19 Amer. & Eng. Ency. Law 484

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the city engineer was required to make surveys of lots within the city limits for private individuals when requested. The ordinance fixed the amount of fees he should receive from persons for whom the survey was made. The surveyor introduced evidence tending to show that he used due care and exercised a reasonable degree of skill in making the survey, and in fixing the boundaries to the lot, and that he believed the survey to be correct at the time it was made.

The case was tried before a jury, and the judge was requested but refused to charge: "That if the jury believed from the evidence that the defendant as city engineer or surveyor used due care and exercised a reasonable amount of skill in locating the boundary line to plaintiff's lot, the latter was not entitled to recover against the defendant surveyor, although the boundary lines were incorrectly established." The jury found for the plaintiff, and the surveyor excepted and moved for a new trial.

In delivering its opinion the higher court said: "An ordinance of the city required the city engineer to survey and mark the boundaries of lots within the city when called upon so to do by private individuals, and prescribed his fees therefor ($2.50). He had no discretion to refuse when called upon to perform such services, but this did not constitute him an agent of the city for that purpose. Neither the city not any private person was bound by the surveys he might make when acting at the request of an individual. His report would not be conclusive as to the boundaries of the lot. His certificate could not be given in evidence as settling the boundary. He did not do it for the city. When the corporation makes public improvements and he acts under its direction, then he is its agent, and his act is the act of the city, and if any person is damaged thereby, it, and not he, is liable."[1]

Whether he acted as city engineer or as a professional surveyor, he was not bound to the exercise of more than reasonable care and skill. If he did the work in the former capacity, he was liable for negligence or fraud only; if in the latter, then he would not only be liable for negligence or fraud, but for want of skill. In neither capacity does he insure the correctness of his work. The law exacts that of no man. A man exercising the functions of an office must discharge his duties carefully, diligently, and honesty, and if he does so, he will not be liable for damages; but when a man holds himself out to the public as a professional man he engages to do more. He thereby agrees with those who employ him to do the work, not only carefully, diligently, and honestly, but skillfully. Absolute correctness is not to be the test of the amount of skill the law requires. A reasonable amount of skill is all he is bound to bring to the discharge of his duties. Upon the trial of the case, the manner in which the survey was made was a material question, and it was a question to be determined by the jury. They were to deter-

[1] McCarthy *v.* Bauer, 3 Kans. 237 [1865]; *semble* Sievens *v.* San Francisco (Cal.), 47 Pac. Rep. 687.

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mine the amount of care and skill he *did* exercise in performing the work, but the court was to determine what amount would absolve him from liability in case he made a mistake. There having been testimony on both sides as to the manner in which the work was done, it was necessary that the jury be informed of the rule of the law in order to arrive at a correct conclusion.[1]

859. Commissioners of Public Works and Their Liability.—Commissioners appointed or employed for a special and single object, in whose employment there is no enduring element, nor designed to be, and whose duties, when completed (although years may be required for their performance), terminate the employment, are not officers in the sense in which that term is used in the constitution of the State of Illinois.[2] Clerks of commissioners intrusted with the conduct of public works, are not liable in damages for an injury occasioned by the negligence of artificers employed under their authority.[3] A public officer has been described as one who occupies an office that is parcel of the administration of the goverment, civil or military, or is itself created directly by the law-making power. The chief engineer of a *quasi* public corporation, like a railroad company, is not a public officer.[4]

859A. Situation of Engineer or Architect in Injunction and Mandamus Proceedings—Liability for Contempt.*—A trying position in which an engineer is sometimes placed, and one in which some knowledge of law will assist him, is where proceedings at law are threatened, or an injunction is sought, when by prompt and decisive action or by shrewd and skillful application of his legal knowledge, he may outwit the prosecutor and accomplish the object which others seek to prevent. A structure once erected, an equity judge will seldom decree its removal or destruction. Structures once erected, or whose definite location, character, and purposes have not been made known, or proposed works which cannot be proved nuisances, because their purpose and character is unknown, are comparatively safe from being enjoined. Under the protection of these and other safeguards the legal engineer is frequently able to defeat opposition to the plans of his employer.[5] However, the fact that an alleged unlawful structure was completed pending an action to enjoin its construction and maintenance does not affect the right of the court to enjoin its maintenance.[6]

Injunctions sometimes issue that may be evaded on technicalities, the recognition and prompt advantage of which may be taken by an engineer

[1] McCarthy *v.* Bauer, 3 Kans. 237 [1865]; *see also* Waller *v.* Dubuque, 69 Iowa 541; Alcorn *v.* Philadelphia, 44 Pa. St. 348 [1863]; 2 Dillon's Munic. Corp'ns, § 237 *note*, 859, 910, 978; Rowe *v.* Addison, 34 N. H. 306, 312; Norwell *v.* Wright, 3 Allen (Mass.) 166; Chitty's Contracts [9th Amer. ed.], p. 598; Story's Agency 328.

[2] Bunn *v.* The People, 45 Ill. 397 [1867]; The cases of Dickinson *v.* The People, etc., 17 Ill. 191; *and* The People *v.* Ridgley *et al.*, 21 Ill. 65, *cited and explained.*

[3] Hall *v.* Smith, 2 Bing. 156 [1824].

[4] Eliason *v.* Coleman, 86 N. C. 235 [1882].

[5] 10 Amer. & Eng. Ency. Law 833–7.

[6] Holmes *v.* Calhoun County (Iowa), 66 N. W. Rep. 145.

* For cases of injunctions, *see* Secs. 326, 438, 556, 689, 705–9, and 747, *supra*.

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versed in law. If the injunction cannot be defeated or avoided, then it becomes his duty to employ other tactics. Whether he assumes to negotiate, to fight, or to beg, he should know what attitude to take, on what ground to stand, and how to maintain it. These questions and duties may properly belong to other officials of the company to determine, but frequently the engineer is the only representative present upon the works. Large corporations whose works extend over a large territory, who offices and officers may be many hundred miles from the arena of trouble, cannot decide such difficulties with the clearness and understanding of the engineer. They have to learn from him the whole story, the condition of the work, the injury consequent to delay, and then decide on as little knowledge perhaps as he should possess, if qualified in the principles of engineering jurisprudence.

The subject of injunctions and mandamus is too deep to undertake to present even in the briefest manner, and the reader must be content with a passing notice of the subject. A fair understanding of what precedes, and some collateral reading upon the law of real estate, including adverse possession, easements, prescription, and the law of torts will put an engineer or architect in the possession of knowledge that will certainly greatly assist him in the preservation of his employer's property, and in carrying out his schemes and projects in spite of opposition and competition.

Notice of the injunction or order must be brought to the knowledge of the party enjoined.[1] It does not matter how the information was acquired, if he knows an injunction has issued and what it contains, he must answer for any violation of it as if the writ had been regularly served upon him by an officer of the court.[1] His knowledge must be positive and something more than heresay, and some cases hold that there must be a personal service of the order before one can be charged with contempt for not obeying it.[2] A copy of an injunction left at a person's residence[3] is a notice to him, and a service on a company at its office is one to its directors,[4] and a service on the mayor of a city has been held a notice to all the officers and members of the city government who know about it,[5] including agents and employees.[6] If officers of a company conceal themselves to avoid service, a service upon one who acts as their attorney will, it seems, be sufficient.[7] It has been held that a notice could be sent by telegraph, if it stated clearly and plainly what the party must refrain from doing.[8]

An injunction issued by a court of competent jurisdiction must be fairly and honestly obeyed it cannot be evaded by subterfuges or tricks.[9] If the

[1] 10 Amer. & Eng Ency. Law 1011.
[2] McCauley *v.* Palmer, 40 Hun (N. Y.) 38; Sanford *v.* Sanford, 40 Hun (N. Y.) 540.
[3] Morris *v.* Bradford, 19 Ga. 527.
[4] Brown *v.* Pac., etc., R. Co., 5 Blatchf. (U. S.) 525.
[5] People *v.* Sturtevant, 9 N. Y. 263.
[6] Wellesley *v.* Mornington, 11 Beav. 181.
[7] Golden Gate Min. Co. *v.* Yuba Co. Super. Ct., 65 Cal. 187.
[8] *In re* Bryant, 4 Ch. D. 98; Cape May, etc., R. Co. *v.* Johnson, 35 N. J. Eq 422.
[9] Wilcox Silv. P. Co. *v.* Schimmel 59 Mich. 524.

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court has not jurisdiction, then one who disobeys it will not be punished for contempt.[1] If the court has not authority in the sense of being in excess of its powers as limited by the constitution or defined by law, then one is not subject to contempt for disobeying it.[2] The erection of a bridge under a special act of Congress in disobedience to an injunction was held not a contempt.[3] Ignoring an injunction to prevent the infringment of a patent which is declared invalid on appeal has been held not contempt.[4] If the order of the court is merely erroneous, some courts hold it must be obeyed, or the one who violates it may be punished.[5]

If the law plainly requires a public officer to perform a duty and he is not exceeding or abusing his powers, but is acting fairly within them, he should discharge his duty as prescribed by law, although a court issues a writ restraining him from its performance.[6] *

The fact that a party who has disobeyed an order of the court did so under the belief or under advice that the order did not forbid the act, will not excuse him from being punished for contempt.[7] Advice of counsel that an injunction is void and may be disregarded will not protect one nor justify a disobedience of an order of the court; yet if the person in contempt has not been headstrong and disrespectful to the court, it will be a factor in mitigating the punishment or lessening the damages incurred.[8] Whether or not a person has committed contempt does not depend upon his intention, but upon the act done. Therefore laboring men, not familiar with legal proceedings, were guilty of a constructive contempt, who did not at once fully obey an injunction served in the absence of their employer, because they thought the writ meant they should appear and answer with the employer, though they desired to respect the order of the court and partly obeyed it.[9]

An interesting case is reported where a company was enjoined, at the suit of a water company, from allowing any deleterious substances to escape from its factory into the river. The company thereupon built a reservoir on the bank of the river, which it negligently and carelessly permitted to break and discharge its contents, it was held a contempt punishable by fine, or by fine and imprisonment, although there was no willful purpose to violate the injunction.[10] A man is not guilty of a constructive contempt

[1] 8 Amer. & Eng. Ency. Law 788.
[2] Keenan *v.* People, 58 Ill. App. 241.
[3] State of Penna. *v.* Wheeling Bdge. Co., 13 How. (U. S.) 518, 18 How. (U. S.) 421, *see other cases*, 10 Amer. & Eng. Ency. Law 842–8.
[4] Worden *v.* Searls, 121 U. S. 14.
[5] Keenan *v.* People, 58 Ill. App. 241; Walton *v.* Develing, 61 Ill. 201 [1871]; *but see In re* McCain (S. D.), 68 N. W. Rep. 163.
[6] Walton *v.* Develing, 61 Ill. 201 [1871]; *see* People *v.* Edson, 52 N. Y. Super. Ct. 53, mayor appointing superintendent of public works: *and* Bowery Nat. Bk. *v.* Mayor, 63 N. Y. 336 [1875].
[7] Atlantic Powder Co., 9 Fed. Rep. 316.
[8] 10 Amer. & Eng. Ency. Law 1011–1012.
[9] Shirk *v.* Cox (Ind. Sup.), 40 N. E. Rep. 750.
[10] Indianapolis Water Co. *v.* American Strawboard Co. (C. C.), 75 Fed. Rep. 972.

* *See* Sec. 438, *supra*.

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for disobeying an injuction prohibiting work on a structure when the order was served on a legal holiday, more than twelve miles away from the works, and that next day he drove to it and ordered his men to quit work, as required.[1]

A person guilty of contempt has the privilege of purging it. A declaration that no disobedience or disrespect was intended and, that he acted in good faith, usually is sufficient, if he can satisfy the court, under close questioning, of the truth of his declaration and sincerity of his intentions. Some courts hold that the offender cannot be fined or punished without giving him a chance to explain. A mere disavowal of an intentional wrong, without an expression of regret, will not purge it. If the person shows his inability to perform, it may purge the contempt, but not inability to pay a fine.[2] Public officers who have not obeyed an injunction, and have been convicted of contempt, which conviction stands unreversed, must, it seems, stand the expense of the contempt proceedings. City aldermen cannot make the city liable for such costs.[3]

[1] Shirk v. Cox (Ind. Sup.), 40 N. E. Rep. 750.

[2] 8 Amer. & Eng. Ency. Law 796–799.

[3] West v. Utica (Sup.), 24 N. Y. Supp. 1075.

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CHAPTER XXXIII.

COMPENSATION OF ENGINEERS AND ARCHITECTS.

PROTECTION OF LIEN AND OTHER LAWS—FREE PASSES.

860. Architect's or Engineer's Compensation.*—In connection with the employment of an engineer or architect the question naturally follows as to his compensation and the means he may have of securing it. His compensation will, of course, be the amount agreed upon in his contract of employment. It is usual to receive a percentage of the cost of the works or structure, varying from 3 per cent. on very large works to 15 per cent. on small jobs. Engineers are frequently employed on an annual salary of from $1000 to $10,000, depending upon the reputation of the engineer and the wealth of the corporation. If no price is agreed upon for services, then the employee may recover what his services are reasonably worth, which may be a question for a jury to determine from evidence produced as to what is usually charged for such services, or the amount it is the custom to receive on such works.

Resort to the courts is the proper means of enforcing payment for services, and the action may be of contract, for work, labor, and materials, or on a *quantum valebat*, or on the common counts.†

To entitle an architect to recover for plans which he is employed to make, he must show their delivery, or a tender of them.[1] An architect employed to prepare plans and specifications of a building, and furnish an estimate of the probable cost, is not, upon submitting the same, entitled to his fees unless the building can be erected at a cost reasonably approximating that stated in such estimate.[2]

861. Rights of Engineers and Architects to a Lien for Services.—Mechanics, laborers, and materialmen have received the special protection of the law in the shape of liens and "stockholders' liability acts" to secure payment for their services and materials. Much litigation has been engaged in to determine whether an engineer and architect were entited to protection under these acts. The courts have arrived at different decisions, depending frequently upon the judges' own notions of an architect's or engi-

[1] Wandelt *v.* Cohen (Com. Pl.), 36 N. Y. Supp. 811.

[2] Feltham *v.* Sharp (Ga.), 25 S. E. Rep. 619.

* *See* Sec. 896, *infra*.

† *See* Secs. 811–814, *supra*.

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neer's duties, and the character of his work, and at other times upon the interpretation and construction of the act. It is impossible to reconcile the cases and to make any general statement of the law that shall cover all cases. It is well established that the acts are not generally intended for the protection of so-called professional men. An act for the protection of employees, operators, and laborers of a company has been held not to include the superintendent and attorneys of the company,[1] nor can an agent, superintendent, general manager, or general manager and bookkeeper be embraced under any of the terms laborer, servant, or apprentice.[2]

It is usually held that a general enactment for the protection of laborers, mechanics, apprentices, and materialmen will not extend to an architect who simply prepares plans and specifications. The decisions are nearly, if not quite, uniform upon this point, except in those states whose statutes expressly name architects as being within its protection.[3] To same effect, a plan of a house, or a model, or a mold, or a piece of work, do not enter into a structure, and cannot be regarded as within a statute giving liens to materialmen and laborers; nor can a lien be had for tools used in the construction of the structure,[4] nor for labor not bestowed upon the works. Therefore, it was held that a cook, who cooked for workmen, even though the cooking was done upon the grounds as the work progressed, was not entitled to a lien on a water-works reservoir.[5] A contrary rule was held in Minnesota, where a cook was held entitled to a lien on logs, he having cooked in a camp for men actually and directly engaged in cutting, hauling, and banking logs, and the blacksmith who shoed horses, repaired, and sharpened tools for the men was also held entitled to a lien on the logs gotten out.[6] Other cases hold that to create a lien the materials must be used for erecting, altering, or repairing the structure, and must be so applied as to constitute a part of it.[7]

A mining engineer who has rendered professional services only is not entitled to a lien under the statute of Utah.[8]

862. If Architect or Engineer Supervises and Directs Work He may Have a Lien in Some States.—It is well settled in Pennsylvania, New York, New Jersey, Minnesota, and Illinois that when the architect directs and oversees the erection of a structure in accordance with the plans and specifications, then he does bring himself within the statute, and is entitled to its benefits for so much as the superintending is worth.[9]

[1] People *v.* Remington, 45 Hun 338 [1887]

[2] Small House *v.* Ky. & M. G. Co., 2 Mont. 443 [1876]; Gettv *v.* Ames (Oreg.), 48 Pac. Rep. 355 [1897]; People *v.* Remington, *supra, and cases cited;* McDonald *v.* Charlestown, etc , R. Co. (Tenn.), 24 S. W. Rep. 252; Addison *v.* Pac. Coast Mill. Co. (C. C.), 79 Fed. Rep. 459.

[3] Price *v.* Kirk, 90 Pa. St. 47 [1879]; Foushee *v.* Grigsley, 12 Bush 75 [1876].

[4] Ames *v.* Dyer, 41 Me. 397 [1856]; *semble*, Sweet & Carpenter *v.* James, 2 R. I. 270, 288; Phillips *v.* Wright, 5 Sandf. 342.

[5] McCormick *v.* Los Angeles Co., 40 Cal. 185.

[6] Breault *v.* Archambault (Minn.), 67 N. W. Rep. 348.

[7] Lambard *v.* Pike, 33 Me. 141.

[8] Mining Co *v.* Cullins, 104 U. S. 177.

[9] Bank *v.* Grice 35 Pa. St. 423; Railroad Co. *v.* Leufner, 84 Pa. St. 168; Hubert *v.* Aitken, 15 Daly (N. Y.) 237; Stryker *v.*

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It is submitted that this is no more than just, that even though a person be denominated an architect in the contract, if he performs the duties of a mechanic, foreman, inspector, or superintendent, he should be entitled to a lien the same as any other employee of the same class. If his duties require him not only to draw plans, but to explain, direct, and lay out the work, then he is performing functions that ordinarily belong to a master mechanic or boss carpenter. It is as essential to the proper construction of a building as is the purely mechanical part; it is simply of a higher order, and the fact that it requires some architectural skill should not impair his right to a lien.[1]

It may be noted, however, that the architect recovers as a mechanic and for mechanical work, and not for general professional duties as an architect. The architect cannot claim a lien for charges and fees alone; he must show work done, and the kind of work should be set forth distinctly. A mere naked architect who draws plans in anticipation of building, without being an operative mechanic, is not within an act that provides a lien for work "done for and about the erection of a building."[2] One who has for more than five years been a student of architecture and building construction, and has planned, worked on, and superintended the construction of buildings of different kinds, inspecting the work of construction in all its branches, has been held a "practical building mechanic," within a city charter prescribing the qualifications of inspectors of buildings.[3]

A similar rule was adopted with reference to a civil engineer, which was reversed by the same court that decided the Pennsylvania case, though at an earlier date. It was held that laborers and workmen were synonyms; that an engineer employed on construction was a workman; that his work was physical as well as mental. He makes diagrams and plans, ascertains and marks the lines, directs and superintends the work. The court further expressed the opinion that the engineer's labor was skilled work, and so was that of the bridge-builder, and whether he was the master who simply directed or the man who used the tools, that it could not be doubted that he was within the statute; that the object of the legislature was to give those whose skill and labor created the structure a special hold upon it for compensation.[4]

This decision was reversed and quite a contrary opinion rendered. The court said: "The words laborer or workman used in the act cannot ordinarily be understood to embrace persons engaged in a learned profession,

Cassidy, 76 N. Y. 50; Rim *v.* Electric P. Co (Sup.), 38 N. Y. Supp. 345; Mutual Benefit L. Ins. Co. *v.* Rowand, 26 N. J. Law 389; Knight *v.* Norris, 13 Minn. 473; Phillips on Mechanics' Liens (2d ed.), § 158; *and see* 1 Oreg. 169; 11 Nev. 304; *and* other cases cited, *infra*.

[1] Bank *v.* Gries, 35 Pa. St. 423 (11 Casey) [1860].

[2] Price *v.* Kirk, 90 Pa. St. 47 [1879]; Rush *v.* Able, 90 Pa. St. 153; Railroad Co. *v.* Leufner, 84 Pa. St. 168.

[3] People *v.* Board of Aldermen of Buffalo (Sup.), 42 N. Y. Supp. 545.

[4] Leufner *v.* Pa. & Del. Ry., 11 Phila. (Pa.) 548 [1876]; *accord*, Stryker *v.* Cassidy, 76 N. Y. 50; *semble*, Conant *v.* Van Schaick, 24 Barb. 99.

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but rather such as gain their livelihood by manual toil. When we speak of the working classes we certainly do not intend to include therein persons like civil engineers, the value of whose services rests rather in their scientific than their physical ability. We thereby intend those who are engaged, not in head, but in hand work, who depend upon such hand work for their living. In all the statutes of this kind the intent has been to protect a class of persons who are wholly dependent upon their manual toil for existence and who cannot protect themselves. It is true in one sense the engineer is a laborer, but so is the lawyer and doctor, the banker, and corporation officer, yet no statistician has ever been known to include them among the laboring classes. We cannot, therefore, even to save a meritorious claim, undertake to make a new classification which must necessarily defeat the statutory intent."[1] In line with the same argument it has been held that a professional chemist, employed to analyze metals, is not entitled to a preference under a statute giving preferences to laborers, even though the work could have been done by a laborer.[2]

These two decisions seem to have been made largely upon the personal (individual) ideas of the judges who rendered them. It is difficult to see how an engineer can better protect himself than a materialman or a laborer. And the appellate judge's knowledge of the duties of an assistant engineer on location of a railroad must have been very limited when he compares the manual labor of an engineer in the field with that of a lawyer, doctor, banker, and corporation officer. This case was an earlier decision than the one allowing an architect a lien for his services superintending, and, as all are Pennsylvania cases, it can hardly be said that the law is settled. It is impossible to distinguish between an architect superintending a house and an engineer in charge of construction of a bridge or other structure. The duties of both are the same. Both are required to explain the plans and drawings, to give lines and levels, lay out work, and give it general superintendence. It is, therefore, contended that if the engineer had only included in his claim for a lien his charges for superintendence and active field duties on the line, he should have been given the benefits of the statute.

This belief is further strengthened by two recent cases—one where an architect had been engaged to prepare the plans and superintend the erection of a building, which was abandoned when only partially completed, and the court held that the architect could not be allowed a lien upon the unconstructed part of the building, for it was the architect's services rendered during the construction of the building which brought him within the lien law;[3] and another case under a statute providing that when any person

[1] Penna. & Del. R. R. Co. *v.* Leufner, 84 Pa. St. 168 [1877]; Wentroth's Appeal, 1 Norris 469.

[2] Cullum *v.* Lickdale Iron Co. (Com. Pl.), 5 Pa. Dist. Rep. 622.

[3] Judge Cullen in Rim *v.* Electric Power Co. of S. I. (Sup.), 38 N. Y. Supp. 345 [1894], 3 App. Div. (N. Y.) 305 [1896].

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shall intrust to any mechanic, artisan, or tradesman materials to construct, alter, or repair any article of value, or any article of value to be altered or repaired, the mechanic, artisan, or tradesman shall have a lien on such articles, it was held that a civil engineer who makes field notes, maps, charts, and drawings for a corporation, while employed by it, on books and papers furnished by it for that purpose, is entitled to a lien thereon and the possession thereof until paid for his services.[1]

It is impossible to say with any certainty what the law is in any state, for the mechanic lien laws are subject to frequent changes; and the right to a mechanic's lien being purely statutory, the value of a decision is lessened by every change. In Illinois and New York an architect or engineer has been held entitled to a lien for superintending;[2] and an architect has been held entitled to the protection of the lien laws in Alabama,[3] for "work or labor upon a building or improvement on land;" in Ohio[4] and in Iowa for plans, specifications, and superintendence;[5] in New Jersey for plans and specifications and superintendence at 2½ per cent;[6] in Minnesota at 5 per cent;[7] also in California;[8] in Louisiana;[9] and in Canada.[10]

Maine, Missouri, Kentucky, and Tennessee have refused to recognize the right of architects to a lien under a law passed to protect mechanics and workmen, even though they do superintend the erection of the building.[11]

If the contract provide that all payments shall be made on certificates of the architects, who were employed to supervise the construction at 5 per cent. of its cost, and that final settlement should be made on their certificate, it was held that, as the last act required of the architect was to give a final certificate, his time for filing a lien for services did not begin to run until the performance of such act.[12]

The argument that by the constitution "all men are born free and independent, and have certain indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness," does not seem to have had much weight in an attack against lien laws which protect only a certain class of employees.[13]

[1] Amazon Irrigating Co. *v.* Briesen (Kans. App.), 41 Pac. Rep. 1116.

[2] Taylor *v.* Gilsdorf, 74 Ill. 359; Rim *v.* Electric P. Co., 3 App. Div. (N. Y.) 305 [1896]; Stryker *v.* Cassidy, 76 N. Y. 50; Gurney *v.* Atlantic, etc., R. Co., 58 N. Y. 358; Hubert *v.* Aitken, 15 Daly 237; *but see* Ericsson *v.* Brown, 38 Barb. 891.

[3] Hughes *v.* Forgerson, 96 Ala. 346.

[4] Phœnix Fur. Co. *v.* Hotel Co. (C. C.), 66 Fed. Rep. 683.

[5] Parsons *v.* Brown (Iowa), 66 N. W. Rep. 880.

[6] Mutual *v.* Rowand, 26 N. J. Eq. 389.

[7] Knight *v.* Norris, 13 Minn. 473; *and see* Wauganstein *v.* Jones (Minn.), 63 N. W. Rep. 717; Gardner *v.* Leck (Minn.), 54 N. W. Rep. 746.

[8] Pac. Mut. Life Ins. Co. *v.* Fisher (Cal.), 42 Pac. Rep. 154.

[9] Mulligan *v.* Mulligan, 18 La. Ann. 20.

[10] Arnoldi *v.* Gourin, 22 Grant's Ch. (Ont.) 314.

[11] Ames *v.* Dyer, 41 Me 397; Raeder *v.* Bensberg, 6 Mo. App. 445; Foushee *v.* Grigsby, 12 Bush 76; Thompson *v.* Baxter (Tenn.), 21 S. W. Rep. 668; *and see* Adler *v.* World's P. Exp. Co. (Ill.), 18 N. E. Rep. 809 [1888].

[12] Bentley *v.* Adams (Wis.), 66 N. W. Rep. 505.

[13] Hoffa *v.* Person, 1 Pa. Super. Ct. 357.

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863. Engineers' or Architects' Rights under the Stockholders' Liability Acts.—The law is in about the same condition with regard to the constitutional and statutory provisions making stockholders liable for the labor debts of the corporation. There are many cases that hold that an engineer is not a laborer within the meaning of these acts,[1] while others have maintained a contrary view.[2]

It is believed that the cases may generally be distinguished in the same way as under the lien acts. It is certain that to bring one's self within the meaning of the statute they must strictly answer the description employed. If the statute provides for the protection of the laborers and operatives of a company or their laborers, servants, and apprentices, the engineer must come well within the meaning of one of the classes mentioned. It was therefore held that a consulting engineer was not within the meaning of the act, the court adding that it was the policy of the legislature to protect those only who are the least able to protect themselves, and who earn their living by manual labor for a small compensation, and not by professional services.[4] This, it is submitted, is peculiar law, which determines the rights of a citizen by the question whether he lives from hand to mouth or whether he has a competence; and this it is believed cannot be made the test. The test should be whether the employee literally brings himself within the statute.

A consulting engineer,[3] a contractor,[4] and officers of the company, as the chief engineer and the assistant chief engineer;[5] persons who have a proper and distinctive appellation, such as officers and agents of the company, are not in the general acceptation of the term servants; but an engineer who is employed in the ordinary field operations of surveying, who is subject to the directions and control of the officers and sometimes the servants of the company, is a servant in its strictest or most ordinary sense. It was therefore held when a civil engineer sought to recover from a shareholder of a bankrupt company, for services of himself and a rodman in his employ, that he could recover. The judge said, "I can see no middle ground between restricting the statute to day-laborers and applying it to all persons employed in the service of the company who have not a different and distinctive appellation, such as officers and agents. The engineer, the master mechanic, the conductor, is as fully entitled to its benefits as the man who shovels gravel. The latter is no more nor less a servant of the company than either of the former."[6]

Ten years later it was decided that a person employed by a manufacturing corporation as its civil engineer and traveling agent at a fixed salary was

[1] Brockway *v.* Innes, 39 Mich 47 [1880]; Boutwell *v.* Townsend, 37 Barb. 205; Hovey *v.* Ten Broeck, 3 Roberts 316; Coffin *v.* Reynolds, 37 N. Y. 640; Aiken *v.* Wasson, 24 N. Y. 482; Fish *v.* Dodge, 38 Barb. 168; 17 Amer. L. Reg. 102.

[2] Conant *v* Van Schaick, 24 Barb. 87; Richardson *v.* Abendroth, 43 Barb. 162; Williamson *v.* Wadsworth, 49 Barb. 296; Bailey *v.* Banker, 3 Hill 188.

[3] Ericsson *v.* Brown, 38 Barb. 390.

[4] Aiken *v.* Wasson, 24 N. Y. 482.

[5] Brockway *v* Innes, 39 Mich. 47 [1880].

[6] Conant *v.* Van Schaick, 24 Barb. 87 [1857]; *see* Bailey *v.* Banker, 3 Hill 188.

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a servant of the corporation within the meaning of the act. This case was determined upon the legal meaning of the word servant used in the act as distinguished from an independent contractor or an officer. A servant in law is one who acts in subordination to others, under whose orders, directions, and control he acts for the time being. The one commands, the other obeys; the one is proprietor and superior, the other a mere helper. The party here was employed as engineer and traveling agent at a fixed salary, he was in every act relating to his employment in subjection to the company, bound as to the time and manner of performing his duties, to follow their directions and implicitly obey their commands. He was, in this capacity, their subordinate helper, and therefore a servant within the act.[1] On this line of reasoning it must follow that a contractor for construction of a structure would not be entitled to the protection of the statute, and the cases are to that effect.[2]

This latter view would seem to be sound law; and the only test that avoids complications and difficult discriminations. In conclusion, it may be said that a general statement that an architect or engineer is or is not entitled to a lien or to an action for services under the stockholders' liability act, have been such as will bring him within the act, and not by what name or cannot be made. It must depend in each case on whether the duties of the claimant title he has been designated.

864. Compensation for Injuries Received while Riding on a Free Pass.— Engineers and architects in the employ of railroad companies or of companies having intimate business relations with the railroads often travel free of charge, or, in the popular phraseology, "upon a pass." These passes usually have printed upon them a stipulation or reservation similar to the following: "The person or persons using this pass hereby voluntarily assumes all risk of accident, and expressly agrees that the company shall not be liable under any circumstances, whether by negligence of their agents or otherwise, and that in the use of this ticket he will not consider the company as a common carrier or liable to him as such." As explained under the subject of Contracts, such an agreement is against public policy and void when it requires the person accepting and using the free pass to release the carrier from injury to his person or property by reason of the negligence or willful wrongdoing of its employees.[3] * Nor can such a stipulation be made a condition in the engineer's contract of employment.[4] In spite of such releases, therefore, it has been held frequently that the party riding upon such pass could recover.[5]

[1] Williamson *v.* Wadsworth, 49 Barb. 294 [1867]; Richardson *v.* Abendroth, 43 Barb. 162.

[2] Aiken *v.* Wasson, 24 N. Y. 482 [1862]; Peck *v.* Miller, 39 Mich. 594 [1880].

[3] 9 Amer. & Eng. Ency. Law 913, 914.

[4] *Accord*, Lake Shore, etc., R. Co. *v.* Spangler, 44 Ohio St. 471 [1887]; Roesuer *v.* Herman, 3 Fed. Rep. 782; Kansas Pac. R. Co. *v.* Peavey, 29 Kan. 169; 2 Thomp. on Negce. 1025; 1 Cent. L. J. 485.

[5] Porter *v.* N. Y. L. Erie & W. R. Co.,

* *See* Chap. I, Sec. 86, *supra*.

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There are many decisions to the contrary, which maintain that an agreement to assume the risk of injuries to one's person from negligence of the company's servants, is valid if it is made *in consideration of the free carriage,*[1] or of employment,[2] and that if a passenger receives a free pass or ticket with an indorsement of such a contract upon it he will be bound by its terms.[3]

The fact that when injured he was riding in a parlor or sleeping car, on a ticket entitling him to that privilege and for which he paid cash, will not change the relation between him and the railroad company, nor make him a passenger for hire.[4]

865. Passes are Usually Given for Some Consideration.— The point is that passes are not, at the present day, granted gratuitously to people. When given to employees they are part of the consideration of employment, and an important one to an engineer, whose duties call him to all points of the road. If he were not provided with free transportation his salary or compensation would have to be increased materially. The same view has been taken of a cattleman riding upon a drover's pass, he being regarded as a paying passenger.[5] The same might be held of many others who ride upon free passes which are indorsed with cast-iron [glass] stipulations calculated to avoid all and every liability for injuries from whatever cause; such as attorneys, granted in part consideration of services; editors and other attachés of newspapers, in consideration of advertising and good will; emigrants and cattlemen, in consideration of getting their shipments; and, perhaps, even office-holders and politicians, in consideration of their looking after the interests of the carrier in Congress and the legislature—lobbying, log-rolling, and their general good will.

The giving of the pass alone is pretty good evidence that it was for a consideration. If otherwise, it is a breach of duty on the part of the officers of the company to so use property intrusted to their care as to cause loss to its stockholders. Gratuitous donation of a thing of value for nothing whatever in return, is not prudent management, to say the least.

866. Free Carriage, without any Agreement—Waiving Damages for Gross Negligence.—It is perfectly well settled that the mere fact that

59 Hun 177 [1891]: 9 Amer. & Eng. Ency. Law 914; Griffiths *v.* Dudley, 9 Q. B.D. 357; Louisville E. & St. L. Ry. *v.* Donnegan. 12 N. E. Rep. 153; *and see* 35 Alb. L. J. 404, 33 N. W. Rep. 603, 8 Fed. Rep. 782.

[1] Kinney *v.* Cent. R. R. of N. J., 34 N. J. Law 513; Perkins *v.* N. Y. Cent. R. Co., 24 N. Y. 196; Bissell *v.* N. Y. Cent. R. Co., 25 N. Y. 448; *and see* Jacobus *v.* St. Paul R. Co, 20 Minn. 110.

[2] Pittsburgh, etc., R. Co. *v.* Mahony (Ind. Sup.), 46 N. E. Rep. 917, but not so if the pass is not a gratuity; Doyle *v.* Fitchburg R. Co. (Mass.), 44 N. E. Rep. 611.

[3] Kinney *v.* Cent. R. R. of N. J., 34 N. J. Law 513; Welles *v.* New York Cent. R. R., 26 Barb. 641; *and see* The Indiana Cent. R. R. *v.* Mundy, 2 Ind. 48; Illinois Cent. R. R. *v.* Read, 37 Ill. 484; *see also* 9 Amer. & Eng. Ency. Law 913-914, *and cases collected;* Steamboat *v.* King, 16 How. (U. S.) 469; 1 Am. R. Cas. 191, *note;* and *an article* in 26 Am. Law Review 213 [1892].

[4] Ulrich *v.* N. Y. Cent. R. Co., 108 N. Y. 80 [1888].

[5] Penna. R. Co. *v.* Henderson, 51 Pa. St. 315; *contra,* Omaha & R. V. Ry. Co. *v.* Crow (Neb.), 66 N. W. Rep. 21; *other cases* 9 Amer. & Eng. Ency. Law 914.

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the passenger is carried gratuitously, or as a matter of courtesy, does not prevent him from recovering from the carrier for injuries received arising from gross negligence of the company's servants.[1] In the absence of express agreement exempting the carrier from liability, it will be liable for injuries resulting either from culpable negligence or want of skill; and the liability does not arise from any implied contract, but from the violation of a duty imposed by the circumstances.[2] A duty is imposed by law that anybody that causes damage to another is bound to repair it, and it is against the policy of the law to allow any one to escape that responsibility.[3]

An engineer does not, it seems, assume the risks of riding over a defective track, to and from his work, so as to relieve the company from liability for the negligence of its employees.[4] A person riding on a construction train on account of a pass issued by a subcontractor, over a section of a railroad in possession and under control of the contractor who is injured through the negligence of a locomotive engineman employed and controlled by the contractor, cannot recover from the railroad company whose road they are building.[5]

The constitution of the State of New York, Art. 13, § 5, provides that any public officer elected or appointed to a public office who shall travel on a free pass shall forfeit his office. A notary public has been held a public officer within the article; and it would, without doubt, apply to engineers and architects appointed or elected.[6] The article applies to public officers using passes received by them before such provision took effect.[6]

[1] Phila. & Reading R. Co. *v.* Derby, 1 Am. Law Reg. 397 [1852]; *other cases cited*, 9 Amer. & Eng. Ency. Law 914.

[2] Nolton *v.* Western R. Corp., 15 N. Y. 444 [1857].

[3] 9 Amer. & Eng Ency. Law 913.

[4] Melvy *v.* Chicago & N. W. Ry. Co. Ia.), 42 N. W. Rep. 563; *see also* Northern Pac. R. Co. *v.* Beaton (C. C. A.), 64 Fed. Rep. 563.

[5] Scarbrough *v.* Alabama Mid. Ry. Co. (Ala.), 10 So. Rep. 316.

[6] People *v.* Rathbone (N. Y. App.), 40 N. E. Rep. 395.

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CHAPTER XXXIV.

EMPLOYMENT OF AN ENGINEER OR ARCHITECT AS AN EXPERT WITNESS.

THE CONSULTATION, PREPARATION, AND BEHAVIOR IN COURT. REMUNERATION FOR HIS SERVICES.

867. Expert Witness—Treatment of the Subject.—The duties of an engineer in the capacity of an expert witness may be properly treated under four heads, to wit: (1) Consultation, which may include inquiries to make, information to seek, attitude to assume, and opinion to express; (2) preparation, including study of books, collection of materials, preparation of documents, diagrams, models, and calculations; (3) behavior in court, experts' conduct, duties, and rights upon the witness stand, and what devices he may resort to, to strengthen them and prove his convictions; (4) compensation, whether entitled to anything but regular witness fees.

THE CONSULTATION.

868. An Expert should Take Time to Investigate and Decide before Giving an Opinion.—When an engineer is approached by a party to a suit, to ascertain if certain facts are true or if certain results would naturally or necessarily follow certain conditions and circumstances, it is necessary that he should exercise the utmost caution and discretion in giving an opinion. Nothing could be more futile or impossible than to give an opinion without knowing all the facts and circumstances, and until time has been taken for consideration, computations, study, and reflection. An expert's first duty is to thoroughly acquaint himself with the whole story; he must learn all the facts and circumstances, visit the scene of controversy before he can attempt a conclusion. He should deny hasty answers and opinions, but reserve his decisions upon all important questions, and in the sober atmosphere of his study or office, secure from excitement and the coloring of partisan spirit, with his books for counsel and his computations for guides, determine questions upon which he may be asked to stake his reputation and professional experience and controvert the opinions of brother engineers. An engineer is as much justified in requesting time for the consideration of a problem in engineering as is a lawyer to look up a question of law, and unless he is perfectly satisfied (of

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the proper solution or of the reasonable outcome of a certain state of facts) that his answer is technically correct, he may simply ask time to consider it further before expressing an opinion or making a decision. Nothing can be more embarrassing than to have to modify or correct opinions hastily given, or more humiliating than to take the fire of a skillful attorney assisted by a learned engineer, in an effort to sustain an untrue statement or a mistake in a professional opinion.

He "stands with bare breast, his entire moral and professional career from childhood open to the shafts of the enemy. If he be proved—and sometimes, if he be accused of being—untruthful, ignorant, incompetent, over-pretentious, careless, or any one of a dozen undesirable things, over goes not only his present case, but his entire future as an unblemished and unvanquished expert."[1] "He stands, as did the gladiator, an Ishmaelite, his hand against every man, and every man's hand against him."[2] His opponents elevate themselves out of his shattered reputation, and glorify themselves out of the destruction of his fame. Such a mistake is worse than a blunder in actual work, for court proceedings are public property, published by individuals and the press. Though perhaps only a hasty, imprudent reply or remark, it becomes an advertised publication to his discredit, that is always on record, to come up before him at any time and every place, a bitter reminder of his carelessness.

869. Expert must have Regard for the Understanding and Knowledge of His Audience.—"Skilled witnesses are apt to make themselves appear less trustworthy by forgetting that their science has advanced them beyond the ideas of the people before whom they appear. Mr. Brunell, the eminent engineer, being asked once in cross examination, before a committee, how fast steam-carriages might be expected to travel on railroads, answered, 'Very possibly ten miles an hour,' upon which the learned counsel contemptuously bid him stand down, for he should ask him no more questions, and the weight of his former evidence was much impaired."[3]

The knowledge, observation, and experience of men vary in every imaginable degree; their notions of possibility and probability naturally differ to nearly the same extent. Facts that one man considers both possible and probable, another holds to be physically impossible. These notions are more or less accurate according to one's acquaintance with the laws of nature, of science and mathematics, for phenomena in apparent violation of nature's laws have been found on examination to be the regular consequences of other laws previously known. "The story of the king of Siam is often quoted to show this. This king believed everything the Dutch ambassador told him about Europe, until he mentioned that the water there in winter became so hard that men, horses, and even elephants could walk upon it, which that monarch at once pronounced a palpable falsehood."[4] The world,

[1] Amer. Engineer, Sept. 12, 1884.
[2] Engineering News, April 9, 1887.
[3] Gressley's Equity Evidence, 469.
[4] Locke Bk. 4 Ch. 14, § 5.

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and especially the ecclesiastical and legal elements of the world, have always been ready to demonstrate the physical impossibility of new ideas and undertakings. Columbus's theory of the shape of the earth, ocean travel by steam, electric telegraphing, high-speed travel in railway-carriages, and a thousand other new ideas and undertakings have been, each in its turn, pronounced impossible, and their probability a lie too gross to require confutation. Their promoters and believers have been the mockery of the world, "consigned to confinement as hopeless lunatics or sent to the stake as emissaries of the powers of darkness."

The skilled witness must confine himself to the understanding of his audience. His language, illustrations, and explanations should be commonplace and within the comprehension of the court and jury. In no instance should good common sense and experience be sacrificed to theoretical and technical views, unless opposed to the truth and to the witness's firmest convictions. He should go into court well armed and fortified with scientific facts and principle, his foundation should be based upon mathematical and scientific reasoning, and not upon popular notions and beliefs; but these facts and principles must be presented and delivered in a manner to be understood. However firm the convictions of an engineer may be within himself, they cannot have much weight as expert testimony unless they can be presented and are comprehensible to the average man; and this must be considered before engaging to prove these convictions in the capacity of an expert witness.[1]

870. Esteem in which Experts are Held by Bench and Bar.—An engineer should be made acquainted with the feelings with which he is regarded and the attitude assumed by the court toward him before he consents to appear before it, for or against a cause. He may then see the necessity o considering how clearly and positively he stands upon the question submitted, and how willing he may be to stake his professional standing and reputation upon it.

Courts have little confidence in expert testimony. The opinion of scientific witnesses is at the very bottom of the scale of importance of all the various classes and kinds of testimony. The following, from one of the best text-writers upon the subject of evidence, is but a fair example of the opinions of jurists frequently expressed. He says: "Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses. These gentlemen are usually required to speak not to facts, but to opinions, and when this is the case it is often quite surprising to see with what facility and to what an extent their views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed, willfully misrepresent what they think, but their judgments become so

[1] For an interesting case in point, *see* Salvin *v.* N. Brancepeth Coal Co., L. R. 9 Ch. App. 705 [1874].

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warped by regarding the subject in one point of view, that even when conscientiously disposed they are incapable of expressing a candid opinion. Being zealous partisans, their belief becomes synonymous with Faith as defined by the Apostles, and it too often is but 'the substance of things hoped for, the evidence of things not seen.' To adopt the language of Lord Campbell, 'Skilled witnesses come with such bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence.'"[1]

Although this strong language is not always indorsed, and expert evidence is often regarded as absolutely essential in the administration of justice, yet it is discouraged, and received only in cases of necessity, the universal feeling being that better results will generally be reached by taking the impartial, unbiased judgment of twelve jurors of common-sense and common experience than can be obtained by taking the opinions of experts, if not hired, at least friendly, and whose opinions cannot fail generally to be warped by a desire to promote the cause in which they are enlisted.[2]

Expert testimony based upon the testimony of a witness which is rejected by the jury is held of no value, and scientific opinions are regarded as worthless when pitted against facts. The theories of skilled men are not always reasonable, and are never to be regarded when they manifestly conflict with established facts.[3] However, it has been held error to authorize the jury to reject as untrue the statement of an expert merely because it is not confirmed by their own experience and observation.[4]

871. Biased and Warped Judgments are not Confined to Professors of Science.—However much is said, or may be said, of the differences of opinion among scientific witnesses and of their warped judgments, it may not be out of place to remind lawyers and jurists that no such diversity of opinion exists in science as is openly exhibited in law, both at the bar and on the bench. Mistakes are no more frequent among engineers, chemists, and physicians than they are in the legal profession. Questions of law are frequently as much matters of opinion as are questions of science, and it is submitted that there is no better evidence of the fallibility of human nature than that recorded in the reports of the courts. Every case that is reversed by a higher court is a record of a mistake in the court below, and every suit brought and defended must prove one of three things, viz.: (1) Either, one of the lawyers has misunderstood the facts of his case, or (2) he has lacked in ability and learning of his profession, or (3) (and with all due respect to the legal profession, and with a full appreciation of the tendencies and temptations, and with as much charity as the bench and bar have shown to men of science) he has possessed too much of "that

[1] Taylor's Law of Evidence (8th ed.) 79 and 573.
[2] Ferguson v. Hubbell, 97 N. Y. 507.
[3] Stone v. C. & M. R. Co. (Mich.), 13 N. E. Rep. 686 [1887-8].
[4] Louisville & N. R. Co. v. Malone (Ala.), 20 So. Rep. 33.

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facility of changing his views to correspond with the wishes and interests of his client, and his judgment has become so warped by regarding the case from one point of view"—the professional point, and not the point of law. Any one of these may apply to a skilled witness, but science and engineering are not based upon fictitious rules and principles, such as "every man is supposed to know the law," and "ignorance of the law is no excuse." If judges and lawyers make frequent mistakes, they should have some charity for scientists, whose field is immeasurably broader and infinitely deeper.

The courts and lawyers talk of bias, prejudice, ignorance, and narrow-mindedness of scientific men, but this is manifestly unjust. It is not evident that scientific men make many mistakes in their professional practice. These same lawyers and jurists do not hesitate to consult and employ physicians, chemists, and engineers when they are sick, poisoned, or have structures to erect.

872. Experts Are Champions of Their Clients as Well as Attorneys.—Experts have come to regard themselves as champions of a cause, "and their testimony is nothing more than a studied argument in favor of the side for which they have been called. So generally true is this that it would excite scarcely less surprise to find an expert called by one side testifying in favor of the other side, than to find the counsel upon either side arguing against their clients in favor of their antagonists."[1] In general this cannot be denied, and so long as experts are hired advocates they can be no more blamed for their partisan views expressed than can the counsel for his arguments against his convictions and better understanding; but to make a wholesale declaration that men of science, as a class, are wholly unreliable, that their opinions are biased, bought, and of no weight, is a libel upon several large professions of honorable men, who in their whole lifetimes may not see a witness-stand.

Courts lay it down as a duty to experts, in any case, to testify with impartiality, to give their honest, conscientious opinion and judgment; but as well might they charge the counsels to adhere strictly to their convictions of what the truth is or what the laws are. The opinions of an expert have become an expression which is a part of the counsel's case, and are to support the framework of his arguments. They are prompted by the solicitations and suggestions of the counsel, who is the loudest in berating and condemning the practices which he has created, an example of which is shown in the following libelous comparison, sometimes indulged in by disappointed members of the bar: as "positive, liar; comparative, thundering liar; superlative, scientific witness."[2]

873. Candid Opinions of Experts may be Had if They are Sought.—If courts want truths and candid opinions, let them acquire the power to summon skilled witnesses of acknowledged authority, on behalf of the court or

[1] 1 Redfield on Wills 108.

[2] 34 Alb. Law Journal 457.

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state. Let them seek the unbiased and free opinion of engineers and architects, and there will not be the controversy now experienced. Their compensation may be added to the costs of the suit, or be paid from the public treasury. Similar practices are in vogue in France and Germany, and must eventually be adopted in this country.[1]

It is submitted that men who care to maintain their name and reputation will hardly care to submit to the reflections, opinions, and directions of an attorney at law upon an engineering question, and it is quite clear that the best men of science, or of the scientific professions, will not act as experts under existing conditions and be subject to any dictation. "Who indeed is oftenest heard from as an expert in court? Not the man of lasting renown and of chief honor in his profession, but rather he of 'your modern kind of fame, the morning papers reeking with his name.'"[2]

874. It Is the Duty of Every Citizen to Promote Justice.—Where an engineer has given due consideration to his subject, and is perfectly satisfied he can assist justice and can prove the truth to court and jury, he should not refuse. It should be his duty to meet and overcome this reckless and biased practice of warping science to the uses of the wicked. Nature should blush at the uses made of her teachings. Is science a marketable commodity? can mathematics be employed to usurp the truth?[3] can the laws of nature be altered to suit the exigency of any and every case? But give an engineer his freedom upon the witness-stand, relieve him from the constant interruption and objections of opposing and friendly counsel, permit him to answer questions with proper explanations and limitations, and matters of science and mathematics will not remain long in doubt. Nothing is more annoying and aggravating to a conscientious witness than to be required to answer questions categorically, by *yes* or *no*—questions that have been studied and prepared by the attorney for the express purpose of demonstrating certain doubtful matters of science, or to prove true an untruth, and which may convey an impression directly contrary to the meaning which the witness would express.

From what has been said, the reader may conclude that the writer would warn engineers of parties to suits or their counsel who require certain facts to be established, or who introduce themselves with the question, "Can you or will you testify to this or that fact?" A much better impression may be had of those who inquires after the truth or actual results of certain conditions. The engineer's mission and his profession is simply the elucidation of truth.[4] If he is a man true to his profession, he will always give the results of his study, whether it bears for or against the side upon which he happens to be called. If he is not prepared to do that, or if the circumstances of the case prevent it, then he is in duty bound to decline, or

[1] Best on Ev'dce (Chamb. ed.) § 515.
[2] 17 Engineering News 234 [1887]; Rogers' Expert Testimony 56.
[3] Article in 3 Law Times 444 [1844].
[4] Wm. J. McAlpine, Transactions of Amer. Soc. C. E. 1870.

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refuse to render his services. This he may not always do; but if compelled to attend against his wishes, he cannot be said to be under any obligations to either party to the suit, and may exercise his honest judgment, without prejudice or criticism.

875. The Preparation—Expert Witness should not Only be Informed, but He must be Prepared to Convince Others.—Having consented to appear, and to testify to certain opinions, beliefs, or truths, it now becomes the office of the expert engineer to maintain his position, and to prove his conclusions beyond question. To accomplish this object he should spare no efforts. He must not only be fully informed himself of all the facts, circumstances, and agencies which have brought about the results claimed, but he must be prepared to intelligently present them to the court and jury; to show them the relative positions of objects that figure in the case, their purpose, condition, and effect. To what extent he should carry these preparations, and how far he may utilize them, will now be considered.

876. Use of Books by Expert Witness.—Books of science cannot in general be utilized in court as evidence to prove the declarations and opinions which they contain.[1] The reason for this rule is that the writer was not under oath when he wrote the opinions, and it may be that new circumstances have arisen, and new discoveries since come to light, under which his beliefs would be changed. Furthermore, the author is not in court, he cannot be cross-questioned, the jury have not the opportunity to observe the effect of questioning, or to judge of the character and disposition of the writer.

The force of these reasons does not exist when an expert adopts or ratifies the contents of a book, and offers the opinions of the author as his own. He is then presumed to have considered and weighed the assertions of the book, and to have reached a conclusion of his own, which he is giving in a court of justice, and under the solemnities of an oath. Experts are not, therefore, confined wholly to their personal knowledge and experience, but may give their opinion formed in part from reading of books. They may give the source of their opinions, and state that all writers, so far as they know, support the same opinion.[2] They cannot, however, be compelled to name the particular books, even when they state that their opinions are based upon standard works.[3] It has been held that an expert cannot read from his own published works to support his testimony, especially when the witness does not testify as to the truth of the extracts read.[4]

Testimony as to matters gained from the study of standard works, rather

[1] State *v.* Baldwin (Kan.), 12 Pac. Rep. 318; 7 Amer. & Eng. Ency. Law 513; Johnston *v.* Richmond & D. R. Co. (Ga.), 22 S. E. Rep. 694.

[2] State *v.* Baldwin (Kans.), 12 Pac. Rep. 318 [1887].

[3] Taylor on Evidence: People *v.* Vanderhoof (Mich.), 39 N. W. Rep. 28 [1888]; Marshall *v.* Brown (Mich.), 15 The Reptr. 693 [1883]; 32 Alb. Law Jour. 54.

[4] Mix *v.* Staples, 17 N. Y. Supp. 775, Justice O'Brien *dissenting*.

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than from actual practice, is admissible,[1] and the fact that the witness's knowledge of the subject is limited to what he has derived from books is not a valid objection to his testimony. He is entitled to speak from the accepted facts of the science.[2] Physicians have been permitted to give knowledge and opinions confessedly *not* from their own observation and experience, but merely from reading and studying medical authorities.[3] When books are referred to for authority, or to strengthen opinions, the opposition may bring the same books in evidence to test the witness's knowledge, or to contradict him or his opinion.[4]

Rules for the construction of cuts and embankments, given by an engineer, and though acknowledged to have been given solely from his recollections of what he had read in Mahan, Gillespie, Gilmore, and other authorities on engineering, were received as competent.[5] It is therefore submitted that though books themselves are not admissible to prove the declarations they contain, yet their statements and opinions may be brought to the court and jury through the mouths of skilled witnesses. The expert engineer should, to that end, seek, collect, and prepare the opinions of learned authors to sustain his position and carry conviction to the minds of court and jury. If contents of books are to be introduced, they must be ushered in through the familiar acquaintance, and by the quotations and references, of skilled witnesses.

Books cannot be read to a witness and the questions plied to prove their contents.[6] Their contents must have been previously known. Though they cannot be read to a witness for the purpose of showing facts set forth, yet questions may be read from a book on technical science for the purpose of making the questions more intelligible.[7] The use of a standard authority on the subject of inquiry has been permitted to shape questions put to an expert, and he has been required to examine and read from the book for the purpose of testing his knowledge of the subject.[8]

Books may also be read to a jury in the argument by counsel, not to prove matters of opinion, or of fact, but to support arguments presented. Counsel should not be allowed to read to a jury from a *legal* text-book,[9] and permission to read *the law* to the jury is within the discretion of the trial judge.[10] Current schedules of prices in trade, calendars, life-tables, and so forth, have been admitted, and it is submitted that in the same cate-

[1] Fordyce *v.* Moore (Tex.), 22 S. W. Rep. 235; Hardiman *v.* Brown (Mass.), 39 N. E. Rep. 192.

[2] Marshall *v.* Brown (Mich.), 12 The Reptr. 693 [1883], and 32 Albany Law Journal 54.

[3] Rogers' Expert Testimony 28; City of Jackson *v.* Boone (Ga.), 20 S. E. Rep. 46.

[4] Marshall *v.* Brown (Mich.) [1883], *supra;* People *v.* Vanderhoof (Mich.), *supra;* Taylor on Evidence.

[5] Central R. R. Co. *v.* Mitchel, 63 Ga. 173.

[6] 50 Mich. 148 and 296 and 629.

[7] Thompkins *v.* West, 56 Conn. 478.

[8] Byers *v.* Nashville, C. & St. L. Ry. Co. (Tenn.), 20 S. W. Rep. 128.

[9] Yarbrough *v.* State (Ala.), 16 So. Rep. 758.

[10] Forbes *v.* State (Tex.), 29 S. W. Rep. 784.

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gory can be classed standard tables of sines, cosines, logarithms, multiplication tables, etc.[1]

In general, it may be stated that books will not be admitted as evidence of the facts they contain. Their statements cannot be used directly to prove the size or shape of a member of a structure, nor what is or is not a proper construction of a piece of work. If the engineer wishes to back up his assertions by the authority of books he must prepare himself upon the subject, and give others' opinions as his own. Questions as to materials, what is "a good and workmanlike manner," what is "hard-pan," cannot be proven by reading directly from a book.[2]

Whatever beliefs or opinions the engineer may wish to advance must be his own. He may have acquired them from reading or the study of books, he may mention books or cite authority, but he cannot read the books in court, nor literally quote the author's statements. He must express his own indvidual opinion and may give in support of his conclusions the fact that others have arrived at the same decision, or that other engineers hold to the same views.[3]

877. Witness may Use a Book, Chart, or Prepared Memoranda to Refresh His Memory.—What has been said need not convey the idea that the engineer's preparation requires him to memorize whole pages of printed matter, for he may take his books, maps, and notes into court and on to the witness-stand with him and refer to them, to refresh his memory, upon questions in doubt. He may draw up a written narrative, make written memoranda of a subject or transaction, and use it while under examination as a script to refresh his memory.[4] If he is able to testify (1) that the statements contained in such memoranda are accurate in his present recollection, or (2) that from his present recollection the memoranda were accurate when made, he may refresh his memory by examination of memoranda regarding dates, figures, results of calculation, minutes of testimony, and the like, whether such memoranda has been made by the party himself or by any other person. An engineer may make use of a map made by him, with figures representing lengths of lines, areas, and quantities, and testify from it. Whether such maps and calculations, so employed, become evidence of themselves, is in dispute. If positively testified to by the witness, they are admissible; if sworn to, that the figures well and truly represent the true distances, quantities, and areas, they may become evidence. In the discretion of the court they may be allowed to go to the jury, and be taken out with them when they retire as a memoranda of the distances, areas, and quantities as sworn to by the engineer.[5] As a witness he cannot read from his memoranda, even though

[1] Morris *v.* Columbian Dock Co. (Md.), 25 Atl. Rep. 417; Richmond & D. R. Co. *v.* Hisong (Ala.), 13 So. Rep. 209.

[2] Lawson's Expert and Opinion Evdce. 187–192. For an article on Books of Science as Evidence, in which many cases are cited, *see* Central Law Journal, vol. 5, p. 489, and vol. 15, p. 88.

[3] Lawson's Exp. & Opin. Evdce. 169 *et seq.*

[4] Best on Evidence (Chamb. ed.) 227.

[5] Neff *v.* Cincinnati, 32 Ohio St. 215;

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made by himself; he can refresh his memory by looking at the writing, but he must testify from his recollections.[1] Even though the memoranda is not admissible as evidence, he may use it, if he knows it to have been correct when it was made, to refresh his memory, after which he must testify to the original facts.[2] The memoranda is not of itself competent evidence to prove the facts stated.[3] In general, such memoranda employed by a witness to refresh his memory must be verified as correct[4] before it can itself become evidence.[5] If an engineer swear that the figures upon a plat representing lengths of lines, areas, and quantities are correct and represent the true distances, areas, and quantities, it may become evidence, and the trial court may in its discretion allow the jury to take the plat with them as a memoranda when they retire.[6] If, however, the witness has no recollection of the facts contained in a memorandum independent thereof, yet testifies thereto in full, it is not error for the trial court to refuse to admit the memorandum itself as evidence.[7]

A witness may refresh his recollection by reference to any memoranda relating to the subject-matter to which his attention is directed on the stand, whether such memoranda is competent evidence or not, and then he may testify, if he has then any independent recollection of such subject-matter.[8] This is not, however, a general rule.[9]

Memoranda of facts that occurred, must have been made at the time or recently after the event. If made weeks or months thereafter, they cannot be used to refresh the memory, nor can they if made at the recommendation of one of the parties.[10] Memoranda made by a workman from day to day, in the ordinary course of business, may be used to show the days his employer worked on a certain building.[11] An architect's certificate has been admitted some time after the facts of the case, but from measurements and notes made contemporaneously with the work.[12] In general, a witness must swear to the facts contained, if he will give testimony of things in a document which he is using to refresh his memory.[13]

Cunningham *v.* Massena, etc., R. Co. (Sup.), 18 N. Y. Supp. 600.

[1] Wilde *v.* Hexter, 50 Barbour 448.

[2] Bonnette *v.* Gladtfeldt, 11 N. E. Rep. 250 (Ills.) 1887; Meade *v.* White (Pa.), 8 Atl. Rep. 912 [1887]

[3] Baum *v.* Reay (Cal.), 29 Pac. Rep. 117.

[4] Elder *v.* Reilly (Minn.), 51 N. W. Rep. 226; City of Birmingham *v.* McPoland (Ala.), 11 So. Rep. 427.

[5] Klepsch *v.* Donald (Wash.), 35 Pac. Rep. 621.

[6] Neff *v.* Cincinnati, 32 Ohio St. 215.

[7] Butler *v.* Chicago, B. & Q. R. Co. (Iowa), 54 N. W. Rep. 208.

[8] Denver & R. G. R. R. *v.* Wilson (Colo. App.), 36 Pac. Rep 67; McNeely *v.* Duff (Kan.), 31 Pac. Rep. 1061.

[9] King *v.* Inhabitants, 2 A. & E. 210; *and see* Commonwealth *v.* Burke, 114 Mass. 261; Merril *v.* The Ithaca & O. R. Co., 16 Wend. 586; Bissell *v.* Mich. Southern, etc., R. Co., 22 N. Y. 262; Halsey *v.* Sincebaugh, 15 N. Y. 485; Harvey *v.* United States, 113 U. S. 243.

[10] Spring Garden Mut. Ins. Co. *v.* Evans, 15 Md. 54 [1859]; Howell *v.* Bowman (Ala.), 10 So. Rep. 640; *see also* Baum *v.* Reay (Cal.), 29 Pac. Rep. 417; Anderson *v.* Imhoff (Neb.), 51 N. W. Rep. 854.

[11] Boughton *v.* Smith (Sup.), 22 N. Y. Supp. 148.

[12] Sanders *v.* Hutchinson, 26 Ills. (Ct. of App.) 633 [1887]; *also* Cunningham *v.* M. S. & Ft. C. R. Co., 18 N. Y. Supp. 600, [1892], *citing* 114 N. Y 498.

[13] Harvey *v.* United States, 113 U. S. 243.

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878. Use of Written Memoranda and Copies Thereof.—Bills for materials, drayage checks, and weigh checks received with materials delivered at works are only hearsay evidence of the quantities of materials purchased and put into a structure, when the witness does not know that they were correct, and was not present when the materials were delivered, and did not thereafter measure and inspect them.[1] Books of account, containing items for work done and materials furnished, the correctness of which was sworn to by a bookkeeper who did not see the work done or the goods delivered, and who made the entries from memoranda furnished by others, are inadmissible, where one who had personal knowledge of the doing of the work and the furnishing of the materials was present at the trial, and was not called to the stand.[2] However, the fact that books of account contain some errors does not, in the absence of evidence that the books were fraudulently falsified, necessarily render them incompetent.[3]

If the original memorandum has been lost or destroyed, the witness may use a copy to refresh his memory, if he testify that the figures or estimate to be used were made at the time of the measurement of the work and that they are correct, and also that the copy is a correct one.[4] So held of a blue print.[5] Proof of loss of books, so as to admit the testimony of the bookkeeper as to their contents, is sufficiently shown by his testimony that he made diligent search for the books, and found some of them in the cellar of the store, in some old rubbish, and among them the covers of the books in question, but the insides of them had been torn out and taken away, and he could not find them.[6] The copy becomes the best evidence of the contents of the original book or document, and is admissible, while parol evidence of its contents, if it be a written instrument, is not admissible.[7]

A stenographer's notes of the witness's testimony given at a former trial, when the stenographer has shown that he took the notes and that they are correct, may be read to impeach the witness's present testimony, even though the stenographer has no recollection of what the witness said.[8] So where the books of original account have been destroyed, the items therein may be proved by the ledger.[9] A manager of a firm business, it seems, cannot use such a book to refresh his memory, if he did not make the entries, or see them made, nor assure himself of their correctness when the matters were fresh in his memory.[10] Nor if such entries were made by a party to the suit in his own behalf.[11]

[1] McCormick *v.* Saddler (Utah), 37 Pac. Rep. 332.
[2] Dodge *v.* Morrow (Ind. App.), 43 N. E. Rep. 153.
[3] Levine *v.* Lancashire Ins. Co. (Minn.), 68 N. W. Rep. 855.
[4] Anderson *v.* Imhoff (Neb.), 51 N. W. Rep 854.
[5] Currier *v.* B. & M. R. Co., 31 N. H. 225 [1855].
[6] Stanfield *v.* Knickerbocker Trust Co. (Sup.), 37 N. Y. Supp. 600.
[7] Dillon *v.* Howe (Mich.), 57 N. W. Rep. 102.
[8] Klepsch *v.* Donald (Wash.), 35 Pac. Rep. 621.
[9] McCrady *v.* Jones (S. C.), 15 S. E. Rep. 430.
[10] Fritz *v.* Burgiss (S. C.), 19 S. E. Rep. 304; *but see* Levine *v.* Lancashire Ins. Co. (Minn.), 68 N. W. Rep. 855.
[11] Doty *v.* Smith (Sup.), 22 N. Y. Supp. 840.

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It is proper to read to a witness extracts from evidence given by him on a previous trial to cause him to recollect the facts as he testified on a former trial;[1] and a witness, either on direct or cross examination, may be compelled to inspect a writing, if it is in his own handwriting or there is reason to believe it will refresh his memory.[2] The use of memoranda to refresh one's memory has been held a matter largely discretionary with the trial court.[3]

879. Use of Maps, Plans, Photographs, and Models in Court.—It being well established that memoranda, books, and maps may be employed to illustrate, explain, and prove the expert's opinions and testimony, the next subject for consideration is what preparations to make. First of all a complete understanding of the facts, circumstances, and surroundings of the case, and the preparation of diagrams, models, and other means of presenting them to the court and jury. The conditions and surroundings attending a problem are primary in the determination of results; small technicalities often make an entire change in the results and deductions to be drawn from certain facts. If possible, the locality should be visited and carefully examined, that the expert may be familiar with all its peculiarities. If the occasion requires it, a careful survey and map of the ground should be made. Samples and pieces may be taken of the soil, structure, and materials.

An *ex parte* map made by a witness, and shown to be correct, may be introduced, not as independent evidence, but to be considered by the jury in connection with other evidence.[4] A civil engineer who has made a survey of the locality may testify that there was no obstruction, and that the headlight of a train would be visible from points in the neighborhood of the scene of a collision.[5]

880. Use of Photographs as Evidence.—Photographic views should be taken from selected positions, which, if sworn to as being true representations of what they profess to be, may be introduced in evidence.[6] The value of photographic views cannot be overestimated. They are invaluable in case of destruction of buildings or other structures by wind, flood, or fire. They are much easier to comprehend than are maps or plans by jurymen, and they are quite difficult of misrepresentation, and are now generally accepted as evidence. They show elevations and depressions, distances and shapes as they naturally appear to the eye, and are more convincing to both jury and judge. They are quickly and cheaply made, and are comprehensible to the most uneducated and unskilled, and are received for nearly all purposes and in all cases where the original object cannot be had. It must be

[1] Ehrisman *v.* Scott (Ind. App.), 32 N. E. Rep. 867.
[2] State *v.* Stanton (N. C.), 19 S. E. Rep. 96.
[3] Michigan Ins. Co. *v.* Wich (Colo.), 46 Pac. Rep. 687.
[4] Poling *v.* Ohio River R Co. (W. Va.), 18 S. E. Rep. 782; State *v.* Harr (W. Va.), 17 S. E. Rep. 794; Roderiquez *v.* State (Tex.), 22 S. W. Rep. 978; McVey *v.* Darkin (Pa.), 20 Atl. Rep 541 [1890].
[5] Chicago, etc., Ry. Co. *v.* Chambers (C. C. A.), 68 Fed. Rep. 148.
[6] Howard *v.* Russell, 12 S. W. Rep. 525; German T. S. *v.* City of Dubuque, 64 Iowa 736.

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admitted that photographs taken from one point of view to determine matters of size, relative proportions, grade, etc., might be very misleading, as very different results can be obtained by tilting the photographic apparatus (camera), or by being too near the object, resulting in distortions; but when a set of photographic views are made of an object from different points of view and at varying distances, it is a very difficult matter to make a misrepresentation of the object and its attendant conditions.

The following examples serve to show their admissibility and value: They have been admitted "to show damage to premises injured by water,"[1] or by a change of grade of a street,[2] to show wrecks,[3] and of broken parts of fallen structures, to show the obstruction to drainage of a turnpike by the erection of a bridge or causeway,[4] to show a defective sidewalk.[5] Photographic views of streets, buildings, railroad tracks, bridges, etc., have been admitted.[6]

Photographs may be received of deeds and descriptions taken from public records which could not be withdrawn, such as to show boundaries,[7] and to identify and describe premises in dispute,[8] to identify persons,[9] a lot of jewelry,[10] and to show the severity of wounds due to an assault; and the fact that the expression of the injured person's face was such as would tend to prejudice the jury is not sufficient to show error in allowing it to be used, the photograph not being included in the record.[11] They have been admitted to identify documents, and in place of the original if the original document itself cannot be had,[12] and to show field notes of a survey.[13]

Photographic copies on a large scale have been admitted to show comparisons of handwriting,[14] but such copies have been excluded when not offered for comparison with enlarged copies of the genuine signature.[15] Testimony as to the genuineness of handwriting has been extended to a mark or cross by means of which an illiterate person signed his name, its weight

[1] 64 Ia. 736.
[2] 31 Wis. 512.
[3] Kansas R. Co. *v.* Smith (Ala.), 8 So. Rep. 43 [1890]; 46 Ia. 109.
[4] Chestnut H. Tk. Co. *v.* Piper, Penna. Sup. Ct., Jan'y 1884.
[5] Barker *v.* Town of Perry (Ia.), 25 N. W. Rep. 100 [1885].
[6] Glasier *v.* Town of Hebron, 16 N. Y. Supp. 503, *an embankment; see* Locke *v.* Sioux City & P. R. Co., 46 Ia. 109; Reddin *v.* Gates, 52 Ia. 210; German T. S. *v.* City of D., 17 N. W. Rep. 153; Udderzooks Case, 76 Penn. St. 340; Ruloff *v.* People, 45 N. Y. 213; Marcey *v.* Barnes, 16 Gray 162; *note* 26 Am. Repts. 319; *note* 38 Amer. Rep. 474; *note* 23 Alb. Law Journal 182; Cozzens *v.* Higgins, 3 Keyes 206, *a cellar floor;* Dedrichs *v.* Salt Lake C. R. Co. (Utah), 46 Pac. Rep. 656.
[7] 20 Alb. L. J. 4.
[8] Blair *v* Pelham, 118 Mass. 421; Mulhado *v.* R. R. Co., 30 N. Y. 370; Cooper *v.* St. Paul City Ry. Co. (Minn.), 56 N. W. Rep. 42.
[9] Udderzook *v.* Commonwealth, 76 Pa. St. 352; People *v.* Smith, 121 N. Y. 578.
[10] 59 Fed. Rep. 684; Rulof *v.* People, 45 N. Y. 213.
[11] Cooper *v.* St. Paul City R. Co., *supra.*
[12] *In re* Foster (Mich.) 3 Am. Law Times Rep. 411 [1876]; *see also* Eborn *v.* Zimpleman (Tex.) [1877]; Haynes *v.* McDermott, 11 Cent. L. J. 378.
[13] Ayers *v.* Harris (Tex.). 13 S. W. Rep. 768 [1890].
[14] Marcy *v.* Barnes, 82 Mass. 161; *but see* Hynes *v.* McDermott (N. Y.), 22 Alb. L. J. 367 [1880]; *also* Tome *v.* Parkerburgh B. R. Co., 39 Md. 37 [1873].
[15] White S. M. Co. *v.* Gordon (Ind.), 24 N. E. Rep. 1053; *and see* Geer *v.* Lumber Co. (Mo.), 34 S. W. Rep. 1099.

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being for the jury.[1] The question of admissibility of photographs is one largely, if not entirely, for the trial judge;[2] it is within his discretion to admit a photograph of a plaintiff in a damage suit, as evidence of the claimant's health and strength at the time of the injury,[3] or to show the effect of a flood from a dam that had given way.[4] The rejection of a photograph of premises whose boundaries are in dispute does not furnish a ground of exception.[5] Photography is almost indispensable to the expert in the enlarged representation of minute objects or to emphasize details[6] not easily recognized by the naked eye. In all cases, either the witness himself or the photographer, or some one familiar with the locality, should be called to testify that the photograph is a correct likeness or representation of the original object or locality.[7]

881. Expert Witness should Fortify His Opinions with Authority and Undisputed Facts.—The expert having made all arrangements for the careful and critical representation of the circumstances, he must next prepare himself to present his case clearly and forcibly. Although he need not be familiar with the language of the authors or books he quotes or refers to, he should be acquainted with the substance and theory of the subject, and know the volume and page in which it is contained. He should review his notes and memoranda of his past work and experience, compare it with the books, reports, and views of other engineers, check them by computations and experiments, and use every exertion to determine *what is* and *what is not* the true merit of the question.

His reasons should be formulated and prepared, for he may or may not be asked to explain the reasons of his opinions.

882. Experts should Seek the Confidence and Respect of the Court.—In his preparation, the engineer always should have in mind the presentation of plain truth in plain English. It should be his aim and effort to gain the respect, confidence, and good will of the court and jury. His competency and privileges depend upon the impression made upon the court and the discretion and judgment it may exercise. It should be his highest endeavor to present his beliefs and opinions by the most convincing proofs, and in a manner that may be fully comprehended by every member of the court and jury. New and unaccepted theories, foreign phrases, terms, and titles, and technical distinctions, cannot have the weight of plain Anglo-Saxon common-sense, or some simple illustration in every-day life. A sensible, moderate, earnest

[1] State *v.* Tice (Oreg.), 48 Pac. Rep. 867.

[2] Verran *v.* Baird (Mass.), 22 N. E. Rep. 630 [1889]; Cleveland, C., C. & St. L. Ry. Co. *v.* Monaghan (Ills.), 30 N. E. Rep. 869 [1892].

[3] Gilbert *v.* West End St. Ry. (Mass.), 36 N. E. Rep. 60.

[4] Verran *v.* Baird (Mass.), 22 N. E. Rep. 630 [1889].

[5] Hollenbeck *v.* Rowley, 8 Allen 473 [1864].

[6] Marcy *v.* Barnes, 82 Mass. 161; *and see* 9 Amer. Law Rvw. 173.

[7] Nies *v* Broadhead, 27 N. Y. Supp. 52, *also* Roosevelt H. *v.* N.Y. El. R. Co., 21 N. Y. Supp. 205; Miller *v.* L. N. A. & C. Ry. Co. (Ind.), 27 N. E. Rep. 339 [1891]; Leidlein *v.* Meyer (Mich.), 55 N. W. Rep. 367; Hollenbeck *v.* Rowley, 8 Allen 473 [1864], which seems to hold that photographer must verify the picture under oath.

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disposition to present one's views plainly and clearly for what they are worth, a careful avoidance of any effort to force conviction into the minds of the court, is far more effective than any attempts to show how very simple and plain the one side is and how preposterous and unheard of are the opinions of the opposite side. A simple acknowledgment that contrary opinions exist, and the fact that witness is familiar with them, has considered and weighed both sides of the question, and has come to his conclusion by study, observation, and reasoning, will carry with them much stronger convictions than any amount of blustering.

Force cannot exist without counter resistance in mechanics, and this is equally true in argument. The moment a witness insists or undertakes to impose his views, that moment he arouses resistance in his listeners, which renders his efforts the more unavailing. Much depends upon the good opinion of the court. It is within its power to permit or deny the engineer the privilege of testifying, to determine whether the witness comes within the requirements of an expert, which is in nowise a question for the jury.[1]

883. Trial Court Determines the Privileges of an Expert Witness.—The preliminary question whether a witness offered as an expert has the necessary qualifications is for the court, and is largely within its discretion.[2] Unless it appears from the evidence that the trial court's decision was erroneous or founded on an error in law, it is conclusive.[3]

If it be apparent that expert testimony would tend to assist the jury in coming to a conclusion on the facts, it is not error for the trial court to admit it.[4] It has been held no error for the trial judge to refuse to receive the expert testimony of a professor of civil engineering who has made the law of moving bodies a study and can tell how far a train will move by its momentum, as to the distance a train would travel, on a question to contradict the testimony of other witnesses testifying from practical experience, on appeal.[5]

The manner and extent to which an expert may refresh his recollections by references to memoranda or books is also determined by the presiding judge—a discretion that may be exercised with reference to the circumstances of the case and sometimes with reference to the conduct and bearing of the witness upon the stand.[6]

In the furtherance of justice, the court may in its discretion depart from

[1] Jones *v.* Tucker, 41 N. H. 546 [1860]; Mut. F. I. Co. *v.* Alvord (C. C. A.), 61 Fed. Rep. 752.

[2] Sneda *v.* Libera (Minn.), 68 N. W. Rep. 36; Helfenstein *v.* Medart (Mo. Supp.), 36 S. W. Rep. 863; Beckett *v.* N. W. Masonic Aid Ass'n (Minn.), 69 N. W. Rep. 923.

[3] Manghan *v* Burns Estate (Vt.), 23 Atl. Rep. 583; St. Louis & S F. Ry. Co. *v.* Bradley, 54 Fed. Rep. 630; Howl nd *v.* Oakland St. Ry. Co. (Cal.), 42 Pac. Rep. 983; *see also* Santa Cruz *v.* Enright (Cal.), 30 Pac. Rep. 197; *and* Chateaugay O. & J. Co. *v.* Blake, 12 Sup. Ct. Rep. 731, *as to the capacity of an ore crusher;* Campbell *v.* Russell, 139 Mass. 278 [1885], *and cases cited.*

[4] State *v.* Hendel (Idaho), 35 Pac. Rep. 836.

[5] Blue *v.* Aberdeen & V. E. R. Co. (N. C.), 23 S. E. Rep. 275.

[6] Johnson *v.* Coles, 21 Minn. 108 [1874]; Wabash R. Co. *v.* Defiance (Ohio), 40 N. E. Rep. 89.

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the usual order of introducing testimony. It may permit experts to testify before the establishment of facts by the other witnesses.[1] It determines the propriety of questions asked, and it is within its discretion to reject questions put to witnesses, if in its opinion they do not bear upon the question at issue. Questions to experts are in a large measure hypothetical and remote, and are likely to receive a much more liberal consideration under a good impression on the part of the judge than in the face of distrust and fear.[2] After the witness has given his own professional opinion in reference to what he has seen and heard, or upon hypothetical questions, it is then within the court's discretion to limit further interrogatories as to what other scientific men have said on such matters, or in respect to the general teachings of science thereon.[3]

The extent to which the temper and disposition of a witness may be shown on cross-examination is largely within the discretion of the trial court;[4] and the extent to which it may be pursued to test his memory is within the discretion of the court.[5] In cross-examination a witness may be asked in regard to any interest he may have in the result of the trial, as affecting his credibility,[6] and he may be asked as to whether the examinations made by him were made in a careful or a superficial manner. Such a question is not objectionable as substituting the opinion of the witness for the judgment of the jury on that point.[7]

In conclusion, it may be said that too much care cannot be taken in the preparation for the expert witness-stand, and any man (engineer) who conscientiously does his duty will merit all that he is likely to get for his services.

884. Behavior of Expert Witness in Court—When will Expert Testimony be Admitted.—An expert's duties in court may be embraced in two classes: (1) The suggestions and promptings he may give to the attorney in examination of other witnesses, and (2) his offices and privileges while upon the stand himself. Little can be said upon the former, as the character and amount of assistance must depend upon the character, disposition, and private ideas of the individuals, and their skill, practice, and methods.

As a general rule, opinions of witnesses are not admissible as evidence; they must speak as to facts within their knowledge; but upon questions of skill or science, with which the jury are not familiar, men who have made the subject-matter of inquiry the object of their particular attention or study are permitted to give their opinions. They are admissible (1) when the question involves subjects which are beyond the determination and full

[1] City of Denver *v.* Dunsmore, 7 Colo. 328 [1884].

[2] Harland *v.* Lillienthal, 53 N. Y. 438 [1873]; People *v.* Angaberry, 97 N. Y. 501 [1884].

[3] Davis *v.* United States, 17 Sup. Ct. Rep. 360.

[4] Czezewzka *v.* Benton-Bellefontaine Ry. Co. (Mo. Sup.), 25 S. W. Rep. 911.

[5] Noblin *v.* State (Ala.), 14 So. Rep. 767.

[6] Blenkiron *v.* State (Neb.), 58 N. W. Rep. 587.

[7] Northern Pac. R. Co. *v.* Urlin, 15 Sup. Ct. Rep. 840.

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understanding of the judge and jurors, and (2) when the witness offered is fully qualified to give the required information.

The rule determining the subjects upon which experts may testify and the rules prescribing the qualifications of experts are matters of law, but whether a witness offered as an expert has those qualifications is a question of fact to be decided by the court at the trial.[1] We have chiefly to deal with the law, as we cannot determine the judges' opinions of individual cases (or person). Courts are inclined to limit the testimony of experts to the rules now in use, and to confine witnesses to facts in all cases where practicable, and to leave the jury to exercise their judgment and experience upon the facts proved. *Facts* may be specifically contradicted, and if witnesses testify falsely they are liable to punishment for perjury, while *opinions* may not be proved positively wrong, and false *opinions* may be given without fear of punishment.[2]

The fact that a witness may know more of, or may better comprehend, the subject than the jury is not sufficient to authorize opinion evidence, but it must relate to some trade, profession, science, or art in which the expert has more skill, and can pass better judgment than jurymen of average intelligence.[3] If the facts can be placed before the jury, and they are of such a nature that jurors generally are as competent to form an opinion in reference to them and to draw inference from them as experts, then the opinions of witnesses are not competent, and such evidence should only be received in case of necessity.[3] A question which elicits a reply based on a mere arithmetical calculation is not objectionable as calling for expert testimony.[4]

If the relation of facts and their probable results can determined without special skill or study, the facts must go to the jury, who will be left to draw their own conclusions and to form their own opinions.[5] If the inquiry relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled witnesses is not admissible.[6] The true test is not whether the subject-matter is common or uncommon, or whether many persons or a few have some knowledge of it, but whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge any aid to the court or jury in determining the questions at issue.

885. Some Questions Held Not to Require Experts to Determine.—It has been held that a question "whether, under circumstances proven, it was a proper time to burn brush," was not a question requiring the assistance of

[1] Jones *v.* Tucker, 41 N. H. 546.
[2] Furgeson *v.* Habbell, 97 N. Y. 507 [1884].
[3] Staffords *v.* City of Oskaloosa, 64 Ia. 251 [1885]. Overby *v.* Chesapeake & O. Ry. Co. (W. Va.), 16 S. E. Rep. 813.
[4] Witmark *v.* Manhattan Ry. Co. (N. Y. App.), 41 N. E. Rep. 78.
[5] Belair *v* C. & N. W. R. Co., 43 Ia. 662; Van Wyclen *v.* City of B., 118 N. Y. 434 [1890].
[6] Overby *v.* Chesapeake & O. Ry. Co., (W. Va.), 16 S. E. Rep. 813.

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experts,' even though the witness offered had many years of experience in clearing land by fire, and had observed the effect of wind on fires, in the locality in question, and had visited the land and made a plan of it. On the same ground opinion evidence has been rejected as to whether a horse should have been tied,[2] whether stairs were located in a safe place in a building,[3] as to the effect of water in disintegrating mortar of a wall,[4] as to the value of real estate,[5] whether a survey was actually located on the ground or was made in the office from plats,[6] and whether wood was, or was not, rotten.[7] Generally questions of value, as of a horse or land, do not require expert knowledge. Witnesses who are not architects, builders, or contractors may be allowed to state their opinions as to the worth of a building from a general knowledge of it without being able to estimate the value of any of the materials entering into its construction.[8]

It has been held not to require an expert to prove that a wall might have cracked as a result of defects in the wall and foundations to show that the wall was defective;[9] whether boards piled in a certain manner will protect a cargo of perishable freight;[10] if a certain arrangement of machinery is dangerous;[11] as to the safety and fitness of a belt-fastening when a piece of the belt and the fastenings are before the jury;[12] as to how much limestone is beneath a railroad and its value per ton;[13] as to what hard-pan is and whether any was found;[14] as to how much a man can improve his handwriting in a short time.[15] In determining the explosive character of dust in a bin, a chemist, not shown to have had any experience with the same kind of dust outside of his laboratory, is not competent to testify that, if fire came in contact with it, an explosion would occur.[16]

Witnesses cannot give any opinions as to the legal effect of documents or events,[17] nor will their opinion be received as to the amount of damages suffered in an action for damages;[18] nor as to whether a certain ailment would bring to a man the knowledge that he was not in perfect health.[19]

[1] Furgeson *v.* Hubbell, 97 N. Y. 507.
[2] Stone *v.* Bishop (Vt.), 22 Rept'r. 319 [1886].
[3] Underwood *v.* Waldron, 33 Mich. 232 [1876].
[4] Naughton *v.* Stagg, 4 Mo. App. 271 [1877].
[5] Schwander *v.* Birge, 46 Hun 66.
[6] Reast *v.* Donald (Tex.), 19 S. W. Rep. 795.
[7] Reynolds *v.* Van Beuren, 31 N. Y. Supp. 827.
[8] Springfield Fire & Marine Ins. Co. *v.* Payne (Kan. Sup.), 46 Pac. Rep. 315; *but see* Little Rock, etc., Ry. Co. *v.* Alister (Ark.), 34 S. W. Rep. 82; *and* Joske *v.* Pleasants (Tex. Civ. App.), 39 S. W. Rep. 586 [1897].
[9] Turner *v.* Haar (Mo.), 21 S. W. Rep. 737.
[10] Schwinger *v.* Raymond (N. Y.), 11 N. E. Rep. 952 [1887].
[11] Freeburg *v.* St. Paul Plow Works (Minn.), 50 N. W. Rep. 1026; Kaufman *v.* Maier (Cal.), 29 Pac. Rep 481.
[12] Harley *v.* Buffalo C. Manfg. Co. (N. Y. App.), 36 N. E. Rep. 813.
[13] Reading & P. R. Co. *v.* Balthaser (Pa.), 13 Atl. Rep. 294 [1888].
[14] Currier *v.* B. & M. R. R., 34 N. H. 498.
[15] McKeone *v.* Barnes, 108 Mass. 344 [1871].
[16] Shufeldt *v.* Searing, 59 Ill. App. 341.
[17] Thompson *v.* Brannin (Ky.), 21 S. W. Rep. 1057.
[18] Tingley *v.* City of Providence, 8 R. I. 493; *affirmed*, Brown *v.* Providence R. Co., 12 R. I. 238 [1879].
[19] Mut. L. Ins. Co. of N. Y. *v.* Simpson (Tex.), 28 S. W. Rep. 837.

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886. Expert Cannot Determine Questions which the Jury are to Decide.—The opinion of witnesses upon the precise questions the jury is to determine is competent only when the nature of the case is such that facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon and no better evidence than such opinions is attainable.[1] The object of all questions to experts should be to obtain their opinions as to the matter of skill or science which is in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts. Questions that require the witness to draw conclusions of fact should be excluded.[2] Opinions cannot be asked upon facts or questions that are to be determined by the judge or jury, but experts may give scientific opinions, under an assumption of facts similar to or identical with those presented in the case.[3] Such questions are termed hypothetical, the witness being asked if certain facts testified to are true, if he can form an opinion, and what his opinion is.[4] The opinion of witnesses cannot be asked directly upon the circumstances of the case being tried, but hypothetical cases very similar may be described and the opinion of the expert asked upon such hypothetical case.[4] So when the question to be determined was whether the state or its employees were negligent in making changes in a bridge, a question to the person who built it whether he "left the bridge, in his judgment, safe for the ordinary uses of a highway bridge," was held inadmissible, as he was thereby permitted to determine the question which was at issue and to be decided by the board (jury). And where the negligence of the party injured by the fall of the bridge was at issue, it was held improper to admit the testimony of an engineer that the load was excessive and that the stones were negligently united and moved over the bridge, though it would have been proper to have admitted him to testify to the supporting power of the bridge or any one of its panels or any one of its stringers.[5] So where a scaffold has given way, a witness should not be allowed to testify as to whether, in his opinion, the scaffold was "put up right,"[6] though he may, as an expert, show the effect of a knot or cross-grain upon the strength of a timber supporting the scaffold.[7] Where the question at issue is the faulty construction of a railroad, an engineer, testifying as to the construction of the track and the probability of deposits of sand thereon in rainy weather, could not, on cross-examination, state

[1] Van Wycklin *v.* City of Brooklyn, 118 N. Y. 424 [1890]; Pacheco *v.* Judson Mfg. Co. (Cal.), 45 Pac. Rep. 833; Ewing *v.* Goode (C. C.), 78 Fed. Rep. 442.

[2] Hunt *v.* Lowell Gas Lt. Co., 8 Allen 169; B. & L. Tpke. Co. *v.* Cassell, 66 Md. 419 [1886]; Butler *v.* Chicago, B. & Q. R. Co., 54 N. W. Rep. 208; Yeaw *v.* Williams (R. I.), 23 Atl. Rep. 33 [1892]; Mauer *v.* Ferguson, 17 N. Y. Supp. 349.

[3] Rogers' Expert Testimony 39.

[4] The C. R. J. & P. R. R. Co. *v.* Moffit, 75 Ill. 524.

[5] McDonald *v.* State (N. Y.), 27 N. E. Rep. 358 [1891]; Eastman *v.* State, 27 N. E. Rep. 358; Hughes *v.* Muscatine Co., 44 Iowa 672.

[6] Mauer *v.* Ferguson, 17 N. Y. Supp. 349.

[7] Boettger *v.* Scherpe & K. A. I. Co. (Mo.), 27 S. W. Rep. 466.

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that the engineers on the road were all aware of that fact, this being a mere inference.[1]

887. Hypothetical Questions may be Asked of an Expert Witness.—The hypothetical question must not call for an inference which is within the province of the jury to draw.[2] The witness should not be called on for his opinion on disputed questions of fact, or as to the credibility of any of the witnesses.[3] A witness is not to be asked if he believes another told the truth. An opinion is worth nothing as against absolute knowledge, fact, or law, and the expert should furnish the facts on which his opinion is founded. In asking questions, the facts should be clearly stated, and the question should be clearly within the expert's special knowledge. If question is clearly within expert's special knowledge, you can sometimes ask the very point which is to be decided. The facts assumed need not have been proved, nor can the question be objected to on the ground that the facts assumed are not true.[4] The testimony offered *should*, however, establish every fact embraced in a hypothetical question, or it may be objected to and the jury be instructed to disregard that part of the evidence.

It is error to receive answers of expert witnesses to hypothetical questions which assume the existence of facts of which *no* evidence is offered;[5] but any facts may be assumed which the evidence tends to establish.[6] If the engineer has heard or read the evidence, or is familiar with the facts of the case, he may be asked his opinion on the assumption that they are true. If the facts are not disputed, the question should include them all. The facts upon which an opinion is based must always be laid before the court and jury. This must be done in order that the jury may judge for themselves, and for the further reason that other experts may be called to controvert the opinion.[7] It is erroneous to permit a witness to be asked to state his opinion, based on his recollection of the testimony of another witness.[8] The assumed facts should be stated hypothetically in the question. An expert bridge-builder has been properly allowed to give his opinion as to the sufficiency of a timber like unto one that broke in a staging.[9]

Some courts have held that such questions should state all the facts,[10] while others have allowed questions that embrace facts deducible from the evidence,[11] and others have permitted questions that assume any facts that

[1] Union Pac. Ry. Co. *v.* O'Brien, 16 Sup. Ct. Rep. 618; Darling *v.* Thompson (Mich.), 65 N. W. Rep. 754.

[2] Prentiss *v.* Bates (Mich.), 50 N. W. Rep. 637.

[3] Stoddard *v.* Town of Winchester (Mass.), 32 N. E. Rep. 948.

[4] Deig *v.* Moorhead (Ind.), 11 N. E. Rep. 458 [1887].

[5] North Amer. Acc. Ass'n *v.* Woodson (C. C. A.), 64 Fed. Rep. 689.

[6] Hicks *v.* Citizens' Ry. Co. (Mo.), 27 S. W. Rep. 542; Bever *v* Spangler (Ia.), 61 N. W. Rep. 1072; Neudeck *v.* Grand Lodge, 1 Mo. App. 330.

[7] Frankfort *v.* Manhattan Ry. Co., 33 N. Y. Supp. 86.

[8] Bedford Belt Ry. Co. *v.* Palmer (Ind. App.), 44 N. E. Rep. 688.

[9] Stanwick *v.* Butler-Ryan Co. (Wis.), 67 N W. Rep. 723.

[10] Prentiss *v.* Bates (Mich), 50 N. W. Rep. 637.

[11] People *v.* Vanderhof (Mich.), 39 N. W.

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the evidence fairly tends to prove, though they may not be fairly proved.[1] It has been held *not* necessary that the hypothetical question propounded to an expert witness shall embrace all the facts as to the particular subject under investigation.[2] If the facts on which the opinion is based are disputed, their truthfulness may be assumed hypothetically.[3]

It has been held even that a hypothetical case stated need contain only such facts as tend to support counsel's theory of the case.[4] Testimony that a thing has been done three or four times a day for a month will support a question whether a certain result would follow if a thing had been done as many as one hundred times.[5] But an inquiry as to how much water would be thrown from a certain opening, "under a pressure such as was on the pumps," was denied, when there was no evidence as to the amount of pressure.[6] Generally, an expert witness should not be allowed to testify to hypothetical questions based upon facts a part of which only have been proved.[7] The fact that the names of the parties to the suit are mentioned in putting hypothetical questions is not objectionable.[8]

It is safer to embody all the particulars on which his opinion is asked, though the trial court may in its discretion allow questions to be put in other form.[9] Decisions are found which hold that the opinion of an expert witness must be based on proved or admitted facts, or upon such facts as are assumed to exist for the purpose of a hypothetical question, and it is not a sufficient objection to such question that the facts stated therein had not been put in evidence, nor can it be objected to upon the ground that the facts assumed are not true.[10] In an action for work and labor performed, it is proper for plaintiff to put to ordinary witnesses hypothetical questions in regard to the value of the services alleged to have been performed.[11] An opinion may be asked of a physician as to what would be the result of a disease in the natural and ordinary course—to wit, that the plaintiff would never be any better and never be able to strengthen his limbs.[12]

888. Witness Acquainted with Facts of Case.—If the engineer has personal acquaintance with the subject-matter, and a knowledge of the

Rep. 28 [1888]; People *v.* Durrant (Cal.), 48 Pac. Rep. 75 [1897].

[1] Hall *v.* Rankine (Iowa), 54 N. W. Rep. 217; Kelly *v.* Perrault (Idaho), 48 Pac. Rep. 45 [1897].

[2] Davidson *v.* State (Ind. Sup.), 34 N. E. Rep. 972.

[3] Frankfort *v.* Manhattan Ry. Co., 33 N. Y. Supp. 36.

[4] Bowen *v.* City of Huntington (W. Va.), 14 S. E. Rep. 217.

[5] K. C., M. & B. R. Co. *v.* Webb (Ala.), 11 So. Rep. 888.

[6] Vermillion A. W., etc., Co. *v.* Vermillion (S. D.), 61 N. W. Rep. 802.

[7] *In re* Mason, 14 N. Y. Supp. 434; *semble*, Ill. Silver M. & M. Co. *v.* Roff (N. M.), 34 Pac. Rep. 544.

[8] Lee *v.* Heuman (Tex.), 32 S. W. Rep. 93.

[9] Roreback *v.* Penna. Co. (Conn.), 20 Atl. Rep. 465 [1890]; *In re* Miller's Estate, 26 Pittsb. Leg. J. (N. S.) 428; Hammerburg *v.* Met. St. Ry. Co., 1 Mo. App. Rep. 578.

[10] Deig *v.* Morehead (Ind.), 11 N. E. Rep. 458 [1887]; *see also* Baltimore & L. T. Co. *v.* Cassell, 66 Md. 419 [1886].

[11] Graves *v.* Pemberton (Ind. App.), 29 N. E. Rep. 177.

[12] Stromm *v.* N. Y., L. E. & W. R. Co., 96 N. Y. 305; *see* Cole *v.* Fall Brook C. Co. (Sup.), 34 N. Y. Supp. 572.

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facts and circumstances surrounding it, he may be permitted to give his opinion directly without any hypothesis, or if there is no dispute as to the facts, the question may be direct, upon the facts of the case. The facts must be stated, for even though the witness may have read testimony and all the facts he cannot be asked for his opinion. There must be a specific question covering the facts or the assumed facts.[1]

Thus an engineer who has had charge of the erection of a wall may testify whether or not it was properly and compactly constructed.[2] If he has inspected and made a proper investigation of a bridge he may give his opinion whether the abutments of the bridge were skillfully and properly placed.[3] He may testify as to the effect of decay of the bridge timbers upon the bridge itself, and as to the ordinary life of such timbers as were used in the bridge,[4] and as to whether in his opinion the decay set in before or at the time of the accident, when the inspection was made a year thereafter, and as to whether a superintendent was qualified.[5] If the evidence be conflicting, *i. e.*, if the facts are not admitted, then questions must be put hypothetically.

In engineering cases, and to engineering experts, questions may usually be put directly. Generally, the circumstances are such that an engineer may visit the scene of the difficulty and investigate the facts for himself;[6] but a hypothetical question put to an expert witness, calling upon him to take into account his own personal knowledge of facts, is not permissible.[7] If he has inspected the work or the wreck, and has qualified himself by stating the facts upon which his opinion is based, his testimony may be admitted even when he is not an expert.[8]

889. Weight and Value of an Expert's Testimony is Determined by Jury.—Although it is the office of the judge to determine who are experts, what are proper questions, and how they be put, yet the truthfulness, weight, and importance of his testimony is decided by the jury. It is for them to determine from the facts, the conduct and behavior of the witness, how much to believe and what to believe.[9] The judgments of witnesses are not as a matter of law to be accepted by the jury in the place of their own decisions. Juries are not precluded from exercising their own ideas

[1] *In re* Snelling's Will (N. Y.), 32 N. E. Rep. 1006.

[2] Pullman *v.* Corning, 9 N. Y. 93.

[3] Conrad *v.* Trustees, 16 N. Y. 158 [1857].

[4] Morgan *v.* Fremont Co (Ia.), 61 N. W. Rep. 231.

[5] Washington C. & A. T'p'ke *v.* Case (Md.), 30 Atl. Rep. 571; Buckalew *v.* Tennessee, C., I. & R. Co. (Ala.), 20 So. Rep. 606.

[6] O'Keefe *v.* St. Francis' Church, 59 Conn. 551 [1890].

[7] Bramble *v.* Hunt, 22 N. Y. Supp. 842.

[8] Galveston, H. & S. A. Ry. Co. *v.* Daniels (Tex.), 28 S. W. Rep. 548. failure of a bridge; *accord*, Denver, T. & Ft. W. Ry. Co. *v.* Pulaski I. D. Co. (Colo.), 35 Pac. Rep. 910, bridge abutments obstructing an irrigation ditch; Helfenstein *v.* Medart (Mo. Sup.), 36 S. W. Rep. 863, speed of a bursted grindstone; Sneda *v.* Libera (Minn.), 68 N. W. Rep. 36, thickness and strength of a cistern wall; Egan *v.* Dry Dock, etc., R. Co. (Sup.), 42 N. Y. Supp. 188, time to corrode a boiler.

[9] Spring Co. *v.* Edgar, 99 U. S. 645 [1878].

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and knowledge upon the subject; it is their province to weigh the opinions offered, the time devoted, and other circumstances, and to apply to them their own experience and knowledge of the character of such questions.[1] The opinions of experts cannot be substituted for the common-sense and judgment of the jury; the purpose of their own introduction is to supplement the general knowledge and experience of the jury.[2] It is therefore error for a judge to charge a jury that expert testimony should be met by other expert testimony, and if it is not, it (the jury) should regard their opinion as correct. Such evidence is to be weighed like other testimony by the jury, and a defendant to a suit is not bound to employ rebutting experts.[3]

890. Expert Witness must Not Try to Determine Questions whose Determination Is for the Court or Jury.—The construction of written instruments is for the court or jury, and not for the surveyor or engineer (witness); the fact that a surveyor has scaled the map by which land is described, and found it incorrect, cannot be admitted to prove title to land in dispute.[4] Nor can the opinion of other witnesses be admitted to show the true meaning and location of boundary lines in dispute.[5] Or, in the language of the court, "Experts cannot be called to give their opinions on subjects of this character. Witnesses are competent to show lines and measurements, but the construction of written instruments is for the court alone."[6] Although a surveyor may in some instances be called upon to explain or account for a mistake in a survey,[7] or give his opinion as to how he would locate a tract similar to the one in controversy,[8] yet he may not give his own construction of the description and survey, nor determine what are the controlling calls of the deed.[9] Though his evidence may be admitted to aid in locating the land by the description in the deed,[10] he cannot determine the location of a tract according to a description when it is a duty devolving upon a jury.[11] He may not testify that there was no conflict, as that question is to be determined by the jury.[12] A question whether there were any marks to show that any persons, other than those mentioned, got any of the land, when the surveyor has, as an expert, fully explained a plat, and all that he saw or could find in regard to the lines therein, calls for witness's opinion as to facts, and is leading.[13] He is a qualified witness to test and

[1] Head v. Hargrave, 105 U. S. 45.
[2] Leittensdorfer v. Kind's Admx., 7 Colo. 436 [1884].
[3] People v. Vanderhoof (Mich.), 39 N. W. Rep. 28 [1888]; The Conqueror, 17 Sup. Ct. Rep. 510; Ewing v. Goode (C. C.), 78 Fed. Rep. 442.
[4] Twogood v. Hoyt, 42 Mich. 609.
[5] Public School v. Risley's Heirs, 40 Mo. 356.
[6] Norment v. Fastnaught, 1 McArthur 515.
[7] Forbes v. Caruthers, 3 Yeates 527.
[8] Farr v. Swan, 2 Pa. St. 245.
[9] Whittesley v. Kellogg, 28 Mo. 404; Tate v. Fratt (Cal.), 44 Pac Rep. 1061.
[10] Cornwell v. Cornwell, 91 Ill. 414. [1879]; *affirming* Colcord v. Alexander, 67 Ill. 584; Ormsby v. Ihmsen, 34 Pa. St. 462.
[11] Schultz v. Lindell, 30 Mo. 310; Blumenthal v. Roll, 24 Mo. 113; Randolph v. Adams, 2 W. Va 519.
[12] Bugbee Land Co. v. Brents (Tex. Civ. App.), 31 S. W. Rep. 695.
[13] Rapley v. Klugh (S. C.), 18 S. E. Rep. 680.

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apply data on a map, in determining their sufficiency as guides by which to ascertain a location.[1] The interpretation of a contract is for the court, though it contains technical terms, and it is error to allow an expert witness to state how he understands it; the expert may explain the meaning of such terms.[2]

If skilled in mason work, his testimony is admissible to show the meaning of the terms "mason work" as used in a contract for the construction of water-works, and whether they include the laying of certain pipes;[3] and if a builder, he may testify as to the meaning among mechanics of "smoke-stack."[4]

891. Qualifications of an Expert—Who may Be an Expert Witness.—After having determined that the question is one requiring expert testimony, it next becomes necessary to inquire if the witness offered is qualified. To render an opinion admissible, it must first be shown that the witness possesses superior skill and scientific knowledge in relation to the question. This must be done before the opinion can be asked.[5] An expert has been defined as nothing more than a man of experience in the particular vocation to which the inquiry relates, or as one having peculiar knowledge or skill in reference to the subject-matter of inquiry, or simply as a person instructed by experience.[6] They have been defined as "men of science,"[7] "persons professionally[8] acquainted with the sciences or practice,"[9] "conversant with the subject-matter,"[10] "persons of skill,"[11] "experienced persons,"[12] possessed of some particular science or skill respecting the matter in question.[13]

No precise knowledge is required. It is enough if the witness shows an acquaintance with the subject as to qualify him to give an opinion.[14] He is not incompetent to testify because he has acquired his knowledge from books, but he must have made the subject of inquiry a professional study and a calling. It cannot be understood that a lawyer may, by a few weeks' study of engineering books, qualify himself to testify as an expert engineer, or *vice versa*.[15] A witness who testifies that he is a mechanical engineer, that he graduated several years before from a university, and since then has been engaged in civil and mechanical engineering; that he has given some study to the investigation of the strength of grindstones, and the safe rate of speed at which such stones of various size might be run, and that he

[1] Grand R. L. & D. R. Co. *v.* Chesebro (Mich.), 42 N. W. Rep. 66 [1889].
[2] Cargill *v.* Thompson (Minn.), 59 N. W. Rep. 638.
[3] Elgin *v.* Joslyn (Ill.), 26 N. E. Rep. 1090 [1891].
[4] Skelton *v.* Fenton Elec. L. & P. Co. (Mich.), 58 N. W. Rep. 609
[5] Page *v.* Parker, 40 N. H. 59 [1860].
[6] Louisville, E. & St. L. R. Co. *v.* Donnegan, 111 Ind. 179; 58 Ala. 290; 92 Ind. 464; 102 Ind. 138.
[7] Folkes *v.* Chadd, 3 Doug. 157.
[8] Jones *v.* Tucker, 41 N. H. 546.
[9] Strickland on Evidence.
[10] Best on Evidence.
[11] Rochester *v.* Chester, 3 N. H. 349, 365.
[12] Peterborough *v.* Jaffrey, 6 N. H. 462, 464.
[13] Beard *v.* Kirk, 11 N. H. 397.
[14] Terre Haute *v.* Hudnutt, 112 Ind. 542.
[15] Rogers' Expert Test. 28; People *v.* Thackery (Mich.), 66 N. W. Rep. 562.

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thinks he can state what is a safe rate of speed, is qualified to testify as an expert in regard thereto.[1] Mere opportunities for observation are not sufficient; thus the opinion of a civil engineer on the sufficiency of a highway was held incompetent,[2] while the opinions of professional road contractors have been held to be competent.[3]

An editor of a stock journal was rejected as an expert on diseases of sheep, having had no practical experience or veterinary practice;[4] but personal experience with and care of stock will qualify a witness.[5] A professor of veterinary medicince, employed for many years by the Department of Agriculture in the investigation of diseases of animals, is competent to testify as to the nature and symptoms of Texas cattle fever. He may state what districts of Texas are infected with the cattle fever, though he has never visited those districts, the knowledge gained by him in the correspondence of the department, and in the investigation of such diseases as to the places of their origin or prevalence, not being properly hearsay.[6]

A druggist who did not make an analysis of a compound, and who was unable to do so, and only judged its character by taste and smell, cannot testify as to a preparation, and that it contained alcohol;[7] but a miller of tweny years' experience, accustomed to analyze flour by a process used more or less by others, may testify as an expert as to the component parts of of flour, though he is not a practical chemist.[8] The objection that expert witnesses based their opinions of a stated question upon a crude and insufficient analysis does not affect the admissibility of the evidence, but its sufficiency only.[9]

The evidence offered through an expert must be confined to the subject-matter in which he is skilled, experienced, or learned. An engineer cannot testify as an expert in medicine, nor a painter in regard to the framing of a building, or its construction.[10] Nor can a brick and stone mason give an opinion as to what caused the floors and walls of a building to collapse.[11] It has therefore been held that a witness familiar with earth dams could not testify as to a dam built of wood,[12] and that the apparent safety of an embankment cannot be judged by one who has merely seen it collapse.[13]

One who has been a civil and hydraulic engineer for several years is qualified

[1] Helfenstein *v.* Medart (Mo. Sup.), 36 S. W. Rep. 868.
[2] Benedict *v.* City, 44 Wis. 495.
[3] Taylor *v.* Town of Monroe, 43 Conn. 43; *accord*, Bergen Neck Ry. Co. *v.* Pt. Breeze F. & J. Co. (N. J.), 30 Atl. Rep. 584; Wheeler & W. Mfg. Co. *v.* Buckout (N. J. Sup.), 36 Atl. Rep. 772.
[4] Rogers' Expert Testimony 33.
[5] Pearson *v.* Zehr (Ill.), 29 N. E. Rep. 854; *semble*, State *v.* Dixon (La.), 16 So. Rep. 589.
[6] Grayson *v.* Lynch, 16 Sup. Ct. Rep. 1064.
[7] Dane *v.* State (Tex.), 35 S. W. Rep. 661.
[8] Davis *v.* Mills (Mass.), 40 N. E. Rep. 852.
[9] State *v.* Martin (S.C.), 25 S. E. Rep. 118.
[10] Kilbourne *v.* Jennings, 38 Ia. 533.
[11] Peteler Portable Ry. Mfg. Co. *v.* Northwestern A. Mfg. Co. (Minn.), 61 N. W. Rep. 1024.
[12] Weidekind *v.* Twolume Co. W. Co. (Cal.), 25 Pac. Rep. 311.
[13] Central R. Bkg. Co. *v.* Kent (Ga.), 10 S. E. Rep. 965.

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to testify as an expert in matters touching civil and hydraulic engineering.[1] An engineer who examined a ditch two months after it was abandoned by the contractors, and found the original stakes, showing the depth of the ditch, and was able to verify his estimate from such stakes, is competent to testify to the cost of completing the ditch.[2] His testimony has been admitted to prove that stakes were surveyors' stakes;[3] that piles of stones and marks upon trees were monuments of a boundary;[4] that a particular line was marked by government surveyors.[5] They have been permitted to give results of surveys made, and the relative position of the line to existing monuments, fences, and buildings;[6] their opinions have been allowed upon the location of boundary lines which had not previously been officially located.[7] These, however, cannot be allowed if the true location of the boundary is a question upon which the jury is to pass.* A surveyor may testify in such a case that in his opinion certain marks upon a tree were corner or line marks, but he may not testify to his opinion that a particular tree is the corner of a grant in question.[8]

Engineers experienced in construction are frequently called, and cases are frequent where they have given opinions in that branch of engineering. Examples as to the time required to construct and complete a railroad,[9] to show what is a reasonable time in which a contract shall be performed;[10] as to the value of the work done,[11] or the cost of construction of a house;[12] as to whether a bridge was skillfully constructed with reference to a creek;[13] as to the proper size of the base of certain columns;[14] to show the strength of materials, and to show that a structure was not properly constructed to sustain the weight to which it was subjected;[15] to establish that a crack in iron machinery could have been ascertained in certain ways;[16] as a defect in a car-wheel by the hammer test;[17] to prove the faulty construction of a dock;[18] that in order properly to carry out a construction contract, certain methods of erection and certain work done were necessary;[19] and what the rule is as to constructive measurements.[20]

[1] Egger *v.* Rhodes (Cal.), 37 Pac. Rep. 1037; *and see* 5 B. & A. 64.
[2] McDonald *v.* Dodge County (Neb.), 60 N. W. Rep. 366.
[3] McGrann *v* Hamilton (Conn.), 19 Atl. Rep. 376 [1890].
[4] Davis *v.* Mason, 4 Pick. 156.
[5] Barron *v.* Cobleigh, 11 N. H. 557; Wallace *v.* Goodall, 18 N. H. 439; 24 Ala. 390.
[6] Messer *v.* Regunter, 32 Ia. 312.
[7] Kinsley *v.* Crane, 34 Pa. St. 146.
[8] Clegg *v.* Fields, 7 Jones' Law (N. C.) 37; Tate *v.* Fratt (Cal), 44 Pac. Rep. 1061.
[9] L. E. & St. L. Ry. Co. *v.* Donnegan, 111 Ind 179.
[10] Goddard *v.* Crefield Mills (C. C. A.), 75 Fed. Rep. 818.
[11] Crawford *v.* Wolfe, 29 Iowa 567.
[12] Woodruff *v.* Imp. F. Ins. Co., 83 N.Y. 133.
[13] Bellinger *v.* N. Y. Central R. Co., 23 N. Y. 42.
[14] Linch *v.* Paris L. & G. E. Co. (Tex.), 15 S. W. Rep. 208 [1891].
[15] Callan *v.* Bull (Cal.), 45 Pac. Rep. 1017.
[16] Pacheco *v.* Judson Mfg. Co. (Cal.), 45 Pac. Rep. 838.
[17] Pittsburgh, etc., Ry. Co. *v.* Sheppard (Ohio Sup.), 46 N. E. Rep. 61.
[18] Munroe *v.* Godkin (Mich.), 69 N. W. Rep. 244.
[19] Haver *v.* Tenney, 38 Iowa 80 [1875]; *see also* Hamilton *v.* Railroad Co., 36 Iowa 31.
[20] Ambler *v.* Phillips (Pa.), 19 Atl. Rep. 717.

* *See* Secs. 886 and 890, *supra.*

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Engineers, architects, and surveyors may in general testify to any opinions which belong peculiarly to their occupation and business.[1] An engineer who has acted as such on construction of a work may testify to his opinion whether it was properly built at a certain point, and whether it was constructed in the usual manner; and so may a witness who, though not a civil engineer, has had experience in railroad construction, and is familiar with the road;[2] and an engineer may testify as to the necessary capacity of a sewer,[3] or whether a cellar would be water-tight if built according to specifications.[4]

The rules determining the subjects upon which experts may testify and the rules prescribing the qualifications of experts are matters of law; but whether a witness offered as an expert has those qualifications is a question of fact to be decided by the court at the trial.[5] The fact that a witness offered as a chemical expert had abandoned his studies as a chemist and become a druggist does not render him incompetent,[6] and the same may be said of an engineer or architect who has given up his professional work for teaching or writing.

Practical mechanics of many years' experience may testify as to the measurement of masonry,[7] as to the amount and value of labor, based upon a given state of facts and their personal knowledge to a certain extent of the work done;[8] that a wall though a little out of plumb is just as valuable for the purpose for which it was built;[9] and blacksmiths may testify as to the quality and condition of a piece of iron.[10]

If a witness is not an expert on the subject of inquiry, he cannot be permitted to give an opinion on the subject. It is error therefore to admit the opinions of witnesses as to overflow of lands due to railroad embankments, unless such witnesses have peculiar knowledge of such matters.[11] A civil engineer with a long experience in railroad work, and in the same vicinity, was held a competent witness to give an opinion as to whether it was possible for an embankment to back water on to certain lands;[12] as was a resident who for twenty-six years had been familiar with a stream and knew from observation what had obstructed or would obstruct its flow, though he was not an expert in building embankments, bridges, and culverts;[13] and a witness having twenty years' experience in the construction of railroads to

[1] Chamberlain *v.* Dunlop (Sup.), 8 N. Y. Supp. 125.
[2] St. L. & T. Ry. *v.* Johnston (Tex.), 15 S. W. Rep. 104 [1891].
[3] Hession *v.* Wilmington (Del.), 27 Atl. Rep. 830.
[4] McNight Stone Co. *v.* New York (Sup.), 43 N. Y. Supp. 139.
[5] Jones *v.* Tucker, 41 N. H. 546 [1860].
[6] Haas *v.* Green (Com. Pl.), 27 N. Y. Supp. 347; Bears *v.* Copley 10 N. Y. 93.
[7] Shulte *v.* Hennesy, 40 Iowa 352 [1875].
[8] Crawford *v.* Wolf, 29 Iowa 567 [1870].
[9] Stiles *v.* Neillsville M. Co. (Wis.), 58 N. W. Rep. 411.
[10] L. N. A. & C. R. Co. *v.* Berkly (Ind.), 35 N. E. Rep. 3.
[11] Gulf C. & S. F. Ry. Co. *v.* Hepner (Tex.), 18 S. W. Rep. 441; K. C. Ft. S. & M. R. Co. *v.* Cook (Ark.), 21 S. W. Rep. 1066.
[12] St. L. I. M. & S. Ry. *v.* Lyman (Ark.), 22 S. W. Rep. 170, 213.
[13] Ethridge *v.* San Antonio Ry., etc., Co. (Tex.), 39 S. W. Rep. 204.

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his credit, after describing the manner in which the culvert was constructed, may testify that it was not properly constructed.[1] A person whose knowledge of coal veins and overhead and underlying strata is entirely theoretical is not competent to testify as an expert as to the cause of the breaking in of the roof of a mine which he had never examined, and of which he had no knowledge except from the testimony of witnesses in the case.[2]

Where a witness qualifies as an expert, and states that certain indentations on a drawbar were made by a round instrument, he should be allowed to state what, in his opinion, that instrument was.[3] An expert engineer may give his opinion that certain culverts through an embankment would materially help in draining certain lands;[4] and that from certain statements given in the testimony of another engineer there is a certain quantity of stone in a wall.[5]

Evidence is admissible as to different methods employed by the profession, and as to who are standard authors, and their several modes of treatment;[6] as to what it was worth to build a structure;[7] as to the usual and proper way of removing paint;[8] as to the construction, strength, and sufficiency of a building;[9] to prove that black means white, in showing a usage of trade;[10] that "one ton" was used to include a pile or heap;[11] that work on a job was completed as soon as practicable under the circumstances;[12] and current prices of materials may be shown by schedule of established prices in the trade.[13] The reasonable value of professional services as those of an engineer, architect, or physician, may be shown by an expert in the same profession.[14] The expert opinion cannot be based upon his knowledge and acquaintance of the client or patient, or of the latter's circumstances, but must be founded upon his knowledge of the character of the services.[14] The qualifications of such witness to testify as to the value of services may be tested by the opinions of other experts.[15] An expert carpenter who has seen only the outside of a building may testify as to its value, upon a description of its interior.[16]

To determine handwriting an expert may give his opinion that the body

[1] Bonner *v.* Mayfield (Tex.), 18 S. W. Rep. 305.

[2] Lineoski *v.* Susquehanna Coal Co. (Pa. Sup.), 27 Atl. Rep. 577.

[3] Galveston H. & S. A. Ry. Co. *v.* Briggs (Tex), 23 S. W. Rep 503.

[4] Willits *v.* C. B. & K. C. R. Co. (Iowa), 55 N. W. Rep. 313.

[5] Moerling *v.* Smith (Ind.), 34 N. E. Rep. 675; *see also* Vulcanite Paving Co. *v.* Ruch (Pa.), 23 Atl. Rep. 555.

[6] Broadhead *v.* Wiltse, 35 Iowa 429; *citing also* 6 Iowa 380, 386, *and* 30 Iowa 456.

[7] O'Keefe *v.* St. Francis' Church, 59 Conn. 551 [1890].

[8] First Cong. Church of Rockland *v.* Holyoke Mut. Fire Ins. Co. (Mass.), 33 N. E. Rep. 572.

[9] Turner *v.* Haar, (Mo) 21 S. W. Rep. 737.

[10] Mitchel *v.* Henry, 15 Ch. D. 181.

[11] Barry *v.* Bennett, 7 Met. 254.

[12] Stiles *v.* Neillsville Mill Co. (Wis.), 58 N. W. Rep. 411; Chamberlain *v.* Dunlop (Sup.), 8 N. Y. Supp. 125.

[13] Morris *v.* Columbian Iron Works (Md.), 25 Atl. Rep. 417.

[14] Lee *v.* Heuman (Tex.), 32 S. W. Rep. 93.

[15] Buehler *v.* Reich (Com. Pl.), 18 N. Y. Supp. 114 [1892].

[16] Pierce *v.* Boston (Mass.), 41 N. E. Rep. 227.

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and signature of an instrument were written by the same person,[1] but the genuineness of a signature cannot be proved by simple comparison.[2] The correctness of the opinion of an expert on handwriting can usually be shown by ocular demonstration; it should always be accompanied by such demonstration.[3]

A court will not allow an engineer who has planned and superintended the erection of a culvert to testify that the plan of it was a judicious and proper one, or that it was a properly constructed one, in an action against his employers for damages resulting from the washing away of the culvert.[4]

A non-expert witness should not be allowed to state that, if the timbers of the bridge had been larger and sound, the bridge would have been sufficient for the uses of the railroad company, except in extraordinary rainfalls.[5] Whether a certain kind of wood is strong or weak is a matter of fact, though it requires knowledge of and experience with such wood, and the exercise of judgment on such experience, to become aware of the fact.[6]

892. Witness may Employ Practical Illustrations and Experiments.—In advancing his opinion the engineer is not confined to the mere assertion of his opinion. He may give his reasons and offer explanations in support of them. This must be done in his examination-in-chief, and it is important, for if the witness can clearly represent the reasons of his conclusions, they are likely to have much more weight with a jury than a mere naked opinion of a witness, however large his experience or extensive his observation.[7]

The engineer may employ almost any reasonable means to explain his reasoning and deductions, such as blackboards,[8] diagrams,[9] maps,[10] models, and photographs.[11] In testifying as to a disputed boundary, a surveyor may use a diagram to illustrate his evidence or make it intelligible to the jury, although the diagram was not made by himself, and is not shown to contain a perfectly accurate description of the lands. A county surveyor testifying as to a line which he has himself run, may state that it was run correctly, and may state the facts on which he bases his opinions of its correctness—as that he found the "corner stake," "bearing-points," "marked trees," etc.[12] When the accuracy of a plat is verified by a witness as correctly representing the relative situation and location of certain lots with reference to other property, it is not error to allow such a witness, on his examination, to use the plat in pointing out to the jury such lots, their situation and location.[13]

[1] Reese *v.* Reese, 90 Pa. St. 89 [1879].
[2] Bevan *v.* Atlanta Nat. Bk. (Ill.), 31 N. E. Rep. 679; The State *v.* Owen, 73 Mo. 440 [1881].
[3] *In re* Gordon's Will, 26 Atl. Rep. 268.
[4] Galena & C. U. R. Co. *v.* Welch, 24 Ill. 31 [1860].
[5] Galveston H. & S. A. Ry. Co. *v.* Daniels (Tex.), 20 S. W. Rep. 955.
[6] Gerbig *v.* New York, L. E. & W. R. Co. (Sup.), 27 N. Y. Supp. 594.
[7] Lewiston S. M. Co. *v.* Androscoggin W. P. Co. (Me. Sup. Ct.), June [1886].
[8] McKay *v.* Lasher, 121 N. Y. 477 [1890].
[9] State *v.* Henderson, 29 W. Va. 147.
[10] Shook *v.* Pate, 50 Ala. 91 [1874]; Calumet Ry. *v.* Moore (Ill.), 15 N. E. Rep. 764 [1888]; Neff *v.* Cincinnati, 32 Ohio St. 215.
[11] Rippe *v.* C. D. & M. R. Co., 23 Minn. 18 [1876].
[12] Shook *v.* Pate, 50 Ala. 91 [1874].

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It has been held error to refuse to permit a diagram of the place to be taken out by the jury, it having been prepared by a civil engineer who testified to its correctness and it having been admitted in evidence.[1]

It is generally a matter within the discretion of the presiding officer of the court, to what extent practical tests may be employed. It may determine whether persons, models. and things shall be exhibited in court to the jury, and the court may properly refuse permission to bring into court such models, as for example, two planks and a cross-bar,[2] or a section of a human body to show the exact location of certain parts,[3] or a sample of needlework by a person who has lost her capacity to do such work.[4] There is no rule requiring a person or thing to be produced or brought into court for exhibition, nor is it necessary to account for its non-production.[5] The trial court may in its discretion permit the jury to go from the court-room and view the premises,[6] and the court's refusal to permit such excursion is not reviewable on appeal.[7] Where counsel had knowledge of the fact that a part of the jury had visited the place of the accident, he cannot, in default of objection at the time of the trial, complain of the misconduct of the jury on appeal.[8]

Plaster casts of a person's mouth and the teeth supposed to fit them,[9] impressions of a horse's mouth in wax and plaster,[9] weapons used and clothes worn,[10] are instances recorded. Courts have permitted chemical tests of the ink with which a paper has been written,[11] and it has been held an error to exclude expert testimony showing the appearance of a note under the microscope, where the jurors could use such microscope for themselves; and notwithstanding a witness testified that almost daily for five years he had used a microscope in the examination of handwriting, and that one without experience could not so use it, though he might if he had intelligence and judgment as to the use of the different object-glasses.[12]

Building materials, such as a piece of a column used by a contractor in the construction of a building, have been admitted in evidence in an action for breach of contract on part of owner, for not allowing the contractor to complete the contract because the columns used, were not such as were required by the contract, nor is it error to allow the jury to take such pieces

[1] Western & A. R. Co. *v.* Stafford (Ga.), 25 S. E. Rep. 656; *accord*, Clegg *v.* Metropolitan Ry. Co. (Sup.), 37 N. Y. Supp. 130.

[2] Mayor *v.* Pool (Tenn.), 19 S. W. Rep. 325 [1892].

[3] Knowles *v.* Crampton (Conn.), 11 Atl. Rep. 598 [1888].

[4] Youngstown Bridge Co. *v.* Barnes (Tenn.), 39 S. W. Rep 714.

[5] Gilmanton *v.* Ham, 38 N. H. 108; King *v.* N. Y. Central, etc., R. Co., 72 N. Y. 607; Dickinson *v.* City of Poughkeepsie, 75 N. Y. 64; Commonwealth *v.* Sturtivant, 117 Mass. 122, spots of blood; Herman *v.* State, 41 N. W. Rep. 171.

[6] Board of Comm'rs *v.* Castetter (Ind.), 33 N. E. Rep. 986; *see also* 14 Gratt. 448.

[7] City of Shelbyville *v.* Brant, 61 Ill. App. 153.

[8] Commonwealth *v.* Webster, 5 Cush. 295.

[9] Earle *v.* Lefler, 46 Hun 9.

[10] Best's Evdce. (Chamb. Ed.) 198.

[11] *In re* Monroe Estate, 5 N. S. 552.

[12] Bridgman's *v.* Corey's Estate (Vt.), 20 Atl. Rep. 273 [1890].

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to the jury-room.[1] The results of practical experiments made, such as the stopping of a train of cars under the same conditions,[2] may be shown in evidence. In another case an expert witness was not allowed to testify that, as an experiment, he fired a bullet through a plank, to ascertain the size of the hole made as compared with the bullet.[3]

892A. Judicial Notice.—Courts frequently take notice of certain notorious facts as being *prima facie* true and as not needing proof. Some things are so well known to all that they cannot be denied, but whether or not the court will take judicial notice may depend largely upon the trial justice. If self-evident or so notorious as to require no proof, then expert testimony will not be admitted to prove or disprove them.

The appellate court will not take judicial notice of the rules of the court below,[4] of the rules of the county court,[5] or of city ordinances;[6] but a city court may take notice of city ordinances.[7] Courts will take judicial notice of a statute incorporating a town in a certain county,[8] or that a city is duly incorporated under the laws of the state.[9]

Courts have taken judicial notice of the following facts, viz.: that a certain day of a certain month was Sunday;[10] that the September term of the circuit court does not extend beyond October;[11] of the population of cities and towns according to the authorized census reports;[12] of mortality tables showing the natural expectancy of duration of one's life at a given age.[13]

A court will take judicial cognizance of the geographical facts and features of the country, of the existence of a large body of water in the state,[14] of its rivers and mountains,[15] of the boundaries of an incorporated city, and of the location and course of a river frequently mentioned in the public statutes of the state;[16] that a certain county in the state is in an arid region.[17]

The court will take judicial notice of the organization of the Dominion of Canada;[18] of the fact that several railroads run into a city;[19] that the streets run in certain directions, and where they begin and end;[20] how the

[1] Linch *v.* Paris L. & G. E. Co. (Tex.), 15 S. W. Rep. 208 [1891].
[2] Byers *v.* Nashville, C. & St. L. Ry. Co. (Tenn.), 29 S. W. Rep. 128.
[3] Evans *v.* State (Ala.), 19 So. Rep. 535.
[4] Gudgeon *v.* Casey, 62 Ill. App. 599.
[5] Kessel *v.* O'Sullivan, 60 Ill. App. 548.
[6] Weaver *v.* Snow, 60 Ill. App. 624; Shaufelter *v.* Baltimore (Md.), 31 Atl. Rep. 439.
[7] City of McPherson *v.* Nichols (Kan.), 29 Pac. Rep. 679.
[8] Stone *v.* Halstead, 62 Mo. App. 186.
[9] Penna. Co. *v.* Horton (Ind. Sup.), 31 N. E Rep. 45.
[10] Brennan *v.* Vogt (Ala.), 11 So. Rep. 893; Williamson *v.* Brandenburg (Ind.), 32 N. E. Rep. 1022.
[11] Anderson *v.* Anderson (Ind. Sup.), 40 N. E Rep. 131.
[12] Hawkins *v.* Thomas (Ind. App.), 29 N. E. Rep. 157; State *v.* Marion Co. Ct. (Mo.) 30 S. W. Rep. 103, 31 S. W. Rep. 103.
[13] Kansas City, M. & B. R. Co. *v.* Phillips (Ala.), 13 So. Rep. 65.
[14] Mossman *v.* Forrest, 27 Ind. 233; People *v.* Brooks (Mich.), 59 N. W. Rep. 444.
[15] Winnepiseogee Lake Co. *v.* Young, 40 N. H. 420; Com. *v.* Desmond, 103 Mass. 445; *and see* 12 Amer. & Eng. Ency. Law 169.
[16] De Baker *v.* Southern Cal. Ry. Co. (Cal.), 39 Pac. Rep. 610.
[17] McGhee Irrigating Ditch Co *v.* Hudson (Tex. Sup.), 22 S. W. Rep. 398.
[18] Calhoun *v.* Ross, 60 Ill. App 309.
[19] Texas & P. Ry. Co. *v.* Black (Tex.), 27 S. W. Rep. 118.
[20] Skelly *v.* New York El. R. Co., 27 N. Y. Supp. 304.

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houses are numbered, and on which side are the odd numbers;[1] but not of the distance between the various streets of the city of Chicago.[2]

Courts have taken judicial notice of the government surveys and the legal subdivision of public lands;[3] of the initials used in surveys and descriptions;[4] of the magnetic variation of a needle from the true meridian;[5] that railroad lines are marked out and the grades fixed by the company's engineer;[6] that trains running upon a railroad are run, directed, and controlled by the owners of the road;[7] that it is within the scope of a section-foreman's agency to keep both the track and right of way in proper condition;[8] of what everybody knows incident to railway travel;[9] but *not* that C. B., & Q. R. Co. means the Chicago, Burlington and Quincy Railroad Company;[10] that the telephone has become an ordinary medium of communication;[11] of the art of photography, the mechanical and chemical processes employed, and the scientific principles on which they are based, and their results.[12]

The court has recognized the fact that a man sitting down on top of a car could not strike his head against an overhead bridge that was 4 feet 7 inches above the top of the car, for such a man would have to have been 9 feet high, which was never known;[13] that a person with an artificial leg can stand;[14] that whisky, apple-brandy, and a whisky cocktail are intoxicating;[15] that kerosene is inflammable,[16] but not that it is refined coal-oil or earth-oil.[17]

These examples are sufficient to show what the courts *may* take judicial notice of, but there can be no certainty that they will do so. The expert must be prepared to prove anything and everything necessary to the elucidation and explanation of the truth, and, if necessary, by practical example. All courts have not had the same experience and training and cannot, therefore, be equally well informed. One might know less of cocktails and applejack and more of coal-oil and kerosene, while another might have lived in many districts of this country and never have seen the common crude petroleum, or coal-oil.

893. Right to Use Models and Make Tests Rests with Trial Court.—While illustrations bearing more directly upon engineering are the use of

[1] Canavan *v.* Stuyvesant, 27 N. Y. Supp. 413

[2] North Chicago St. R. Co. *v.* Cheetham, 58 Ill. App. 318.

[3] *See cases* 12 Amer. & Eng. Ency. Law 171.

[4] Kile *v.* Yellowhead, 80 Ill. 208.

[5] Bryan *v.* Beckley, Litt. Sel. Cas. (Ky.) 91.

[6] Alabama M. Ry. Co. *v.* Coskey (Ala.), 9 So. Rep. 202.

[7] South, etc., R. Co. *v.* Pilgreen, 62 Ala. 305.

[8] Mobile & O. R. Co. *v.* Stinson (Miss.), 21 So. Rep. 522.

[9] Downie *v.* Hendrie, 46 Mich. 498.

[10] Accola *v.* Chicago, B. & Q. R. Co., 70 Iowa 185.

[11] Globe Printing Co. *v.* Stohl, 23 Mo. App. 451.

[12] Luke *v.* Calhoun Co., 52 Ala. 115.

[13] Hunter *v.* New York, O. & W. Ry. Co (N. Y.). 23 N. E. Rep. 9.

[14] New Jersey Traction Co. *v.* Brabban (N. J.), 32 Atl. Rep. 217.

[15] Schlicht *v.* State, 56 Ind. 173; Thomas *v.* Commonwealth (Va.), 17 S. E. Rep. 788; United States *v.* Ash (D. C.), 75 Fed. Rep. 651.

[16] Wood *v.* N. W. Ins. Co., 46 N. Y. 421; State *v.* Hayes, 78 Mo. 307.

[17] Bennett *v.* N. British Ins. Co., 8 Daly (N. Y.) 471.

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maps, monuments, and descriptions in deeds as evidence of titles; valuable evidence furnished by accurate and verified models; instances in which the jury is taken to view works and premises in question,—the employment of all these is in general within the discretion of the trial court, and an expert witness should not, under any circumstances, be surprised if he be refused the privilege of making practical tests or illustrations. His privileges will probably depend upon the importance of his tests, the leisure of the court, and the disposition, impressions, and intelligence of the court and jury.

894. An Expert's Advice to Fellow Experts.—Before drawing the division of this subject to a close, the author adds a few maxims recommended by an eminent engineer of experience as an expert, who concludes:[1]

"That the court always understands that an engineer has been previously advised in regard to questions upon which his direct examination will be made, and that he has prepared himself by study and reasoning to apply to the case in hand all of the scientific principles which are necessary to elucidate it.

"It is, therefore, unwise to attempt to conceal from the court that the engineer has been in consultation with the lawyers upon the side upon which he has been called, or that he has been paid or is to be paid professional prices for his services.

"No provocation on the part of a lawyer will justify an uncourteous reply, and it is unwise to give back a sharp or witty answer.

"If the lawyer uses improper language in addressing the witness, the latter may appeal to the judge.

"If questions requiring study and research are put to the witness, he may reply, 'I have not considered the subject under that aspect sufficiently to reply,' or 'I shall require a little consideration before I can reply; I will make a note of your question, and answer it as soon as possible.'"[2]

"A witness is often called upon to express an opinion on some subject which is a matter of exact or approximate measurement and calculation; it is often impossible for him to make such calculations accurately in the presence of a roomfull of people. His proper course, under such circumstances, is to take a note of the question and inform the counsel that he will make the calculation and give it in writing. In strict law, however, a witness on the stand is not compelled to make any calculations except those of a simple and elementary character."* It is absurd to call upon the

[1] William J. McAlpine before the American Society of Civil Engineers, 1870.

[2] This is justified by the co rts, for an engineer can no more be expected to answer questions embodying tedious calculations than can a chemist be required to tell the contents of a stomach on the stand. Eastham v. Riedell, 125 Mass. 585, *and* Insurance Co. v Tobin, 32 Ohio St 96.

[3] Newlan v. Dunham, 60 Ill. 233. An expert witness will not be required to give a categorical answer to a question of

* Although an engineer may not be required to make calculations upon the witness-stand, he may be required to give the basis upon which they were or should be made If it is the intention of the opposition to show that the engineer is unable to make the estimate and do the necessary calculations, he may be asked if he can make them.—Ed.

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engineer to perform duties of a professional character when upon the stand as a witness or to give professional opinions as it would be for a lawyer, under the same circumstances, to be called upon for legal opinions upon some grave question of law."

The distinguished engineer continues by adding, "that for many years the engineer abroad has been called into a new field of duty, viz., that of acting as associate or adviser to the counsel in regard to all professional (engineering) points of the case."

895. Experts as Assistants in Examination of Witnesses by Attorneys.—It must be evident that an engineer could not perform such functions without a fair knowledge of the rules and laws of expert testimony, upon which ground the author will excuse the considerable depth to which he has gone into the subject. This position has long since become a field of large practice and high compensation, and no lawyers now venture upon the conduct of a case involving important engineering or architectural questions without assistance from engineers or architects. A professional man appointed under Code Civ. Proc. § 873, to make an examination of a subject-matter of an action, is an officer of the court, and should be sworn.[1] An attorney has not the right to be present, nor to have men present, at the physical examination of his female client, made by order of the court pursuant to Code Civ. Proc. § 873, providing for the physical examination of a female plaintiff by a female physician.[1]

896. Compensation—Reward for Services as an Expert Witness.—The question of extra compensation to an expert who is called to give an opinion which requires the exercise of professional skill and study is one about which there is no general rule. The decisions are wholly at variance, and different states have established their own laws. Some have enacted laws giving extra compensation, and some have denied it altogether. Rhode Island, North Carolina, and Iowa[2] have statutes allowing such additional compensation as the court may determine. Massachusetts courts have allowed experts to be selected in criminal cases and their compensation to be paid out of the public treasury.[3] Indiana, on the other hand, refuses to acknowledge the right to extra compensation, and requires experts to attend her courts and give their opinions with no compensation more than that allowed to any other witness.[4]

Courts have usually expressed the opinion that services of an expert witness should be compensated, but the decisions rendered as to whether he must be remunerated before he testifies are opposed. Physicians have been committed for contempt of court and fined for refusing to testify until

opinion evidence, which he says he cannot answer categorically. Quinn *v.* O'Keeffe (Sup.), 41 N. Y. Supp 116.

[1] Lawrence *v.* Samuels (City Ct.), 44 N. Y. Supp. 602.

[2] *See* Statutes of the States.

[3] Rules of Practice in Chancery, 104 Mass. 573.

[4] Indiana Revised Statutes, 1881, p. 94, § 504.

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their fees were paid or secured to them.[1] In Arkansas it has been held that a physician is not entitled to any more than the regular witness fees for his expert testimony in respect to a post-mortem examination he had made.[2]

In these cases the physician had been employed in attendance of the case or had made examinations of the subject of inquiry and investigation. They were criminal cases, in which it was the duty of every man to lend his efforts in aid of justice; but one of those cases held that it made no difference whether the judicial investigation was of a civil or criminal nature.[3] Two decisions were reached in Indiana, where a physician had been called, not on account of any knowledge of the facts of the case, or because he had had any connection with it, but merely for his opinions on professional questions, and it was held that he need not answer questions involving professional skill and knowledge.[4] This decision was, however, opposed by two dissenting judges,[5] and can have little weight to-day from the fact that a statute has been passed opposed to the decision.[6]

It is established law in England that a witness selected and called for his opinion need not testify without extra compensation. The earlier decisions in this country followed the English law, and higher courts refused to sanction penalties and fines imposed for such neglect or refusal to give professional opinions, without extra compensation. The skill and knowledge of experts were regarded as professional services and as property, which were no more at the mercy of the public than were the goods of the merchant or the crops of the farmer, and the decision was based upon the broad principle of the constitution that "property [services] shall not be taken for public use without just compensation."

On the same principle, it has been held that interpreters cannot be compelled to serve a court without compensation.[7] If a man cannot be compelled to translate the language of a foreign people, how can the scientist be required to divulge the secrets and interpret the laws of nature?

On the other hand, it is claimed that the opinion of a skilled witness is no more his property than is the *time* of any witness. That a physician's vocation is that of healing and treating diseases, that of a lawyer is the investigation, securing, and protection of his clients' rights and property, and *semble* of engineering, that an engineer's professional practice or business is that of the designing, direction, and construction of works, and that in every case their opinions are not the object of their studies, but a necessary result of their calling.

[1] *Ex parte* Dement, 53 Ala. 389, 5 Tex. App. 374, 112 Ill. 540

[2] Clark County v. Kerstan (Ark.), 30 S. W. Rep. 1046.

[3] *Ex parte* Dement, 53 Ala. 389.

[4] Buchannan v. State, 59 Ind. 1; s. c., 17 Alb L J. 242.

[5] Dills v State, 59 Ind. 15.

[6] Indiana Revised Statutes 1881, p. 94, § 504.

[7] Rogers' Expert Testimony 256.

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897. Expert Witness in Civil and Criminal Cases Distinguished.—Whether the power of a court in civil cases, to summon an expert to appear, and to compel him to testify to professional opinions, in cases of which he has no knowledge of the facts, and with which he has had no connection, would be upheld by higher courts, cannot be foretold. In criminal cases where the law is endeavoring by its every effort to do justice to a man who has been charged with committing a great crime, it may be that public policy demands that every citizen should assist in the administration of the laws of his country; but in civil cases it is submitted that the necessity does not exist, and such a usurping of a man's freedom and appropriation of his services is an outrage, in a professedly free country, not countenanced by the autocratic governments of Europe.

There is no doubt a strong tendency to maintain this imperious practice of appropriating professional services to public use, but it must be accomplished by judicial legislation if extended to cases in which the witness has no interests nor knowledge. If the witness in the beginning professes his utter ignorance of the facts of the case, claims to have no knowledge of the parties or the circumstances of the complaint, it will require an exercise of power not often manifest to compel him to testify.

898. If Expert Has Knowledge of Facts of Case, He must Testify.—If an expert takes the stand and without protestation testifies in part to facts and circumstances, it is quite likely that the court will insist on his answering questions calling for his professional opinion. This belief is supported by a recent Illinois case, in which a physician who had attended the victim, and had testified to some facts of the case, refused to give his professional opinion as to the causes and results of his investigations until his professional fee was paid or secured to him. He was fined as for contempt, which was supported on appeal.[1] In Arkansas it has been held that in criminal cases where no preliminary examination or preparation has been required, an expert who testifies can demand no compensation in addition to the usual fees allowed witnesses.[2] In Colorado court of appeals it has been held that if the witness testifies in a criminal case in obedience to a subpœna, without making in advance any demand for special compensation, he can recover only the statutory witness fees.[3]

It has been held that where an agreement is made by one to go into court at a future day and testify as an expert as to a matter which he had examined as a civil engineer, he is entitled to recover the reasonable compensation (in addition to the statutory fees) promised him therefor, though he is afterwards summoned and paid the regular statutory fees, and does not then claim extra compensation, or give notice that he will make such claim, and, though testifying, and advising counsel as to questions

[1] Wright *v.* The People, 112 Ills. 540 [1884].
[2] Flinn *v.* Prairie Co. (Ark.), 29 S. W. Rep. 451.
[3] Board Com'rs Larimer County *v.* Lee (Colo. App.), 32 Pac. Rep. 841.

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to be asked him and other witnesses, he is not asked any question as an expert.[1]

An expert witness employed by an attorney to testify in a proceeding may recover compensation therefor from the party represented by the attorney, in the absence of evidence that the witness had notice of the limitation of the attorney's authority, or agreed to look solely to the attorney for compensation.[2]

899. Expert's Knowledge, Experience, and Character may be Inquired Into.—When an expert takes the stand he must answer under the same rules as ordinary witnesses, however embarrassing the questions may be. Not only his character, reputation, and truthfulness may be inquired into and tested, but he is subject to an examination as to his professional qualifications, his knowledge, accuracy, and learning.

For the annoyance and risks of injury to a man's business consequent to undergoing such an examination and for the information thus established, the courts must declare no compensation is due or they cannot support their decisions.

900. If Expert Cannot Collect Extra Compensation, then No Extra Preparation Can be Required.—However doubtful the law may be as to extra compensation to experts for professional opinions, it is certain that if an expert can demand no more pay than an ordinary witness, so certain is it that he cannot be compelled to make any more preparation. He may refuse to make investigations, inquiries, or any preparation whatever for the occasion of the trial. If an engineer, he cannot be required to inspect works, or to investigate a casualty, or to make estimates and computations; but whether, having made them with the expectation or under the promise of compensation, he can be compelled to testify to his results and conclusions before being paid, is an unsettled question. Some inference may be drawn from a case of a physician who, having made a *post-mortem* examination of a body, was compelled to give the results of it without extra compensation, though the court acknowledged it could not have ordered him to make the examination for the purpose of testifying.[3] Where there has been no special contract with the witness, and it is not shown that the refusal to pay him extra compensation would be an injustice, the court trying the case has no power to order payment of extra fees to the witness.[4]

901. Legislation is Needed to Improve Expert Testimony.—In conclusion, it may be said that the law of expert testimony is in a very unsatisfactory condition, and sadly needs legislation. It should be the duty of every engineer to use his efforts to secure that legislation, each in his own state.

[1] Barrus *v.* Phaneuf (Mass.), 44 N. E. Rep. 141.

[2] Mulligan *v.* Cannon (Sup.), 41 N. Y. Supp. 279.

[3] Rogers' Expert Testimony 261.

[4] Board Com'rs Larimer County *v.* Lee (Colo. App.), 32 Pac. Rep. 841.

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First, some law should be enacted to abolish the present system of allowing the parties or their attorneys to select the experts. Secondly, compensation should be allowed, and either fixed by law or power given the court to determine it. Thirdly, experts should be selected by the court or appointed by the government, to do away with the present practice of using experts, on the witness-stand, to win cases.

No men or body of men have more regret that "engineering science has become a commodity, and that engineers have" (in some instances) "become hired advocates" than engineers themselves; and to their own efforts chiefly must they look for such a change. A well-directed crusade by the organized industrial and scientific forces of the country is what would bring it about. It cannot come too soon. Then only will courts get true scientific opinions, and the scientific professions free themselves from the suspicion of bartering their opinions.[1]

[1] Upon the subject of Expert Testimony the engineer is referred for special study to Lawson's Expert and Opinion Evidence, by John D. Lawson, 1888; Rogers' Expert Testimony, by Henry Wade Rogers, 1883; an article of interest to engineers by Clemens Herschell, C.E., in *Engineering News*, 1887, vol. 17, pp. 284 *et seq*: Inaugural Address of President Wolcott Gibbs, National Academy of Sciences, Proceedings 1896.

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